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).

As in other countries, therefore, the formation of the French state evolved through a profound transformation of feudalism. This process was integrally linked to the rationalization of the instruments of justice, which was itself intensified by the longer process of formal differentiation between state and church. In both England and France, in fact, the high medieval period was at once structurally dominated by the concerted endeavour of actors around the state to claim jurisdictional rights from the church, by the – closely related – suppression of feudal laws and indemnities, and by the concentration of increasing jurisdictional power in the emergent state, through which these actors were able to negate the privatistic and centrifugal legal forces in society. In particular, like the Italian cities, these societies also began to produce principles close to modern ideas of state sovereignty, and proto-state institutions began to be identified as dominant repositories of political power, exercising a monopoly of force both against the church and against the local reserves of feudal authority.

Constitutions and the formation of early states

This account of patterns of early state formation is not intended to be exhaustive, and it addresses only the main lineages of political construction in Europe in the wake of the investiture contests. Many variant patterns of this process can be identified. Indeed, even the basic principle that states resulted from sustained legal discord between ecclesiastical and worldly powers, which in itself reflected a deep-lying, although intermittent, process of feudal transformation, can only be applied to those medieval societies that, in a more or less obvious manner, possessed a feudal structure and were originally marked by a close interaction between bearers of political power and the papal church. A very important partial exception to these patterns, for example, was Spain. In Spain, it is often (although not universally) argued that feudalism existed only in a weak and rather under-evolved form: indeed, it is seen as characteristic of medieval Spain both that political offices remained recuperable by the monarchy,[44] and that, owing to high levels of social

[44] For the classic expression of this view see Sánchez-Albornoz (1942: 265). For commentary see Lourie (1966: 61, 63); O'Callaghan (1975: 165–7, 263); and Linehan (1993: 192–5). This view is often (in my opinion, very persuasively) disputed. For salient revisions of this view see Barbero and Vigil (1978: 15); Estepa Díez (1989); and García de Cortázar (2000: 561).

militarization, peasants could extricate themselves from feudal servitude with relative ease. Moreover, it might also be observed that in Spain the concentration of monarchical power was widely flanked by a recurrent growth in seigneurial autonomy, and the pluralistic interdependence between central jurisdiction and the privileges of the *seňorios* remained higher and more embedded in Spain than in other societies.[45] Importantly, furthermore, in Spain there was no investiture contest or directly analogous event, and the emergent state of Castile-León gradually evolved into a Catholic monarchy, in which worldly rulers claimed to act as defenders of Roman Catholicism. However, in key respects the case of Spain was deeply analogous to the evolutionary patterns underlying other states. In Spain, the lines of authority between state and church were also clearly drawn by the later Middle Ages. Moreover, Spain, too, saw a strengthening of royal authority in the later twelfth century, and the consolidation of the monarchy was flanked by the prevalent use of Roman law to concentrate jurisdictional power in the state.

Despite these partial qualifications, however, it can be argued that the formalization of the law in the Western church and the translation of legal constructs from church to state in and after the investiture contests produced a crucial impetus for the formation of the proto-typical institutions of modern European states. This was intimately tied to the capacity of formal law for responding to changes in social structure in feudal society and for constructing political power as a relatively abstracted phenomenon, focused on a series of distinct and increasingly public functions. The emergence of consistent and abstracted legal principles in the church intersected with the wider dynamics of social transformation, and these principles enabled both the church and the state to separate themselves from the interwoven socio-legal structure of feudalism and to consolidate their power as relatively autonomous entities. Above all, the generalization of law in the church enabled the state to borrow from the church a projection of itself as the unique and consistent source of law, and states gradually adopted this principle of legal generality in order at once to secure their institutional consistency,

[45] It is arguable that in medieval Spain monarchy and *seňorios* enjoyed something close to a symbiotic relationship, and the high medieval period witnessed a growth and proliferation of seigneurial power: Estepa Díez (1989: 219, 240); de Moxó (2000: 71). It has been widely argued that, despite monarchical claims to highest jurisdictional power in Spain, the parcellation of judicial force was endemic (Rodríguez-Picavea 1994: 366–7).

