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The significance of borders : why representative government and the rule of law require Nation States

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CHAPTER ONE

THE STATE

1.1. *THE RISE OF THE STATE*

To understand national sovereignty, it is first necessary to examine the institution that upholds it: the state.

States of the kind we are familiar with today have certainly not always existed. They gradually gained shape over a period of several centuries, leaving behind the multi-layered organization of power that characterized the Middle Ages. It is, however, not easy to draw a sharp line between feudal and modern statehood: rather, the distinction is ideal-typical. The development towards modern statehood consisted in the slow undoing of feudal structures and in the diminution of the power of the church, in favor of the central political force commonly associated with the monarch.¹ As Samuel Finer writes:

The Middle Ages were regulated, shaped, and permeated by two great institutions: Christianity and Feudalism. (...) If the cathedral is the stone symbol of the Middle Ages, so, equally is the castle. Feudalism and the feudality embraced them both.²

The replacement of the power of the 'stones' of the Middle Ages, the cathedral and the castle, by the paperwork of bureaucratic central administrations, marks the coming of the modern state.³ Ernest Gellner has written about the influence of modernization on 'the replacement of diversified, locality-tied low cultures by standardized, formalized and codified, literacy-carried high cultures.' He noted that 'the Reformation universalized the clerisy and unified the vernacular and the liturgy, and the Enlightenment secularized the now universalized clerisy and the now nation-wide linguistic idiom, no longer bound to doctrine or class'.⁴

¹ In republics, this increase in power was naturally not brought about by a monarch, but by another central political figure. In the United Provinces, for instance, political power increasingly concentrated in the person of the Stadtholder.

² S.E. Finer, *The History of Government, Volume II. The intermediate ages* (Oxford: Oxford University Press, 1997) 857.

³ It is against this background that Edmund Burke wrote: 'Nothing is more certain, than that our manners, our civilization, and all the good things which are connected with manners, and with civilization, have, in this European world of ours, depended for ages upon two principles; and were indeed the result of both combined: I mean the spirit of a gentleman, and the spirit of religion. The nobility and the clergy ...', in: Edmund Burke, *Reflections on the Revolution in France. A Critical Edition*. Edited by J.C.D. Clark (Stanford: Stanford University Press, 2001) 241.

⁴ Ernest Gellner, *Nations and Nationalism* (Oxford: Basil Blackwell, 1983) 76-78.

This, however, was a process that differed significantly from region to region,⁵ and a great number of elements of feudalism can still be found in Europe well into the 19th and 20th centuries (for example in the continuation of certain privileges for aristocracy and church, as well as culturally, for instance in the English idea of the 'officer class'⁶).

Moreover, a pivotal institution in the political organization of nation states, parliament, originated in the counsel that vassals rendered to their overlords – and thus has its roots in feudalism.⁷ The same goes for the 'estates' idea – as in 'Estates General' – which originally referred to the different feudalities, summoned by the King.

In addition, while the theory of the modern state developed in the 16th and 17th centuries, it was only in the 18th and 19th centuries that states actually acquired the means to administer central political powers even remotely resembling those of today. Powers concerning taxation and legislation remained mostly decentralized until the breakdown of the *ancien régime* in Europe following the French Revolution. An illustration of this fact is that in the years directly preceding the Revolution, Louis XVI tried in vain to increase taxation when government deficits rose to unacceptable levels following the French support for the American War of Independence (1775-1783): the nobility, however, prevented the state from taking such measures.⁸ From the modern perspective, all states

⁵ As did the rise of feudalism, which certainly did not exist all through Europe in the same amount. Finer writes: 'The German Kingdom in the tenth century was not feudal. Feudalism was introduced there in the twelfth century. The kingdom started off with a powerful but primitive personal type of monarchy. By the fourteenth century this kingship was reduced almost to nullity and the kingdom itself was an almost nominal confederacy of independent units. The kingdom of the Franks, on the other hand, was in the tenth century in a similar condition to what Germany would come to be in the fourteenth, a largely nominal confederation of some half-dozen great territorial duchies and counties under a shadowy kingship; whereas by the thirteenth century it had been pulled together as the paradigm feudal kingdom, under a kingship which exploited to the full all the advantages it could extract from feudal law. England in the tenth century was non-feudal, like Germany, and it too possessed a powerful personalized kingship. Reinforced by the effect of the Norman Conquest, this kingship, a blend of Anglo-Saxon and feudal characteristics, ended up as the most effective and wide-reaching central government of the time, but one whose activities were balanced and controlled by the equal and opposite growth of increasingly institutionalized restraints.' Finer (1997) vol. II, 899.

