modes of ownership in the economy (Goetz 1944: 93; Calasso 1949: 156). That is to say, the gradual extension of monetary transactions and individual property ownership and the disintegration of property-holding groups from feudal tenures created an early urban economic elite, and this class intensified its authority through techniques of governance and legal integration that were not tied to socially embedded customs and feudal arrangements (Bertelli 1978: 29; Dilcher 1967: 7; Faini 2004).

In the later twelfth and thirteenth centuries, in sum, it is possible to discern a broad set of transformative processes, which, in conjunction, at once disaggregated different spheres of social activity and diminished the local or personal embeddedness and the violent contestability of political power. As a result, European societies began to develop institutions that were able to utilize political power as a facility that was increasingly indifferent to the local, personal and patrimonial distinctions underlying feudal social structure, and which possessed a certain distinction or even tentative autonomy against other modes of social exchange. In consequence, these societies also began to require institutions that could organize their functions in a relatively firm and consistent legal apparatus. Indeed, the general restructuring of feudalism throughout the high medieval period was reflected most distinctively in the law, and, in promoting gradually generalized and differentiated patterns of social exchange, this transformative process clearly stimulated a growing need in most European societies for precise and increasingly constant legal forms. At a general level, this period witnessed a wide employment of more consistent legal formulae across very different spheres of society, and the widespread rise in the distinction between separate social practices meant that each set of social activities required constructs to support its exchanges at a growing level of internal abstraction: in particular, the first emergence of a relatively independent economy presupposed the use of legal forms that could be predictably applied to monetary transactions in very different locations. At a specifically political level, this period was marked by a need for legal instruments able to store political power in relatively stable, centralized form, to reinforce political institutions above the highly personal rights and customs of immunity and vassalage characteristic of early medieval societies, and to formalize relations between political actors and those granted feudal rights in increasingly settled legal arrangements. In addition, in view of their wider incremental differentiation, European societies of the high feudal era also experienced an increased need for political institutions that

could transplant power inclusively across broad social divisions, and they evolved a requirement for institutions that could, over large geographical areas, refer to relatively stable and consistent constructions of themselves and their functions. In these different respects, therefore, European societies increasingly came to require new formations within the law, and the law became a crucial device both in the growing distinction of different spheres of functional exchange and in the widening circulation of political power which marked societies in the early process of feudal transformation. The high medieval period, in other words, induced a change in social structure in Europe in which power, separated from private lordship and particular privilege, was 'objectively defined' and increasingly transmitted across growing social distances (Bisson 2009: 415). The increasing regularization of the law was fundamental to this process.

Legal order in the church

The first and most important example of this process of legal formalization at the origins of high medieval society can be found in a sequence of institutional changes, beginning in the eleventh century, that occurred in the Roman Catholic church. Generally, in the early stages of the high medieval period the church assumed an increasingly distinctive role in emerging European societies, and it began, through a long process of reform, both to establish itself as the central institution in society and to acquire systematically ordered powers of jurisdiction and legal regulation that distinguished it from the local, personalized structures of feudal order. To be sure, this process did not take place in a political vacuum, and the distinction between processes of formalization in ecclesiastical law and similar processes in civil law cannot always be clearly drawn. For example, the tendency towards legal uniformity in the church was driven in part by the growing construction of the Holy Roman Empire as a concerted and increasingly autonomous body of political institutions: the increasing legal consistency of the church evolved almost in parallel to similar changes in the Empire, whose rulers progressively asserted their right to act in independence of the church, to assume independent territorial power and even to form a universal Empire. The reforms in the church thus (at least in intention) set the foundations for a period of *papal monarchy*, in which the papacy sought to suppress the claims of the Holy Roman emperors and to assert both worldly and spiritual authority throughout Christendom. Further, the conceptual foundations

of legal reform in the church were in large part derived from Roman law. The increase in legal consistency in the church coincided roughly with the promotion of the science of Roman civil law in the medieval law schools in Italy, especially Bologna, and the ecclesiastical reforms were deeply influenced by ideas emanating from these schools (Helmholz 1996: 17–18). Despite this, however, as early as the late eleventh century the church had clearly assumed a uniquely ordered and centralized internal legal structure, and, to a greater extent than societal actors using the civil law, it instituted a uniform model of legal order, which began pervasively to transform European societies in their entirety. In particular, the church began to respond both to the endemic privatism and disorder of early feudalism and to the gradual differentiation and expansion of European societies by constructing for itself a legal apparatus that enabled it to make decisions and enforce its authority at an increasingly high level of inner autonomy and outer uniformity – that is, to circulate its power in increasingly regular and inclusive procedures across the local and jurisdictional fissures that underlay European societies in the condition of early feudalism. At the caesura between early and high feudalism, therefore, the church assumed distinctive status as an institution that, in reforming its legal apparatus, was able autonomously to confer consistency and unity on its particular functions, and so reproducibly to apply its power across the intra-societal boundaries of pre-modern social order.

