reflected and rivalled the claims for juridical autonomy and internal consistency that underpinned the Gregorian church.[24] Through this process, a political system began to emerge that condensed political power into a distinct proto-modern administrative edifice. In particular, this regime succeeded, in a rudimentary manner, in projecting an independent legal order for itself, and in using law uniformly to enforce vertical territorial control. In addition, this regime succeeded in establishing office holding as founded in a direct relation to the state, and in so doing it created a legal/political apparatus which, unlike the privatistic apparatus of feudal power, functioned (albeit rudimentarily) as a generalized and in principle impersonal and extensible system of social domination.

Law and feudal transformation II: Italian city-states between church and Empire

A distinct process of state building resulting from the investiture contests and the incipient transformation of feudalism can be observed in the governance of the cities of northern Italy, the *comuni*, which were mainly under the rule of the Holy Roman Empire. In this context, the investiture controversies also provided an immediate impetus for the construction of political power in independent positive form, and in this setting, too, the controversies over secular and ecclesiastical jurisdiction acted to differentiate and consolidate political agency as a socially independent function, reacting strongly against the privatistically interwoven legal structures of earlier feudalism. The form of independent political power resulting from the transformation of feudalism in northern Italy, however, assumed a distinctively broad-based and socially integrative quality.

The first impulse behind the construction of relatively independent political institutions in the Italian city-states arose from the fact that the investiture contests led to a marked decline of episcopal power in many cities, and for this reason they created a setting in which new patterns of authority began to evolve. In many city-states, civic and political authority had originally been vested together in holders of episcopal office, and the bishops governing these cities had obtained the right to exercise civic rule through feudal immunities or *regalia* granted by the Empire.

[24] In agreement, see Dilcher (2003: 285–6); Kannowski (2007: 176).

Bishops often enjoyed a high degree of independence from the papacy, and they regularly presided over quasi-feudal regimes, sustained legally by imperial immunities:[25] One historian has argued that an 'alliance of monarchy and Episcopate' was the basis for governance in the cities before the eleventh century (Keller 1979: 332–3). However, as the cities became caught in the conflict between Empire and church, urban episcopal power was often substantially weakened. This was mainly due to the fact that the reformist papacy, in pursuit of monastic discipline and legatine centralization, sought to undermine the independent authority of bishops, to dissolve the feudal obligations, patterns of office holding and the imperial *regalia* supporting episcopal power, and to ensure that bishops were more strictly attentive to papal command. Most notably, for instance, Gregory VII excommunicated bishops who allied themselves with the imperial party in the investiture contests. This diminution of ecclesiastic power placed the Italian cities in a new and unusual legal situation. On one hand, the reduction of episcopal power freed civic authority in the cities from immediate supervision by the church, and it enabled the cities to obtain and enlarge autonomous communal structures. More importantly, in weakening the feudal ties between bishops and Empire this process also liberated the cities from the direct, or at least mediated, control of the imperial dynasty. In conjunction with this, however, it is also widely documented that cities first reinforced their administrative autonomy as they rejected the authority of the feudal lords in their surrounding rural territories and separated the administration of the urban communes from the regional legal order (Wickham 2003: 17).[26] The Italian cities, in other words, began to obtain institutional independence in a highly distinctive legal/political setting, from which, simultaneously, feudal-imperial, feudal-territorial and feudal-episcopal power was receding.[27] At this primary level, the dissolution of the close feudal ties between church and Empire in northern Italy gave rise to a political condition, often described as an 'anti-feudal revolution', in which, to speak metaphorically, a legal opening appeared, in which free-standing and impersonal political institutions had to be created and

[25] Dilcher argues that the urban bishop became the 'feudal lord' of the city (Dilcher 1967: 64). See also Keller (1982: 58).

[26] In Pisa it is documented that the conflict with the rural powers in the *contado* was the preamble to a subsequent conflict with the bishops (Volpe 1902: 195–9).