⁶ This was expressed, for instance, by the aristocrats who led in war and who were the first to be killed in the First World War. Cf. David Cannadine, *Class in Britain* (New Haven: Yale University Press, 1998), and Martin Gilbert, *The Somme. Heroism and Horror in the First World War* (New York: Henry Holt and company, 2006), or, from the perspective of fiction, R.C. Sherriff, *Journey's End* (New York: Bretano's Publishers, 1929).

⁷ J.H.A. Lokin and W.J. Zwolve, *Hoofdstukken uit de Europese Codificatiegeschiedenis*. Derde, geheel herziene druk (Den Haag: Boom Juridische Uitgevers, 2006) 103.

⁸ Attempts to increase taxation were for instance undertaken by Turgot, minister of Louis XVI, in 1774. Cf. Joël Felix, 'The financial origins of the French Revolution', in: Peter R. Campbell (ed.), *The Origins of the French Revolution. Problems in Focus* (New York: Palgrave Macmillan, 2006) 35-62.

that may have been in place in Europe before the French Revolution, with the possible exception of Britain since 1688, were at best 'failed states'.⁹

A central characteristic of the Middle Ages was the feudal organization of power. Feudalism had come up when local communities and peasants sought a new bond to provide for their security as the *pax romana* collapsed.¹⁰ During the several centuries usually denoted as 'dark ages', this security was found in different local princes and potentates, who offered protection in exchange of their counsel and military support.¹¹ They became their *vassals*.¹² Vassals who had pledged allegiance to an overlord, could in turn establish their own fief over parts of their territories. Through this process, a hodgepodge of regional nobles and local lordships arose upon the collapse of the Roman Empire, each with their own means of the enforcement of order.¹³

During the Middle Ages, society thus became structured as a long hierarchical chain of mutual obligations and duties. And whoever stood at the top of this pyramid (a King and, in the German case, an Emperor) had a role much different from that of current heads of state. An old feudal principle was that *vassallus vassalli mei non est meus vassallus* (a vassal of my vassal is not my vassal), severely limiting the power of the king to interfere in matters on the ground.¹⁴

As a consequence, the relationship of the monarch with his noblemen was one of mutual dependence. This is illustrated by the fact that until the 15th century, there were in principle no standing armies at the disposal of the King.¹⁵ As a result, the monarch, lacking easy means of enforcement, usually had to rule

⁹ Another exception may be Sweden since Charles XII (1697-1718). Tilly uses a broader definition of the term 'state', however. In contrast, I am specifically referring to the comparison of the modern state with whatever previous types of states may have existed in the past. Cf. Charles Tilly, *Coercion, Capital, and European States, AD 990-1992* (Oxford: Blackwell, 1989) especially 45ff. I also touch upon the notion of the 'failed state' in chapter 2, section 2.2 on 'internal sovereignty'.

¹⁰ Lokin en Zwolve (2006) 103. Finer writes: "Feudalism" and "feudal system" may be ill-chosen terms – most medievalists agree on that – but they have acquired a connotation which we still have to use because we can avoid it only at the cost of a tedious and, indeed, obfuscating circumlocution. The fact is that in the West and central parts of Europe between the tenth and fourteenth centuries the form of polity was sharply different from any we have met with so far, and "feudal" is the best name we can give it, in: Finer (1997) vol. II, 864.

¹¹ The *auxilium* and *consilium* of the vassal. Lokin and Zwolve (2006) 103, fn23.

¹² Cf. Stuart Hall, 'The state in question', in: McLennan, Held and Hall (eds.), *The idea of the modern state* (Philadelphia: Open University Press, 1984) 4-7; Hendrik Spruyt, 'The origins, development, and possible decline of the modern state', in: *Annual Review of Political Science*, Volume 5 (2002) 127-49.

¹³ Hall (1984) 4-7.

¹⁴ Cf. W.F. Church, *Constitutional thought in sixteenth-century France. A study in the evolution of ideas* (New York: Octagon Books, 1969) 180ff.

¹⁵ Spruyt (2002) 127-49.

with the consent of his noblemen, for instance concerning taxation.¹⁶ He was *primus inter pares*, not supreme executive.¹⁷

Nor were any powers in place remotely resembling those of a modern legislature. Law in the Middle Ages was primarily customary law, gradually supplemented with more uniformly applied Roman and Canonical law.¹⁸ John Maitland emphasizes that in England, from the time of Henry II (1154-1189), 'a rapid development of law common to the whole land' came into existence, where 'local variations are gradually suppressed'.¹⁹ Finer likewise notes that 'the great leap forward in expanding royal justice at the expense of the feudatories took place under Henry II'. As a result, '[English] kingship, a blend of Anglo-Saxon and feudal characteristics, ended up as the most effective and wide-reaching central government of the time'.²⁰