To illustrate this analysis, during the high medieval period the Roman Catholic church began to extricate itself both from the tradition of territorial or private-dynastic control of the church (*Eigenkirchentum*) and from the integration of the church in the feoffs of the Holy Roman Empire, which had characterized the legal status of the church since the Carolingian period (Weise 1912: 19, 36; Tellenbach 1988: 57–8). At the centre of this transformation was the increasingly powerful declaration, expressed in the reforms of Gregory VII in the late eleventh century, that the pope possessed *plenitudo potestatis* in all matters of the church. This meant that no pope was bound by secular laws of custom, that each pope could assume authority to act, abstracted from all specific or embedded legal arrangement, as a *lex animata* for the church as a whole, and that papal legates could enforce church power across extensive geographical areas as commissioned representatives of the pope. The crucial point of law in this development was that, owing to the Gregorian reforms, popes followed Roman-law maxims in claiming the *ius condendi legem* (the power to legislate – that is, to introduce *new*

laws), through which the papacy assumed for itself rights analogous to those of the emperors of classical Rome.[7] As the popes assumed supreme and general power in this manner, then, the church began to internalize an account of itself as containing a higher natural law, which was categorically distinct from local laws and could be generally invoked to authorize the actions and decisions of the church.[8] In the first instance, this idea of higher law allowed the church, externally, to assume a representative dignity and integrity through which it could separate itself from, and assert its autonomy against, the corpus of personal agreements that had previously supported the early-feudal interconnection between territorial lords and ecclesiastical potentates. In addition, however, this idea of higher law also allowed the church, internally, to define itself as a relatively unitary personality, and it created a legal structure in which ecclesiastical delegates could borrow (and thus, also, *represent*) the pope's power and appeal to a corporate personality in the church in order to make decisions or settle disputes across substantial regional and temporal divides. Through the ascription of supreme legislative authority to the pope, thus, the church obtained the ability to use its power at a dramatically heightened level of administrative generality, and this allowed the power of the church to overarch different regions and in principle to include all members of European society in a consolidated *ecumene*. Paradoxically, moreover, the assumption that the pope incarnated higher law permitted the church more fluidly to positivize its basic legal principles: it enabled the church to produce legal decisions from within an inner justificatory apparatus, to abstract a formal judicial order for its procedures and to store a set of clear principles to accompany and unify very diverse applications of its power. In all these respects, in and after the period of Gregorian reform in the late eleventh century the church progressively defined itself as a distinct fulcrum of power within society, and it invoked principles of higher law in order both to integrate and regularly to sustain the procedures in which it used its power and to augment the volume of power that it contained.

This progressive attribution of unitary legal power to the highest offices of the church was reflected at all levels of the church's internal

[7] This was stated in the famous Dictatus Papae of Gregory VII, in which the pope was accorded the power: 'pro temporis necessitate novas leges condere'. This document is printed in Caspar (1967: 203–8).

[8] Note the argument – 'Sed canones pro varietate gentium non variantur' – to support the universality of canon law (Weigand 1967: 169). I found excellent commentary on this in Leisching (2001: 214, 233).

organization. Throughout the reformist period, in fact, the entire operative structure of the church was placed on a firm legal basis. For instance, this period witnessed the formation of the monastic regime in the church, and it witnessed the institution of a formal concept of sacraments. It also witnessed the imposition of firm standards of behaviour and worship across churches in all countries under the papal see; and it witnessed the establishment of a stricter episcopal regime in which bishops were closely tied to Rome and were commissioned to impose the pope's will throughout the church in its entirety. In addition, during the Gregorian reforms and their aftermath the church even began to develop institutional features now considered characteristic of secular states: that is, it evolved new resources for raising fiscal revenue, it acquired devolved legal-administrative powers for codifying law and for issuing and promulgating new laws, and it reinforced its jurisdictional powers for enforcing positive law through specialized judicial procedures (Morris 1989: 388, 402, 575). Through these reforms, training in law became a qualification for ecclesiastical office, the papal curia was expected to process a dramatically increasing mass of litigation, and episcopal courts, with expansive administrative staffs, were appointed to conduct, delegate and uniformly control church legal affairs. Distinctive for this period was also the fact that the legal bureaucracy of the church increased markedly, and a specially qualified class of canon lawyers was required to preside over cases for legal adjudication. The legal order imposed by the reformist papacy, thus, led to a legal unification of the church as a whole, and throughout the church written law was used to transmit ecclesiastical power in a specifically consistent and general fashion.