[27] This is a common argument. See Hegel (1847: 137); Dilcher (1967: 66); Bertelli (1978: 17); and Occhipinti (2000: 20).

new sources of political authority, centred in a new, less personalized legal apparatus, had to be instituted (Calasso 1949: 156).

Most of the northern Italian cities responded to this unprecedented legal situation by taking steps to avoid renewed reintegration under the direct dominion of the Empire. In particular, most cities sought strategically to consolidate the indemnities through which they had initially established their semi-autonomous legal status, and they endeavoured to expand the rights obtained through *regalia* to establish a foundation for a more fully independent order of civic government. In this process, in the first instance, powers of government and jurisdiction, originally attached in many cities to urban bishops, were placed in the hands of freely appointed urban consuls (*consoli*): these consuls were usually drawn from outside the ranks of the most powerful feudal groups, and they were intent on elaborating the political apparatus outside inherited structures of personal status and affiliation (Dilcher 1967: 172, 177; Faini 2004). In many cases, this first stage of political formation had occurred as early as the beginning of the twelfth century. Notably, however, the quest for autonomy on the part of the cities culminated in the formation of the Lombard League in 1167, in which cities banded together to resist imperial ambitions to reimpose regalian overlordship. At this point, the northern Italian cities witnessed a rapid increase in the power of their civic authorities, and they began more consistently to act as semi-independent communes, possessing increasingly firm legislative and – most vitally – judicial responsibility for their populations. From this time on, the constitutional system of consular government was progressively supplanted by a model of public governance concentrated around more formally ordered and often professional offices. The later twelfth century saw a general 'reinforcement of oligarchical powers' in the cities (Bertelli 1978: 55), as judicial authority was separated from other urban responsibilities and condensed in the *podestà*: that is, in magistrates and judicial office holders, sometimes originally appointed by the Empire, and often called from outside the city in question, who assumed supreme judicial power and ruled by standard legal procedures in the cities.[28] After this time, the autonomy of the cities was repeatedly threatened, but it continued to expand. By 1275, the Empire had effectively renounced control of the Italian cities, and the urban *podestà* operated as independent centres of political power.

[28] For a comprehensive account of the supplanting of consuls by *podestà*, see Zorzi (2000).

The battle for the autonomy of the Italian city-states was inevitably fought, in part, as one dimension of the larger legal battles between the papacy and the Empire, and, accordingly, the changing status of the cities was widely reflected in constructions extracted from Roman law. On one hand, for example, the coterie of Roman civil lawyers employed by the Empire rejected the legality of claims to independence expressed by the cities, and they sought to entrench regalian authority and reclaim the cities as direct dominions of the Empire. At the Diet of Roncaglia (1158), when the Empire clearly had the upper hand in the struggle with the cities, the emperor called on the doctors of Roman law in Bologna to support him. These lawyers duly asserted that the imperial will should act as the foundation for government, and they sought to demonstrate that all laws, liberties, judicial offices and *regalia* in the Empire were derived solely from the emperor's express and voluntary approval.[29] Backed by the civil lawyers of Bologna, in fact, the imperial party eventually attempted to conduct a thorough reorganization of the Empire as a personal-bureaucratic state, and to impose on northern Italy a strict regime similar to that later pioneered in the Kingdom of Sicily.[30] Indeed, the emperor used the opportunities afforded by his military victories over the cities to reacquire all the *regalia* that had been given to the Italian communes, and effectively to subject the cities to immediate imperial jurisdiction.

An interim end of the conflicts between the Empire and the Lombard League was sealed in the Peace of Constance (1183), however, and after this time concepts of Roman law were widely employed, against the Empire, to reinforce the power of the cities. At a most general level, the essential legal principle of communal autonomy – namely, the principle that the *comuni* possessed an autonomous legal personality outside the feudal relations that bound the Empire, the episcopate and the imperial aristocracy together – marked (arguably) a triumph of Roman law over the personalistic elements of Germanic law (Mayer 1909: 443; Volpe 1976: 67, 101). More specifically, the Peace of Constance recognized the cities as possessing independent *regalia*, and it played a crucial role in the legitimization of the cities as legal entities obtaining a degree of sanctioned constitutional and legislative autonomy within the Empire.