Government in England nevertheless remained 'by any modern standard quite appallingly incoherent, clumsy, crime-ridden, and corrupt (...) violence was endemic: small private wars, the destruction of manor houses, the breaking of enclosures and rustling of livestock, as well as the crop of robberies, murders, burnings and thefts'. Thus, 'even what passed as the best of its kind for that era' had to go far 'to reach even the minimal standards of justice, fairness, and security'.²¹

It was in the 17th and 18th century, that administration became significantly centralized in most other European countries,²² and only after the French Revolution that national codifications were realized.²³ Although the rediscovery of the 'Digest' – a compendium of writings of important classical jurists, elucidating the tenets of Roman law –, contributed to some increase in legal uniformity from the 13th century onwards; the law remained mostly a matter of customs and privileges.²⁴ On the European continent, cities were significantly independent

¹⁶ Illustrative in this context is the fact that the French Revolution followed on the bankruptcy of the French state, which had come about because of the King's failed attempts to raise taxes from the local potentates in the provinces. (See also above, footnote 8.)

¹⁷ Cf. Hall (1984) 4-7.

¹⁸ Lokin and Zwälve (2006) 122-123.

¹⁹ John Maitland, *The constitutional history of England* (Cambridge: Cambridge University Press, 1961) 13.

²⁰ Finer (1997) vol. II, 899-902.

²¹ Finer (1997) vol. II, 899-919.

²² Tocqueville writes for instance in *l'Ancien Régime et la Révolution* (1856): 'Je soutiens que [la centralisation] n'est point une conquête de la Révolution. C'est, au contraire, un produit de l'ancien régime, et, j'ajouterais, la seule portion de la constitution politique de l'ancien régime qui ait survécu à la Révolution, parce que c'était la seule qui pût s'accommoder de l'état social nouveau que cette révolution a créé.' Tocqueville, *op. cit.* (Paris: Éditions Gallimard, 1953) 107: book 2, chapter II. Cf. Lokin and Zwälve (2006) 180ff.

²³ Lokin and Zwälve (2006) 182ff. Some German states had already commenced with codification projects in the years preceding the Revolution. As a consequence, Prussia for example presented its codification as early as 1792.

²⁴ The *Corpus Iuris Civilis* was issued by Eastern Roman Emperor Justinianus I between 529 and 534. It consists of three books: the 'Institutions' (a handbook for students), the 'Digest' or 'Pandects',

to pass and uphold their own legislation, and so enjoyed an amount of political independence far beyond the scope of municipalities today. As social and economic life was deeply regional, moreover, no effective standardization of measures and weights existed, which could therefore differ significantly from one region to another.²⁵

Different rules applied to noblemen, clergymen, students or farmers, and guilds and other intermediary institutions were to a large extent able to make and act according to their own rules and trading decisions.²⁶ The predominant jurisdictional principle of modern states is territorial equality before the law; this did not exist in the Medieval system, in which there was no overarching law that applied equally throughout the territory. Instead, the principle of personality applied: rights and obligations followed from personal status, not territorial coordinates.²⁷

In addition, the connection of nobles with their territories was loose. Titles were inherited, or passed through marriages from one family to another. As the principle of primogeniture did not always apply, fiefs were sometimes divided among the different sons of monarchs or nobles as well.²⁸ Borders were thus subject to constant change and the connection between rulers and ruled, while depending almost entirely on the personal entitlements of the lord, was weak.²⁹

John Gerard Ruggie approaches the matter from another angle: 'the Medieval ruling class', he writes, 'was mobile in a manner not dreamed of since, able to assume governance from one end of the continent to the other without hesitation

and the 'Codex' (a collection of imperial laws). Cf. Paul Koschaker, *Europa en het Romeinse Recht*. Nederlandse editie verzorgd door Theo Veen (Deventer: W.E.J. Tjeenk Willink, 2000) 57ff [55].

²⁵ Andreas Kinneging, *Aristocracy, Antiquity, and History, Classicism in political thought* (New Brunswick and London: Transaction Publishers, 1997) 9: 'Apart from the purely physical restrictions on royal authority due to the poor network of communications – it took a courier a week to travel from Nice to Paris –, and the traditional dependence of the French kings on the advice of their counselors – Louis XV constantly reiterated Louis XIV's advice to take counsel in all things –, there was a wide range of formidable checks upon the exercise of monarchical power. The many municipalities, law courts, guilds, provincial estates, and other corporate bodies, all with a different historical background, a different culture, and a different legal code, together formed a profound barrier against royal despotism.'

²⁶ Cf. Robert Nisbet, *The quest for community. A study in the ethics of order and freedom* (Oxford: Oxford University Press, 1953).