to explain, justify and transplant their political power throughout society, and to capture, manage, and apply in the form of statutes, relatively autonomous reserves of power. In England, for example, the idea of the monarch as the fount of justice became widespread through the first expansion of royal government: the Angevin monarchy, for all its recurrent despotic proclivities, was specifically defined and obtained legitimacy as a *law state*, in which the instruments of justice were condensed around the monarchy and the king acted as the 'highest source of justice' or even as a *judicial king* (Jolliffe 1955: 32; Bartlett 2000: 178).[46] In the Holy Roman Empire, the emperor was expressly conceived as the source and custodian of all law, and the preservation of legal order was viewed as the highest duty of the emperor. The *Sachsenspiegel*, the main secular legal code of the territories of medieval Germany, clearly defined the emperor as 'the common judge of all' (III, 26). In France, the need to provide justice was almost an article of faith for the Capetian kings: throughout the early formation of the French state the monarchy explained its legitimate right to legislate as deriving from its custodianship of justice.[47] In Spain, too, a codified law book, *Las Siete Partidas*, was introduced and promulgated throughout Castile-León in a period of far-reaching legal innovation undertaken by Alfonso X in the mid thirteenth century. Spanish society remained marked by a very high level of legal particularism, and the aspiration to legal uniformity remained unfulfilled. However, this law book also defined the monarchy as the primary centre of justice, and it aimed to concentrate the most important elements of jurisdiction around the crown (II,1,1).[48] The close interdependence of state and law was thus the most vital conceptual construct in the slow emergence of post-feudal states possessing, or aspiring to possess, a monopoly of political power, and the formation of distinctively political institutions was closely correlated with the abstraction of a general legal apparatus. In fact, decisively, in each case considered above it was the interdependence of law and state that allowed the state to project itself as a public body or actor, and this construction of the state played the most vital role in enabling states to organize and apply their power as a distinct, positive and autonomous facility.

In many instances, the processes of generalized legal formalization that defined high medieval European society involved little more than

[46] On this in general see Marongiu (1953: 702).
[47] This is a common argument. But in this case see Petit-Renaud (2001: 180–1).
[48] I refer to the 1807 edition of the *Siete Partidas*.

the establishment of formally drafted summaries of existing common laws or customs. In most cases, it was not until a much later point in history that judicial power was fully centralized and a consolidated body of public law was established. In most European countries supreme judicial functions were still attached to unstructured royal courts, which were convened as the monarch moved around the land. Nonetheless, it remains the case that most European societies in the period of nascent state formation were marked by the principle that general and consistent laws were required to supplant private justice and private violence as the source of judicial settlement, and the law was expected to restrict the degree to which personal agreements, settlements or individual decisions were used to satisfy society's need for jurisdiction.[49] Furthermore, most societies of this time also began to utilize law, not as a body of norms embedded in diverse customs or local practices, but as a more positive medium, which could be produced from legal reserves that society stored in consistently written and reliable form, and whose application was subject to principles of professional regularity and formal qualification. The increasingly dominant motive in legal finding from this time onwards, in short, was that law was expected generally and iterably to traverse diverse social fields, and a body of law was required that could authorize and reproduce singular principles from within itself. In order to fulfil the growing requirement for legal iterability, the law began to reduce the influence of external considerations on judicial procedure and law-finding more generally, it distilled itself into internally refined, consistent and professionally differentiated and documented forms, and, in this form, it became possible for law to cross many social spheres and to apply political power at a high level of generality, inner consistency and reproducibility. At the very formative origins of the political institutions of European society, in consequence, it is possible to identify what might be defined as a normative relation of *differentiated interdependence* between political power and positive law. High medieval societies, in particular, were characterized by the progressive formation of differentiated political institutions, which could structurally isolate themselves from other areas of human practice and autonomously circulate, as statutes, resources of political power across society as a whole: by 1200, most societies had begun to construct power, in distinction from laterally configured lordship and feoffdom, as distinctively *politicized power* (Bisson 2009: 484). This consolidation of