[29] See the documentation of the Curia Roncaglia (Pertz 1837: 110–14). See the near-contemporary account of the consultation between Friedrich I and the 'four masters' of Bologna (Schmale 1986: 88–9).

[30] This point is made in Sütterlin (1929: 8); Vergottini (1952: 207); and Zorzi (1994: 87).

Moreover, it accepted the validity of the customary statutes and documented *consuetudines*, which many cities already possessed, and in so doing it sanctioned the free exercise of judicial power by the *comuni* of the cities.[31] Additionally, the Peace of Constance also defined the administrative organs of the cities as bodies that were authorized independently to introduce their statutes, and it acknowledged urban political elites as entitled to transform customary laws into acts of written public order and so, in effect at least, freely to create *new laws*. In each of these respects, the end of the first Lombard conflicts gave rise to a deep (although still tentative and piecemeal) reconstruction of the legal order of the cities. It created an environment in which principles of secular law, loosely influenced by Roman-law concepts, could be used to establish new patterns of post-feudal public governance, and a written legal order instituted a positive and generalized political apparatus for urban centres.

In addition to this constructive use of civil law, the cities of northern Italy also borrowed elements of canon law to support their cause, and they found in the Roman-law arguments of the canonists, themselves often hostile to the Empire, an effective support for their independence. Many canon lawyers, like the papacy itself, were keen to affirm the customary legislative powers of the semi-independent Italian cities, which they saw as a vital bastion against the intensification of imperial power, and they often provided legal assistance for urban rulers and *comuni* who aimed to explain and strengthen their legal foundation. Indeed, many earlier commentaries on canon law entailed a *de iure* recognition of the claims to statutory autonomy and even semi-sovereign power asserted by the rulers of individual administrative organs within the Empire:[32] the view was quite common among earlier canonists that the independence of particular states in the Empire had sound claim to legal validity and that the Empire had no entitlement to assume universal territorial power. Seminally, for instance, the canonist Alanus Anglicus argued that each ruler had the same authority in his kingdom as the emperor in his.[33] Later commentators on civil law, such as Bartolus and Baldus, then applied these ideas to the Italian cities, and

[31] The Pax Constantiae conceded 'jurisdiction in criminal and pecuniary cases' and 'in other matters relating to the well-being of citizens' to the cities (Pertz 1837: 175–80).

[32] This argument is strongly asserted in Onory (1951: 226) and Calasso (1957: 122). It is contested in Catalano (1959: 29).

[33] This text is printed in Schulte (1870: 90). See a similar claim in the *summa* of Étienne de Tournai (Schulte 1891: 12).

they argued that office holders in the Italian city-states were, in proportion to the dignity of their office, entitled to presuppose relative autonomy under law (Bartolus 1555: fol. 11; Baldus 1616: fol. 13). Indeed, Bartolus and Baldus recognized the city-states as possessing quite manifestly a legitimate *ius statuendi*, and they used principles of natural law, derived from the *ius gentium* of Roman law, to accord to the Italian city-states the right to pass laws without full authorization by the Empire. This interpretation of civil law underwrote a legal structure, in which the urban *comuni* could assume the right to unify the customary laws that had traditionally been applied in informal fashion in the cities. Moreover, this made it possible for an elite and increasingly professionalized class of learned judges to reform the hitherto rather haphazardly applied fusion of custom, regalian liberties and ecclesiastical edicts that had formed the legal structure of cities, so that urban legal codes could be compiled to form a reasonably systematic and, above all, positively alterable statutory system.