²⁷ The same goes for the Roman Empire until the *Constitutio Antoniniana* of 212 AD, when all inhabitants of the Empire became Roman citizens, and hence subjected to the same, territorially instead of personally applying law. It is true that most modern states still apply some jurisdiction based on the principle of personality; criminal acts committed by subjects abroad are an example.

²⁸ This was especially the case in the Holy Roman Empire, as will be discussed more in depth below. Cf. Paula S. Fichtner, *Protestantism and Primogeniture in Early Modern Germany* (New Haven: Yale University Press, 1989) 8ff.

²⁹ Under feudal law, vassals retained the formal right to *diffidatio* as well: to renounce their allegiance to the king. Robert of Gloucester did this, for instance, in 1138, to King Stephen (1135–1154). 'In France', writes Finer, 'if a vassal "defied" the king and levied war, his vassals had to follow him, even against the king', in: Finer (1997) vol. II, 921. Cf. Spruyt (2002) 127–49.

or difficulty'. He quotes the French historian Georges Duby, who ironically wrote of the already mentioned Henry Plantagenet (i.e. King Henry II, 1133-1189):

This was Henry, count of Anjou on his father's side, duke of Normandy on his mother's, duke of Aquitaine by marriage, and for good measure – but only for good measure – king of England, although this was of no concern to the country in which he spent the best part of his time.³⁰

A final aspect of Medieval political organization that contrasts sharply with modern statehood is the role of the church in society. For besides the fragmentation of political power through the mutually dependent and layered power structures of feudalism and decentralized administration, there was unity in Medieval Europe too – the unity of religion. The 'universal' church³¹ provided not only spiritual like-mindedness, but also dealt with a wide range of everyday matters of a legal and practical nature, including civil administration, education, and charity – roles that churches to a high extent, if not entirely, have abandoned in modern states.

This involvement of the church with political matters was certainly not always experienced as harmonious. In fact, the power struggle between lay rule and clerical rule – between worldly and spiritual leadership – was one of the major causes of political (and ultimately, armed) conflict in the Middle Ages. This conflict was already a reality by the time pope Leo III crowned Charlemagne as Emperor in 800, and was given a new impulse when, later in the 9th century, the Vatican declared that *Papa caput totius orbis* (the Pope is the master of the world). The struggle for the highest power never left the scene, sometimes more slumbering and indirect, at other times right on the surface: for example at the end of the 13th century, when Pope Boniface VIII claimed worldly sovereignty and the right to levy taxes. This claim was endorsed in his *Unam Sanctam* bull of 1302, in which he stated that he, the Pope, was superior in power over Kings.³² The French King Philip IV responded to this bull by assembling the council of

³⁰ John Gerard Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', in: *International Organization*, Vol. 47, No. 1. (Winter, 1993) 139-174, there 149-150. The quote from Duby is from: George Duby, *The Three Orders: Feudal Society Imagined*, translated by Arthur Goldhammer (Chicago: University of Chicago Press, 1980) 286.

³¹ The word Catholic comes from the Greek *Katholikos*, meaning 'throughout the whole', or 'universal'.

³² The bull is known by its incipit: 'Unam sanctam ecclesiam catholicam et ipsam apostolicam urgente fide credere cogimur et tenere, nosque hanc firmiter credimus et simpliciter confitemur, extra quam nec salus est, nec remissio peccatorum ...' (In translation: 'We are compelled to believe that there is one holy Catholic and Apostolic Church, and our faith urges us to hold – and we do firmly believe and simply confess – that outside of this there is neither salvation nor remission of sins ...').

Bishops and a council of nobles to reject it, and consecutively sent the knight Guillaume de Nogaret on an expedition to Italy to imprison Boniface in 1303.³³

As mentioned before, the development of more centrally organized polities went slowly, and differed in each region.³⁴ However, as Finer writes,

In all feudal [realms] without exception (...), the political process boils down to a struggle between king and feudatories, and is marked by what are tritely referred to as periods of royal 'expansion' and feudal 'reaction'.³⁵

In England, the year 1215 marked such a feudal 'reaction' against the expansion of central power. By the end of the tenth century, its ruling aristocrats had recognized England as one indivisible realm, and William 'the Conqueror' of Normandy reconfirmed this in 1066.³⁶ Besides some 6,000 armored knights,³⁷ he had brought with him a new bureaucratic language (French),³⁸ had declared the entire country to be royal property,³⁹ and had installed a feudal system loyal to him.⁴⁰ It was in the 11th century as well that primogeniture appeared in England, facilitating the accumulation of wealth from generation to generation.⁴¹ Despite his attachment to his French duchies, as we saw above, King Henry II 'Plantagenet' (r. 1154-1189) significantly increased the central imposition of law through the institution of a royal court.⁴²