[49] For general literature on this, see Kaeuper (1988: 145); Harding (2002: 33).

politics and political power, however, presupposed a close relation between politics and positive law, through which the developing political system increasingly presupposed juridically formalized categories of law in order meaningfully and reliably to use, and, in fact, to produce and augment, its power. The formation of states as differentiated autonomous institutions applying increasingly positive reserves of power only occurred because of the interpenetration of political institutions with the law. Formal law was the primary precondition of statehood: formal law was at once a normative construct that allowed early states to define and project a foundation for their growing autonomy, and a functional instrument that enabled them to reduce their own residual privatism and to transplant power positively across widening and increasingly defeudalized (less and less privatistic) societies.

In this relation, however, it can also be observed that the existence of a general legal apparatus was not the sole prerequisite for the first abstraction of political power and the first construction of states in the process of feudal transformation. In addition to this, the articulation of political power as an increasingly autonomous and positively generalizable social medium also meant that power was forced to support its diffusion through society by constructing an increasingly uniform account of its addressees: that is, by imagining its addressees as distinct and abstracted from their natural or regional particularities, and by projecting an idea of those subject to law that could be consistently and reproducibly presupposed as the terrain to which law was applied. One further precondition for the growing autonomy and the widening circulation of political power, therefore, was that power began to utilize procedures and principles of legal *inclusion*, which it could use to support and accompany the particular acts of its application. This in itself was partly accomplished through the establishment of a general written legal order: written laws allowed nascent states to perceive their subjects as uniform legal constructs, and so to apply power to their subjects in simplified, internalized and routinized fashion. Additionally, however, the detachment of power from particular persons and locations in the wider transformation of feudal order also, of necessity, meant that states began to co-opt and integrate a growing number of social actors into the political apparatus in order to authorize their statutory power, and states invented procedures in which the recipients of power were drawn into a direct, controlled and replicable relation to political power. The first general diffusion of power through emergent modern societies, in consequence, was internally linked to an increase in power's internal inclusivity: *abstracted generality*

and *positive inclusion* might in fact be seen as the vital, reciprocally formative characteristics of political power as it first emerged as a differentiated and autonomous societal facility. For this reason, it is notable that many of the legal codes that were introduced in later medieval Europe clearly provided, not only for consistent judicial order and legal regularity, but also for an expansion of the state to include, and give representative powers to, (selected) relevant political actors. The English Magna Carta, for instance, was a document that possessed (albeit limited) constitutional implications, and it made clear provision, not only for legal rule and legal respect for acknowledged freedoms, but also, in Article 12, for the convocation of representative assemblies to approve exceptional levies. Shortly after Magna Carta, Bracton's commentary on English law also enunciated the principle that royal power was subject to both legal and political limits, and that the intensification of power in the monarchy necessarily presupposed certain norms of popular inclusion and elected representation. There is, Bracton stated, 'no *rex* where will rules rather than *lex*' (1963 [*c.* 1235]: 33). In Castile, similarly, the *Siete Partidas* expressed the constitutional presumption that royal power could only be exercised across society if it was derived from a 'balanced relationship' between sovereign and subjects (O'Callaghan 1975: 372). Although using selected principles of Roman law to authorize the king's statutory powers, the *Partidas* instilled a moral/inclusionary dimension in the law, and they even stipulated (1.1.18) that the king could not revoke laws without 'the great counsel of all the good men of the realm' (O'Callaghan 1989: 127). A further example of this was the Swedish Land Law, introduced by Magnus Eriksson in the fourteenth century. This law expressly provided for governance by council-constitutionalism, and it obligated the king both to respect 'the ancient Swedish laws' and to consult members of a permanent royal council on matters of general importance (Upton 1998: 1).