Gradually, in sum, the use of Roman law and elements of canon law in the northern Italian cities created a legal culture in which statutes became the primary positive foundation of authority, and from the later twelfth century onwards most cities began to design statutes in which they defined and codified their underlying legal principles. As a corollary of this, most cities began to set these principles apart from common life, and they introduced strict procedures to ensure that their laws were formally and equitably applied: in many cases, the urban statutes stipulated that, to ensure impartiality of judgment, foreign judges should be appointed to administer the laws. Early examples of this formal organization of law were the quasi-constitutional consular documents instituted in Pisa and other cities in the twelfth century. These included the Constitum Consulum Comunis in Pistoia (1117), the Pisan Constitutum Legis and the Constitutum Usus (*c.* 1160), and, most importantly, the Breve Consulum Civitatis of Pisa (1162). Indeed, the *constituti* of Pisa and Pistoia contained procedural rules regarding the obligations and elections of consuls (Bonaini 1854: 6–9; Rauty and Savino 1977: 47). By the mid thirteenth century, as analysed below, most cities of northern Italy had produced statutory accounts of their basic political functions and responsibilities, and they used techniques of legal codification to create a positive and autonomous overarching legal apparatus for the urban polity.[34]

[34] On the connection between writing, legal positivization and the formation of public law see Keller (1991: 183).

In the Italian cities, to conclude, the legal disputes between church and state, the transformation of feudalism and the early construction of positive abstracted forms of statehood were three aspects of the same inextricably conjoined process. In this second case, the conflict between church and Empire gave further impetus to the tentative emergence of early states, and states began to develop as positively founded and increasingly *public* political actors that filled an open legal space created as the complex feudal nexus between church and Empire was dissolved. Of crucial importance in this was that the Italian cities began to concentrate their power around statutes and they attached great constitutional importance to securing the *ius statuendi*: statutes became the constitutional form in which nascent states expressed and administered their increasing powers of positive political autonomy.

Law and feudal transformation III: the consolidation of central monarchy

A series of related developments was also evident in England. In this regard, first, some cautionary observations need to be made. High medieval England cannot be compared directly with other European states and societies. For example, it is debatable whether English society ever, or at least for very long, possessed fully characteristic features of feudal organization.[35] Even before 1066, English society had been marked by a high level of statehood and an 'exceptionally powerful and unified' order of royal lordship (Bartlett 2000: 201), and it gave only limited recognition to feudal justice. By the twelfth century, then, England was already in a process of de-feudalization, and it was beginning to evolve rudimentary administrative, jurisdictional and fiscal features typical of modern central states. Despite this, however, the conflicts between church and early state in England had implications that reflected the same underlying processes as in other regional settings. Indeed, these conflicts were again flanked by, and they in turn intensified, a dynamic of legal and political transformation, in which the diffuse corpus of feudal law was subject to systematic statutory organization, and in which a monarchical executive began to emerge that possessed substantially enhanced reserves of positive legislative power.

Two processes acquired particular prominence in this context. In the first instance, the aftermath of the investiture controversies in England

[35] As the salient view in this polemic, see Richardson and Sayles (1963: 91).

was generally characterized by a formal consolidation of the legal system that reinforced and intensified monarchical power. In England, although there was only limited reception of Roman law, the high medieval period, and especially the reign of Henry II, saw a thorough systematization of the legal apparatus of state. This process involved a rapid increase in the formality of judicial procedure, the establishment of reliable precedents for ruling cases, the integration of local courts into one overarching legal system subordinate to a central court, the more extensive use of general eyres (in fact established, debatably, by Henry I) to supervise the provision of justice in local courts, and, in total, a thorough laicization and regular central organization of judicial process.[36] By 1200, the primary foundations of the English common law, destined to last for centuries, were already established. Notably, then, the principles of English judicial order were further formalized in Magna Carta (1215), which at once clarified feudal law and enshrined a set of normative principles that could be invoked to resolve controversy over judicial procedure. Although most obviously an attempt to curb the use of royal power against a baronial oligarchy, Magna Carta arose from a context in which plaintiffs found substantial benefits in a stable judicial order, and it reflected a positive evaluation of regular centralized royal justice (Holt 1992: 121–3). Indeed, Article 18 of Magna Carta evidently reinforced royal justice: the document as a whole 'demanded more justice' (Stacey 1987: 9), and it led to the holding of county courts with increased regularity (Palmer 1982: 25). In addition to this, in England the later feudal era was also marked by the fact that, as in other settings, leading political actors detached the law from its more customary and embedded forms, they slowly integrated the originally private functions of baronial and seigneurial courts into a judicial hierarchy, and, in so doing, they progressively transformed the law into a more positively malleable medium of social exchange (Adams 1926: 185; Denholm-Young 1939: 89). This began with the institution of assizes under Henry II, which, as the 'headspring of English legislation', allowed regents and royal commissioners to form and alter legal edicts by regulating and settling inequalities in customary law (Jolliffe 1961: 239). By the later medieval period, baronial courts were mainly restricted to initiating cases for settlement in royal courts, and, correlatively, the use of general statutes as instruments for introducing new laws had increased exponentially: this culminated in