³³ The history of the reign of Philip IV (1268-1314) clearly illustrates how decentralized political power was in the Middle Ages. His constant efforts to centralize power and attempts to have his jurists install new ways of central government are an insightful illustration. His biographer, Joseph R. Strayer, concludes his *The Reign of Philip the Fair* (Princeton: Princeton University Press, 1980) 423: 'Philip drew heavily on the political capital accumulated by his ancestors, but he also replenished it. He was king of all France in a way that none of his predecessors had been. He had forced the most independent lords – the king-duke of Aquitaine, the counts of Flanders and of Bar, the southern bishops – to recognize his superiority. His courts, and especially the High Court that was the Parlement, retained their reputation for justice and made that justice available to more subjects than ever before. Provincial loyalties were still strong, but some men were beginning to see a vision of a *patria* that was the kingdom of France.'

³⁴ W.G. Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos Verlagsgesellschaft, 1984); J.R. Strayer, *On the medieval origins of the modern state* (Princeton: University Press, 2005); A. de Jasay, *The State* (Oxford: Basil Blackwell, 1985); McLennan, Held and Hall (eds.), *The idea of the modern state* (Philadelphia: Open University Press, 1984); Held, *Political theory and the modern state* (Cambridge: Polity Press 1989).

³⁵ Finer (1997) vol. II, 904.

³⁶ Finer (1997) vol. II, 899.

³⁷ Finer (1997) vol. II, 900.

³⁸ Cf. Jean-Benoît Nadeau and Julie Barlow, *The Story of the French* (London: Anova Books, 2006) 31ff.

³⁹ William did not keep all the lands for himself. As Finer writes: '[William declared] about about one-sixth to himself alone, about two-fifth to his soldiers, and about one-quarter as church lands; the remaining one-fifth stayed in the hands of the petty freemen.' Finer (1997) vol. II, 900.

⁴⁰ John Gillingham and Ralph A. Griffiths, *Medieval Britain. A very short introduction*, (Oxford: Oxford University Press, 2000) 3.

⁴¹ Fichtner (1989) 8ff.

⁴² Finer (1997) vol. II, 902.

But when the opposition of the nobility succeeded in having King John (1199-1216) sign the Great Charter (the *Magna Carta Libertatum*) in 1215, they in fact already accepted considerable powers in the hands of the monarch. For acknowledging the central government's right to punish criminal offenses, which the Magna Carta does, was already a significant dilution of feudalism (and a power that certainly did not exist in France at the time, for instance⁴³). The nobles only managed to mitigate this power through provisions concerning fair trial and due process.⁴⁴ The Charter further contained several limitations on the King's powers of taxation as well as provisions for the participation of nobles in important decisions, and was reissued several times: in 1216, 1217, 1225, and again in 1297,⁴⁵ but bureaucratic organization nevertheless continued to grow over the years. This increasingly demanded the active participation of the King's officials who took seat in a 'great council' – more and more frequently to be called a 'parliament',⁴⁶ which could also issue 'statutes': modifications in the 'common' law of the land.⁴⁷

Step by step, then, the level of organization of the royal administration in England increased. When two centuries later, King Henry VII (1485-1509) succeeded in ending the civil wars known as the Wars of the Roses, the crown managed significantly to increase its demesne revenues; to rely on lower (and thus more dependent and loyal) aristocrats for administrative tasks; and to preside over a kingdom with an aristocracy with smaller estates and 'smaller [armies] (...), firmly subordinated to the Council [of the King]'.⁴⁸ The son of Henry VII, Henry VIII, would even defend the Tudor sovereignty against the religious claims from Rome.

Centralization of governing tasks in England in the 15th century had closely been connected to the fact that the Hundred Years' War (1338-1453) had provided opportunities for both the English and the French king to increase their hold over the realm. This is not surprising, as Finer writes: 'the verdict of history – at least European history – is that war calls out a superabundance of military, administrative, and fiscal overkills which largely remain in place when peace returns'.⁴⁹

⁴³ Cf. Finer (1997) vol. II, 921.

⁴⁴ An example is Clause 39, reading that 'No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right'. The clause was numbered 29 at the restatement of 1297 and can be found online at <http://www.legislation.gov.uk/aep/Edw1cc1929/25/9/contents>.

⁴⁵ Gillingham and Griffiths (2000) 35.

⁴⁶ Finer (1997) vol. II, 910-913.

⁴⁷ Finer (1997) vol. II, 910-914.

⁴⁸ Finer (1997) vol. III, 1271.

⁴⁹ Finer (1997) vol. III, 1277.