Fundamental to this legal revolution in the church was a far-reaching revival and refinement of the canon law, through which distinct branches and procedures of ecclesiastical order were gradually underpinned by uniformly ordered legal principles, and both the church and the papal monarchy assumed independent and positive legal foundations. The revival of canon law was shaped, in the first instance, by a substantial expansion of legal learning, both in the ecclesiastical and in the secular realms, in the eleventh century. However, the refinement of canon law was also decisively stimulated by the rediscovery of older canonical collections, and it was pursued through a systematic reconstruction of existing canonical texts using principles of Roman law. This process resulted in the revision, redrafting and widespread promulgation of new collections of canon law. Most importantly, it culminated in the

codification of Gratian's *Decretum*, which appeared towards the middle of the twelfth century, and, finally, in the Fourth Lateran Council of 1215, where a more uniform set of laws and judicial procedures was established for the church as a whole. In this respect, as above, it needs to be noted that this codification of ecclesiastical law was not fully separate from secular law, and it did not constitute an unrestricted endorsement of papal monarchy. In fact, some sections of Gratian's *Decretum* served as conceptual 'cornerstones for the doctrine of the universal Empire', to which the reformist papacy was opposed (Kienast 1975: 297). In fact, the *Decretum* claimed that imperial law was justified under divine law and that civil order depended on imperial law.[9] Vitally, though, Gratian's *Decretum* was designed systematically to differentiate church law from secular law, and it established a consistent and positive legal order to which judicial practices in the church could refer to explain their authority.

It was the systematic rewriting of ecclesiastical law, above all, that enabled the church to give a reproducible internal account of its functions and regularly to transmit principles of order across society. In particular, the codification of canon law had this result because it allowed the church to form itself as an institution whose power obtained a certain corporate legal integrity against distinct persons, including, tentatively, those factual persons that it incorporated and that used and dispensed its power. If the pope's claim to act as a *lex animata* was at the heart of the growth in ecclesiastical authority, therefore, this was augmented further by the systematic organization of canon law, which greatly extended the ability of the church to explain its authority and its validity as residing in a legal source distinct from any immediate subject or bearer of power. This assumption of a stable legal apparatus in the church meant that the church was able to apply power as an increasingly abstracted and autonomous phenomenon, and that it could presuppose flexible principles to underwrite diverse applications of its power. Naturally, this is not to suggest that at such an early stage the Roman Catholic church had begun to assume a corporate-constitutional or genuinely conciliar character. This eventually became the case in the fourteenth century, when theorists of ecclesiastical law began to accept the principle that the church possessed a legal personality (a *persona ficta*) that was distilled solely from law and that was at once internally consistent and constitutionally distinct from its particular representatives or executors. Both

[9] *Decretum Gratiani* (1676 [*c.* 1140]: 22).

canonists and political theorists of the later Middle Ages in fact ultimately claimed that the representative and doctrinal powers of the church reposed, not in the person of the pope alone, but in the church as a community of the faithful (*congregatio fidelium*), which had its supreme constitutional organ in the church council (Tierney 1955: 4, 13). John of Paris, for example, concluded that the power of the church had a constitutional source that was not to be conflated with the pope and the inner administrative hierarchy around the pope (1614 [*c.* 1302]: 45). Similarly, William of Ockham insisted that the pope did not possess a categorical 'fullness of power' in either spiritual or temporal matters. Ockham in fact added to this the telling claim that Christian law should be viewed as a 'law of liberty' – that is, as a law that was founded in the institution, not of the pope, but of Christ, and which inspirited all members of the church in equal manner (1940 [*c.* 1339]: 233). Marsilius of Padua also endorsed conciliar ideas, and he argued that not the pope alone, but only a 'general council composed of all Christians', could represent the 'whole body of the faithful' (1956 [1324]: 280). These conciliar theories thus expanded the transpersonal or organic implications of earlier doctrines of canon law, and, especially during the Great Schism (1378–1417), they came to define the church as an order with an administrative and doctrinal personality separate from all its functionaries, even the pope. Even in earlier canonical discourses, however, the implication inevitably became clear that, as an agent using and founded in generalized legal principles, the church possessed a distinctly unified, positive legal personality, which it could invoke to support a substantial number of devolved and personally indifferent administrative or judicial acts and decisions. As a result, the church was able to claim singular authority for the multiple decisions of its representatives, and it could refer to a set of general internal norms that authorized its representatives to create, and explain the necessity of, *new laws*. Indeed, in promoting the acceptance of a canon law as a formal *lex scripta*, the church obtained the specific benefit that it was able to override and remove old laws, to question the authority of simple customs and embedded judicial practices and to devise principles to support new legislation and appellate rulings. Paradoxically, therefore, the schematization of canon law in the church, which expressly derived the authority of ecclesiastical law from the church's ability to incarnate divine law, substantially augmented the reserves of legal autonomy, positive generality and reproducibility contained in the church: the belief that law could be uniformly justified by higher, even transcendent, principles deeply enhanced law's ability to