[36] See Stenton (1965: 26); Keeton (1966: 204); Turner (1985: 74); Hudson (1996: 150); and Musson and Ormrod (1998: 2).

the large swathes of statutory legislation introduced during the reign of Edward I.[37] The earlier organization of the common law through royal writ under Henry II thus ultimately created a framework in which common law itself could be flexibly altered and augmented by positive legal statutes.

These two legal processes – first, the formal structuring of common law and, second, the expansion of the state's positive statutory powers – were fundamental to the building of central political institutions in England, and together they formed a transformative process that pierced the legal arrangements typical of feudalism.[38] Indeed, the assumption of statutory powers by the government during the high feudal period is widely viewed as reflecting the historical process in which England was transformed 'from a feudal to a national state' (Prestwich 1972: 224), and it created the foundations for a governmental order able to apply political power across the entire national territory, in growing indifference to particularities of territory, privilege or status. The first English statute is usually seen as the Statute of Merton of 1236 (Wilkinson 1948–58: 242). However, the Statutes of Westminster introduced by Edward I in 1275 and 1285 were perhaps the decisive moment in the formation of the English monarchy as a political system that could legislate independently of feudal custom and whose power was condensed in positively authorized institutions. Notably, these statutes coincided with the Quo Warranto legislation of Edward I, which aimed to sever the law from private jurisdiction, to restrict judicial privileges granted under feudal order, and to ensure that laws were subject to central statutory monarchical control (Ault 1923: 5; Sutherland 1963: 1).

In France the controversies over the limits of papal and royal power reached their highest levels of intensity rather later than in other European countries, and the subsequent process of feudal transformation also approached conclusion at a somewhat retarded juncture. However, processes similar to those in other countries were also identifiable in France. In the first instance, for example, the period of early Capetian rule saw a re-establishment of monarchical power as a source of public authority: it was marked by a sustained attempt on the part of

[37] For this analysis see Plucknett (1922: 30; 1949: 10).

[38] Maitland famously saw the reforms of Henry II as giving England a more centralized legal-political order than any other state in Europe (Pollock and Maitland 1895: 146). This thesis has been repeatedly disputed, most notably in Milsom (1976: 186). But for a moderating pronouncement see Biancalana (1988: 535).

the monarchy to transform and consolidate feudal obligations, to suppress independently exercised seigneurial privileges, and to use regalian powers to bind the lords of the realm into a direct juridical relation to the crown. This naturally coincided with an intensification of the law, through which the monarchy attempted to salvage its jurisdictional powers from the feudal privatization to which they had fallen prey in the eleventh century and to transform by statutory means the customary constitutional order of French society.[39] During the reign of Philip Augustus (1180–1223), the machinery of justice underwent a significant transformation, and royal writ was expanded as a medium for settling disputes. By the end of the reign of Philip Augustus full assizes were held in many towns. The period 1190–1200 is commonly regarded as marking a crucial turning point in the regularization of the French judicial apparatus (Baldwin 1986: 137). Similarly, the teaching of Roman law at French universities expanded substantially under the Capetians, and Roman law became a vital tool for reinforcing secular political order. In 1219, in fact, the pope even issued a bull to suppress instruction in Roman law at the University of Paris. These processes then continued under the later Capetians. In 1278, for example, Philippe III issued procedures to ensure that supreme jurisdictional powers were to reside solely in the *parlement* (the sovereign court of the monarchy, performing the highest judicial and certain limited legislative functions). By this time, royal justice prevailed over local and ecclesiastical jurisdiction, and the *parlement* began to perform many functions previously performed by feudal courts.[40]