Indeed, 'war is revolution, and revolution is war', as Robert Nisbet observed.⁵⁰ When Hugh Capet became King of the Franks in 987, he presided over people speaking 'German in the extreme north-east, Celtic in western Brittany, Basque in the south-east, while the two main branches of the *lingua popolare* – French and Occitan⁵¹ – were mutually unintelligible, with weak resources and very little administrative power over his realm.⁵²

By that time, primogeniture had become common practice in France,⁵³ ensuring that the estates of the Gallic nobility stayed intact. The position of the French king remained – when compared to the English monarchy – relatively powerless until the late 12th century.⁵⁴ Finer writes that 'between 1179 and 1337 the Crown won the centralization race against the principalities. In 1349-51 and intermittently till 1445 the process went into reverse.'⁵⁵ Duchhardt, on the other hand, still discerns the following trend:

Considered within the category of the *longue durée* one might say – very coarsely and roughly – that the period from the thirteenth to the sixteenth century was shaped by the decline and erosion of both of the universal powers, Empire and Papacy, from which national states and churches and new confessions became more and more emancipated.⁵⁶

One way in which the French kings managed to increase their influence was through the establishment of increased tax administration through a system of *prevôts*: 'directly salaried and removable agents, drawn from the lesser nobility, and so dedicated to the royal cause.'⁵⁷ The French King found another way to enhance his power in his alliance with the Church, enabling him, through hospitality at abbeys and bishoprics, to travel the country more easily.⁵⁸ But the third and most important way of increasing his power, the French king found in the establishment of parallel courts, *parlements*, as well as the establishment of an *appeal to the king* 'if a seigneurial court failed to do justice'⁵⁹ (a comparable institution existed in England in the form of the court of Chancery).

⁵⁰ Robert Nisbet, *Prejudices: A philosophical dictionary* (Cambridge, MA: Harvard University Press) 225.

⁵¹ Hence the region *Pays d'Oc*.

⁵² Finer (1997) vol. II, 920.

⁵³ Fichtner (1989) 8ff. Cf. H. Rowen, *The King's State: Proprietary dynasticism in Early Modern France* (New Brunswick, N.J.: Rutgers University Press, 1980).

⁵⁴ Finer (1997) vol. II, 922.

⁵⁵ Finer (1997) vol. II, 923.

⁵⁶ Heinz Duchhardt, 'Münster/Osnabrück as a short-lived peace system', in: A.P. van Goudoever (ed.), *Great Peace Congresses in History 1648-1990*, *Utrechtse Historische Cahiers*: issue 2, year 14 (1993) 13.

⁵⁷ Finer (1997) vol. II, 924. Cf. A. Luchaire, *Histoire des institutions monarchiques de la France sous les premiers Capétiens (987-1180)* (Paris: Alphonse Picard, 1891) 221ff.

⁵⁸ Finer (1997) vol. II, 925-927.

⁵⁹ Finer (1997) vol. II, 925.

Subjects who appealed to a king's court were under the king's protection until the matter was settled. 'The royal court now swarmed with lawyers versed in Roman law and these *légistes* were to press the royal prerogative against strict feudality; in particular, they would use (for instance) the notion of *utilitas*, the king's overriding duty and right to take any measures whatsoever in the cause of the "public weal". But (...) the legists were equally skilled in turning feudal law itself against the feudatories'.⁶⁰

It was thus through law that bit by bit, the king succeeded in increasing his central influence⁶¹ (and the comparison with the way the European Court in Luxembourg has increased the powers of Brussels in the 20th century is striking – see part II).

The feudal lords attempted to counter these successful attempts of the French king to increase his power at their cost, and this was the most important cause of the Hundred Years' War – a kind of civil war indeed (if it is not anachronistic in itself to speak of such a thing before the advent of modern statehood in the first place). The great feudatories Aquitaine, Burgundy, Brittany and Flanders, in any case, rebelled, in alliance with England, against the French king.⁶² This, however, proved ultimately unsuccessful and at the end of the war, the French king began to manage the upkeep of the first standing army in Western Europe since the fall of Rome.⁶³

Louis XI moreover, acceding to the throne in 1461, successfully managed to maintain the increased military, financial and administrative powers that the loyal feudatories had granted him to fight the war. He succeeded in appropriating Burgundy in 1477, and in 1514, future king Francis I (1515-1547) married the Duchess of Brittany, thus acquiring that territory for the French monarchy as well.

In the Spanish peninsula, the marriage between Ferdinand of Aragon and Isabella of Castille, and the completion of the 'reconquista' in 1492, meant that the government of the whole of Spain came in the hands of one crown and this

⁶⁰ Finer (1997) vol. II, 927.