overrule local feudal agreements, to supplant private authority and to confer a perennial and flexible consistency on the church's legal order. Owing to this, the church was able dramatically to expand the volume of power that it contained and, gradually, it began to use its power, through law, as a personally autonomous, iterable and inclusive facility. Through the legal transformation of the church, in short, for the first time since late antiquity European societies acquired an institution that could autonomously explicate its use of power by referring to resources that it stored within itself, and could apply its power as relatively independent of external determinants and relatively insensitive to immediate consent, local resistance or accepted custom.

Throughout the course of its formation, to conclude, the legal order of the medieval church at once refracted and intensified a number of defining dynamics, transformations and problems in feudal society. In the first instance, it reflected a wide process of societal expansion, and it distilled the power of the church into a generalizable form that could be equally and iterably applied to all members of the Christian community. Vital for this was the fact that the canon law began to project a construction of the church as an overarching organic personality – that is, as a personality that retained an inner consistency against the particular bearers of its power, and could autonomously authorize, devolve and reproduce power in varied settings by referring to highly generalized and inclusive legal concepts. This brought the crucial benefit to members of the church that they were able to distribute power in a relatively stable and consistent fashion (that is, in written codes, formal judicial procedures and static juridical instruments) across geographically and temporally widening societies.[10] At the same time, however, the legal reforms in the church reflected a process in which society as a whole experienced an incremental differentiation into discrete functional spheres, and in which the densely interwoven mass of personal and seigneurial functions and immunities characterizing early feudalism was beginning to disintegrate. The formalization of canon law was also at the centre of this second process: canon law provided a body of terms in which, for the first time, one free-standing institution was able to delineate its functions as internally consistent and relatively indifferent to patterns of exchange and obligation in other social spheres, and to transmit its authority in a functionally unified and specialized manner.

[10] On the wider importance of written law in the creation of a positively abstracted legal culture, see Clanchy (1979: 46, 50); Keller (1991: 183); and Dreier (2002: 3).

The increasing reception of Roman law in the church, in particular, was the crucial element in each aspect of this process. Roman law stored the legal order of the church in clear written procedures, and this facilitated the emergence of a legal apparatus that could articulate its power, not in local or socially embedded agreements or customs, but in temporally and locally indifferent juridical categories (Radding 1988: 299).

Church law, the state and feudal transformation

This legal organization of the church as a source of inclusively transmissible power had resonances across medieval societies that extended far beyond questions of ecclesiastical jurisdiction, and it deeply shaped the secular political form of nascent European societies in their entirety. Indeed, just as the church had borrowed elements of Roman law and other ideas of legal personality from the secular arena, worldly political actors also began to replicate the church's legal and procedural innovations, and secular institutions increasingly employed techniques of legal-political abstraction that they appropriated from the church. The growing legal order of the church thus provided a general model of legal organization for early Western societies, and, by the later twelfth century, this had become formative for the initial construction of secular political power in its characteristically modern institutional form. In fact, in a number of ways the legal abstraction of the Roman Catholic church in the longer Gregorian period directly stimulated the growth and shaped the structure of early European states.