This formalization of the state's legal order culminated in the later decades of the thirteenth century in a series of protracted and envenomed altercations over temporal jurisdiction between the late Capetian kings and the papacy. This led both to a substantial transfer of judicial power from the papal church to the French monarchy and to a concerted attempt by the monarchy to centralize and regularize legal procedures. During the famous jurisdictional conflict between Philippe le Bel and Pope Boniface VIII, most notably, the monarch conducted a systematic reorganization of the *parlement* in Paris, and he called on specialists in Roman law, notably the *légistes* Pierre Dubois, Pierre Flotte and Guillaume Nogaret, to articulate juridical concepts to strengthen his jurisdictional powers. Accordingly, the

[39] See the classic analysis in Lemarignier (1965: 163, 169).
[40] On these points see Boutaric (1861: 208); and Rigaudière (1988: 233).

légistes offered a legal justification of monarchy that defended royal powers against a series of inflammatory bulls circulated by Boniface VIII.[41] In particular, the *légistes* argued that the claim to temporal powers by a pope was tantamount to heresy, and that the king of France had no 'sovereign on earth save God' (Rivière 1926: 104, 118).[42] Philippe himself opposed the church by offering the classical definition of royal power as a quasi-sovereign attribute, stating that it was inconceivable that '*in temporalibus nos alicui subesse*' (Dupuy 1963 [1655]: 44). Through the analyses of the *légistes*, therefore, a clear concept of monarchical sovereignty, founded in Roman law, began to emerge, and the French monarchy arrogated to itself supreme responsibility for maintaining peace and order in the realm. Notably, this doctrine was intended to support the French monarchy, not only in relation to the pope, but also in relation to the universalist claims of the Holy Roman Empire: it stated that the monarch assumed powers of sovereignty in France that were in no way inferior to the powers of the emperor in the Holy Roman Empire. This argument finally assumed emblematic form in the anonymous tract, *Le songe du vergier*, of the 1370s, which stated that the French king held 'his realm from God alone' and was fully entitled to make, alter and interpret laws (1982 [*c.* 1378]: 55, 28). In according these semi-sovereign attributes to kingship, the *légistes* also set out relatively systematic principles to determine the competence of different courts, to augment royal authority in the courts, and to oversee courts and prevent judicial irregularity. The period around 1300 saw the introduction of stricter protocols in the royal courts and the institution of fixed judicial personnel. During this time the *parlement* began to grow in authority and to specialize more exclusively in judicial matters, and it was becoming a fixed institution in Paris. Its regularity and professionalism grew substantially under the influence of legist doctrine. Under Philippe le Bel, Roman law was also utilized as an ideal tool for promoting systematic understanding of French law, and it was even claimed that Roman law was an integral part of French customary law.[43]

[41] A most inflammatory declaration of papal power was the Unam Sanctam bull of 1302. The most extreme statement of this position was the (apparent) bull Deum Time, which stated: 'We want you to know that you are subject to us in both spiritual and temporal matters.' However, this was a forged bull, fabricated in order to legitimize monarchical reaction.

[42] On the formation of the doctrine of monarchical sovereignty in France see David (1954: 76).

[43] On these matters, see Chénon (1926: 508–10); Bloch (1964: 43); Bisson (1969: 366); Aubert (1977: 7–11); Strayer (1980: 218); Shennan (1998: 22–3).