The earliest positive construction of modern European states, therefore, did not only presuppose a necessary relation between the general growth of state power and the general positive abstraction of the law. This process also presupposed recognition of the fact that the state's power could only be legally generalized across society if it was underscored both by constant legal formulae and by inclusionary arrangements by means of which it could at once integrate its addressees and harden preconditions for its support. The first construction of political power had a twofold normative character: it presupposed legal norms for its transmission and legal norms for its procedures of inclusion. Indeed,

if the introduction of general law codes was part of a wider process in which states transformed their legal foundations from custom to statutes and so assumed capacities for positively generalized legislation, those states that established strong inclusionary devices to sustain their legal systems normally experienced greatest success in introducing statutes, pursuing positive processes of legal enactment and fulfilling the basic functions of statehood. On these grounds, if the first stage in the transition from early feudalism and privatistic lordship to the rudimentary establishment of modern statehood was integrally bound to the process of power's positive legal organization, this path also widely presupposed an increasing interdependence of power, law and a rudimentary system of inclusive constitutional representation. The generalized use of law and power normally required an inclusionary apparatus that acted evenly to integrate social actors within the sphere of political power, to solidify uniform societal conditions for the application of law and to create a climate of general responsiveness to law.[50] In fact, the earliest – very tentative – formation of the European state as an agent consolidating its autonomy under public law widely depended on the capacity of the state for quasi-constitutional inclusion.

Early states and constitutions

The correlation between the early formation of European statehood, the generalization and positivization of law, and the construction of a constitutional order to sustain early states was visible in different ways in a number of national settings. In each of these settings, as above, the specific conjuncture between these processes corresponded to the distinctive pattern of feudal transformation or gradual de-feudalization that marked particular societies.

Italian city-states

The case of the Italian cities has been briefly considered above. As discussed, the initial emergence of the Italian cities occurred, simultaneously, in the context of a conflict over jurisdiction between the papacy and the Holy Roman Empire and in the context of a conflict over regalian rights between the Empire and powerful urban administrations. In these conflicts, the cities assumed autonomy by gradually asserting positive

[50] This point is corroborated in Bisson (2009: 529–72).

statutory control of legal and judicial functions. These processes, and their political outcomes, naturally followed a different course in different cities, and many local variables affected the formation of different communes. To speak very generally, however, Italian city-states, whose jurisdictions were originally based in privileges granted by the Empire, began to act as distinct administrative and judicial entities – *comuni* – around the middle of the eleventh century. By 1100, many northern Italian cities are documented as possessing a communal authority. In 1117, for example, Milan (belatedly, given its status) obtained the status of an independent municipality. By 1154, Florence possessed its own independent judicial apparatus. Subsequently, after the Peace of Constance (1183), the *comuni* progressively acquired, despite ongoing disputes with the Empire, the (still very rudimentary) features of modern statehood: that is, they were authorized to administer justice, to summon armies, to impose duties and raise taxes, and even – in some cases – to elect magistrates.

In addition to this, it is notable that, as these city-states consolidated their functions outside inherited personal and legal forms, they were also obliged to produce increasingly inclusionary arrangements to underpin their statutory authority, and they instituted general procedures to ensure support for their power throughout their societies. For this reason, the early Italian city-states experienced a proliferation of formulated legal documents that prescribed norms for the regulation of public matters (that is, for fiscal and judicial processes), that laid down principles for the election and selection of temporal magistrates, and that contained elaborate mechanisms for avoiding the arbitrary use of power. In other words, it was crucial to the process of their autonomous political/judicial expansion that, in parallel to their intense activities of legal construction and statutory revision, the Italian *comuni* elaborated extensive, although also clearly highly limited, provisions for popular representation and veto and approval in political decision making. The growing statutory autonomy of the cities was thus structurally reliant on an underlying inclusionary constitutional order.

In the earliest stages of their political formation, the highest political authority in the cities, as discussed, was allocated to informally appointed consuls. The consular period was characterized by only the most rudimentary constitutional apparatus, which was normally restricted to prescribing procedures for electing consuls and to imposing oaths of integrity and probity on bearers of office (Rauty and Savino 1977: 47). By the later thirteenth century, however, some cities, notably Florence, had developed