In the first instance, both before and during the period of ecclesiastical reform the church was in the forefront of the promotion of temporal legal order throughout European society, and secular authorities increasingly relied on the church and its legal apparatus to pacify society and to suppress the endemic violence and feuding that were characteristics of earlier feudalism.[11] Notably, the ecclesiastical ideal of the Peace of God (*Gottesfriede*, *Treuga Dei*, *Paix de Dieu*) – that is, the prohibition of feuding and private violence enforced by the church under threat of excommunication – acted at times, especially in the eleventh century, as a vital mechanism for establishing order in societies fragmented by the pursuit of justice through feuds, local lordship and private violence. In many cases, moreover, the Peace of God provided a direct stimulus for

[11] On the relation between the church reforms and the Peace of God, see Barthélemy (1999: 212). Generally, see Hoffmann (1964).

the imposition of peace in the realm by worldly actors, and secular leaders, both of territories and cities, used legal forms and oaths derived from the Peace of God in order to bring legal and judicial order to their territories and to solidify their own jurisdictional powers.[12] In this respect, the increasing consolidation of law in the Roman Catholic church clearly marked a crucial step towards the more general enforcement of law and political jurisdiction in the temporal sphere.

In addition to this, however, the legal reorganization of the church had its most significant external or secular consequences, not in any direct appropriation of ecclesiastical legal structure in the political arena, but rather in the protracted conflicts between the church and emergent states, which defined the political contours of high medieval society and are generally known as the investiture contests. These contests, beginning in the later eleventh century, were conflicts over jurisdiction, which were conducted both between the reformist papacy and the Holy Roman Empire, and – to a lesser degree – between the papacy and emergent smaller national dynasties. The central manifest issue in these conflicts was a controversy over the degree to which temporal rulers were authorized to anoint their own bishops and whether the dispensing of church offices fell under temporal authority. More generally, however, these contests centred around the legal question of whether representatives of the church were beholden to regents in whose territories they operated, and they raised the question, which had vital status in a period of rising functional specialization, whether ecclesiastical laws could prevail over local legislation and transcend the jurisdiction of particular regents.

It is often claimed that the investiture contests marked the beginning of an era of papal monarchy, in which the papacy rebutted the claims to universal Empire made by the Holy Roman emperors, and that through the resolution of these contests the papacy assumed extensive powers in relation to and even *over* worldly rulers, so that the church asserted its authority as the dominant political agent in European society (Calasso 1954: 171). In most instances, however, the investiture contests actually ended in a bilateral clarification of the legal relation between church and state, in which ecclesiastical power in spiritual matters was established as an exclusive principle and in which the exclusive authority of temporal

[12] This was vital in some of the earliest Italian *comuni*, where the urban constitutions were often legitimized by the exchange of oaths to keep the peace: the *treuga dei* was at the foundation of the *comuni* (Keller 1982: 67).

lords in matters of worldly significance was also clearly underlined. In England, the controversies in their strictest sense came to an end in the Concordat of London of 1107, which formulated a compromise between Henry I and Anselm of Canterbury. However, related conflicts continued and found their apotheosis in the murder of Thomas Becket in 1170. In the Holy Roman Empire, these controversies, which culminated in the excommunication of Heinrich IV, were resolved in the Concordat of Worms (1122). This concordat gave express legal form to an arrangement in which church power was sanctioned as unlimited *in spiritualibus* and imperial power was accepted as inviolable *in temporalibus*. Although it symbolically accepted papal supremacy in church offices, the Concordat of Worms also integrated the temporal elements of the church into the feudal system of the Empire, it placed the worldly possessions of the church under imperial law so that the emperor retained the right to confer ecclesiastical property in the form of regal rights (*regalia*), and it played a significant role in extending the feudal power of the Empire over all areas of worldly legislation.[13] Naturally, these agreements did not bring an end to the contests between church and state, and the papacy continued to claim that the pope possessed two swords, the spiritual and the temporal. A most notable example of this was the decretal, Per Venerabilem (1202), of Innocent III, which, while (reluctantly) accepting the claim of kings to supreme temporal jurisdiction, asserted that the pope had the power to decide whether candidates for imperial office were worthy of assuming this dignity. It was under Innocent, moreover, that the canon lawyers fully elaborated their theory of papal monarchy, and they defined papal powers in the church as specifically derived from Christ's original mandate (Pennington 1984: 38). Nonetheless, the diverse accords marking the end of the investiture contests put in place the foundations for a division of jurisdictional powers between church and state, and in principle they accepted a legal distinction of competence between these powers.

These legal controversies over investiture had the most far-reaching consequences for the secular-political structure of European societies. Indeed, one main result of these controversies was that political institutions began to design themselves around the same principles of positive legal order that had been consolidated in the church, and, in different

[13] For this interpretation see Classen (1973); Minninger (1978: 208); and Paradisi (1987: 387).