much more complex documents to dictate principles for the assumption of public office, and in many cases these documents subjected the exercise of public power to clear principles of accountability. By the 1280s, in fact, Florence had acquired a constitutional order, entailing provisions for citizen participation, which contained express rules for the maintenance of uniform justice for all members of society and – above all – for the suppression of private violence (Rondoni 1882: 45–58), and which sought to guarantee an impersonal legal order as a matter of express public interest: it evidently provided a legal/judicial framework for establishing the *comune* as an early *res publica*. Subsequent constitutional documents in Florence also regulated election to public office, and they enunciated the categorical principle that the use of power within the city must refer to and be determined by existing written statutes (Caggese 1921: 4). Most importantly, the Florentine Ordinances of Justice of 1293 stipulated that the consent of substantial sections of the population was the precondition of legitimacy in the exercise of communal power, and the Ordinances provided legal support for intermittent periods of rule by the *popolo*: that is, by governments founded in the approval of powerful members of the middle-class, confederated in guilds. These Ordinances also directly invoked the principle that matters of common interest had to be approved by all (*quod omnes tangit debet ab omnibus approbari*) as the foundation for communal rule (Najemy 1979: 59): that is, theoretically, they reflected the principle that sustainable power was power that included all politically relevant sectors of society, and they made public authority directly contingent on laws receiving common consent. In Bologna and Padua, similarly, documents of the 1280s set procedures for elections, and they stipulated that government had to be conducted in conformity with existing statutes.[51] Indeed, the Sacred Ordinances introduced in Bologna in 1282 provided foundations for guild-based quasi-republican government, and these, too, were focused on suppressing private violence between powerful groups of magnates. These principles were then widely reproduced in the statutes of other cities.

Naturally, these descriptions are not intended to suggest that, by the thirteenth century, the Italian cities possessed the characteristics of fully evolved and constitutionally determined states. The converse was in fact the case for a number of reasons. First, it is not clear that the *comuni* existed as fully public bodies. Their legislative processes were generally

[51] For Padua, it was stated that election to office of *podestà* was not to be made *contra formam statuti* of the Padovan *comune* (Gloria 1873: 6). For similar principles in Bologna see Fasoli and Sella (1937: 5).

founded in a balancing of horizontally structured private interests, and sovereign power was often inseparable from the immediate prerogatives of potent social groups, which meant that political authority remained rooted in specific milieux and professions. Government often vacillated between the magnates and the guilds, and much legislation was devoted both to enacting particular interests and to suppressing oppositional groups, who pursued motives of private justice in order to unsettle the *comune*. Second, it has also been widely observed that, if the *comuni* were formed as organs that cut through the feudal ties binding the cities to the Holy Roman Empire and the imperial aristocracy, they always existed alongside other channels of obligation, and they were not constituted as finally sovereign or independent institutions. Neither the feudal apparatus of the Empire nor the private associations of interests within the cities were ever fully brought under the force of the judicial authorities of the cities – the *podestà*. Moreover, the level of private violence in the cities remained very high, and it is difficult to claim that the *comuni* possessed an administrative apparatus enabling full public or sovereign control of the city or, in fact, even an approximate monopoly of force. Third, over a longer period of time the communal origins of the constitutions of the city-states were partly eroded. Most, although not all, cities progressively abandoned the broad-based model of government. Most opted instead, first, for a pattern of government in which power was removed from the *comune* and placed in a *signoria*, which in most (but not all) settings tended to assume a relatively closed oligarchical form.[52] Later, then, most cities ultimately settled for government by an aristocratic *principato*, which centralized more power in one single dynastic elite. One commentator has observed that as early as 1300 much of northern and central Italy was under 'despotic rule' and that the 'period of effective autonomy' in the communes was very brief (Jones 1965: 71–2). In some cases, the transition from commune to *signoria* led to the consolidation of the city-states as quasi-territorial states, in which urban regions secured their power against the Empire by adopting hierarchical patterns of sovereign jurisdiction. In other cases, in seeming paradox, the transition from *comune* to *signoria* re-accentuated the private/familial control of political power, and it even involved a partial reintegration of the cities into the neo-feudal legal order that still prevailed in the Empire. In general, however, the advent of the signorial

[52] Florence was the crucial exception, where, initially, the *signoria* extended political representation across class boundaries (Becker 1960: 423).