⁶¹ The example of Aquitaine is telling. It was a fief of the King of France, but the Duke was the King of England. Robin Neillands writes: '... the exact boundaries of the duchy had been neither fairly settled nor mutually agreed, which provided (...) cause for argument.' He goes on to point at the nobility of Aquitaine, 'who were perfectly placed to play one king off against the other, and did so at every opportunity. On the one hand, they much preferred to be ruled loosely, and at one remove, by the King of England, who usually resided in his misty northern island and provided a rich market for wine. On the other hand, if there were disputes with their lord the Duke, it was useful to appeal over his head to his suzerain, the King of France, and to the *parlements* of Paris, and not simply face the Duke again, in a higher court, when wearing his crown of England.' Robin Neillands, *The Hundred Years War, revised edition* (London and New York: Routledge, 1990) 28.

⁶² Finer (1997) vol. III, 1277. Jonathan Sumption writes in the preface of his three-volume history of the Hundred Years War: 'I have written about England and France together, almost as if they were a single community engaged in a civil war as, in some respects, they were.' Jonathan Sumption, *The Hundred Years War, Volume I. Trial by Battle* (London and Boston: Faber and Faber, 1990) ix.

⁶³ Finer (1997) vol. III, 1282.

significantly increased the possibilities for centralized government. Nevertheless, the regions conquered from the Moors, most notably those in Andalusia, were quickly claimed by the 'conquistadores' as their feudal territories, and it was difficult for the Spanish throne to keep a hold over them. At the same time, Catalonia was reluctant to surrender more powers to the central government. These circumstances made Spain 'a loose confederacy held together purely by the personal union of the monarchs of its two great constituents'.⁶⁴ Nevertheless, Isabella of Castile had great ambitions. She desired 'one king, one faith, one law'⁶⁵ – and set out to centralize political power by increasing taxation, by placing governors in cities who were involved with the administration of justice, and by use of the Inquisition, which could try such crimes as blasphemy, and was employed to destroy political opponents as well as fulfilling its religious mission.⁶⁶ The discovery of the New World meant an enormous boost for the power of the state as well, as colonial revenues flowed directly into the treasury.⁶⁷

It was also in the 15th century, with the conquest of the North African city of Ceuta in 1415, that the flourishing of the Portuguese kingdom commenced. In 1484, Bartolomteo Diaz reached the Cape of Good Hope, opening a sailing route to the treasures of Asia. The treaty of 1494 with Spain divided the colonial world into two parts: west of current Brazil for Portugal, east of it, for Spain,⁶⁸ enabling Lisbon to increase its revenues and power, and so develop a stronger grip over the country as well.

The history of the Holy Roman Empire runs along rather different lines from the general picture of increased centralization, especially in the 15th century. For the German attempts at centralization of powers experienced many more drawbacks than in the other parts of Europe, creating a sharp contrast with France and Britain. In the 11th century, when the German emperor Henry IV dismissed the claims to political power of Pope Gregory VII, but had to make his infamous walk to Canossa to beg for mercy, the problematic conflict between pope and emperor over ultimate sovereignty had left deep traces in the political awareness of the empire. The relationship between the emperor and his vassals, the princes of the different *Länder*, moreover, remained rather unsettled until the beginning of the 15th century. That is to say, the relationship was constantly redefined, depending on the personality of the emperor and the vassals. When in 1486, emperor Frederick III asked the nobles for additional taxes to pay for

⁶⁴ Finer (1997) vol. III, 1291.

⁶⁵ W.H. Atkinson, *A History of Spain and Portugal* (Harmondsworth: Penguin, 1960) 110.

⁶⁶ Finer (1997) vol. III, 1296.

⁶⁷ Finer (1997) vol. III, 1297.

⁶⁸ In 1580, Portugal entered into a personal union with Castile, but it broke away again in 1640.

his military conflict with Hungary,⁶⁹ they united to demand more formal rights of participation, especially in the form of an Imperial Court. The assembly of the electors and other dukes was called *Reichstag*, and it was first assembled by Maximilian (1493-1519) in 1495. At this gathering, a series of bills was passed, denoted together as the *Reichsreform*. In this same year, the Empire also received its new title, the *Heiliges Römisches Reich Deutscher Nation*.⁷⁰ From then on the beginnings of more formalized administrative institutions started to take shape. Nevertheless, the Empire remained the least centrally administered political entity in early modern Western Europe.⁷¹ While the 'golden bull' of 1356, issued by Emperor Charles IV, had reinforced the principle of primogeniture that had been introduced in the 12th century concerning the titles of those princes who held a fief directly from the king (the Golden Bull fixed these fiefs to a total of seven),⁷² partible inheritance remained common practice amongst lower aristocrats until as late as the eighteenth century, and Paula S. Fichtner observes that 'few aspects of political life in Germany before the eighteenth century seem as remote from current views of the state as partible inheritance'. She continues:

With this willful redistribution of lands, both private and public, and often the dignities associated with them (...), the German princes of the sixteenth and seventeenth centuries confound our views of rational administrative behavior.⁷³

Moreover, under the Emperor Maximilian, who had attempted to increase centralized rule, the Swiss Confederacy saw its *de facto* independence recognized in the treaty of 1499. The Low Countries had been brought under more centralized administrative control by Charles the Bold of Burgundy in the fifteenth century and it was determined at the 'pragmatic sanction' of Charles V that they would stay together and not be divided again. From 1568 onwards, the Dutch successfully fought Habsburg rule and gained *de facto* independence in 1609, and *de jure* in 1648, establishing a confederate commonwealth of 'Seven United Provinces'.⁷⁴

⁶⁹ The King of Hungary at the time was Matthias Corvinus (1458-1490). He declared war on the Emperor in 1481, and conquered Vienna in 1485.

⁷⁰ The empire was called Holy Roman from the 13th century onwards, and the addition 'of the German nation' (Deutscher Nation) was made in the 15th century, in part to emphasize its separateness from the French.

⁷¹ Finer (1997) vol. II, 935-936.

⁷² This was introduced by Frederick Barbarossa in 1158. Cf. Fichtner (1989) 8ff.

⁷³ Fichtner (1989) 4. See also: H. Schulze, *Das Recht der Erstgeburt in den deutschen Fürstenhäusern und seine Bedeutung für die deutsche Staatsentwicklung* (Leipzig: Avenarius und Mendelsohn, 1851).

⁷⁴ The Italian peninsula saw a fading of its city-state decentralization and the necessity to organize itself along larger political lines after its defeat at the battle of Marignano in 1515 by Francis I of France, who was able to afford much heavier artillery because of his centralized military apparatus. With the peace of Cateau-Cambresis in 1559, though formally still consisting of different states, most of Italy fell under Habsburg rule or its sphere of influence. East of Venice lay the countries that were heavily affected by the fall of the Eastern Roman Empire in 1453 and the subsequent raids of the Ottomans. The kingdoms of Austria, Hungary, and Serbia struggled with rather fluid borders, but the continuing battles necessitated more centralized political organization as well.

The German empire thus presents the least clear picture of increasing centralization. Indeed, the conflict between worldly and religious authority – and thus of ultimate jurisdiction – brought about an opposite development resulting in the birth of the theory of the modern state exactly *at the cost* of German imperial ambitions. The exploitation of their conflict took place in the reformation, which began when a German monk nailed, as was common practice at the time, the announcement of a debate on the door of the *Schlosskirche* of Wittenberg. The announcement read:

Out of love for the truth and with the object of eliciting it, a discussion will be held in Wittenberg under the presidency of the reverend father Martin Luther, master of the liberal arts and of the sacred theology as well as professor in the same matter, about the following theses:⁷⁵

The theses that would be debated, 95 in total, contained fundamental criticism of the practices and teachings of the Catholic Church, most notably concerning indulgence.⁷⁶ From this followed an internal struggle within the Catholic Church, creating occasions for Luther to express further criticism – for instance concerning the alleged infallibility of the pope, celibacy, and the hierarchy of the church. The papal bull *Exsurge Domine*, in which Luther was summoned to recall his views, was burnt by him in public.⁷⁷ The conflict was picked up by some ambitious feudal leaders to play out their own power struggles: with the pope but likewise with the emperor. This certainly contributed to the escalation. What ultimately followed was a bitter war in which the German Lutheran princes, united in the Schmalkaldic League, eventually managed to establish in 1555 the

⁷⁵ The German text reads: 'Aus Liebe zur Wahrheit und in dem Bestreben, diese zu ergründen, soll in Wittenberg unter dem Vorsitz des ehrwürdigen Vaters Martin Luther, Magisters der freien Künste und der heiligen Theologie sowie deren ordentlicher Professor daselbst, über die folgenden Sätze disputiert werden.' Available online at <http://www.oeffekt-erfolgsplanung.de/ron/freenet/site/de/normal/gothik/bibel/95/95.html>.

⁷⁶ This also illustrates the remarkable freedoms that could exist in the feudal system. As Tocqueville writes: 'Si Luther avait vécu dans un siècle d'égalité, et qu'il n'eût point eu pour auditeurs des seigneurs et des princes, il aurait peut-être trouvé plus de difficulté à changer la face de l'Europe', in: Alexis de Tocqueville, *De la démocratie en Amérique*, vol. II, book 3, chapter XXI: 'Pourquoi les grandes revolutions deviendront rares'. He also writes in tome I, deuxième partie, chapitre VII: 'Du pouvoir qu'exerce la majorité en Amérique sur la pensée', that 'En Amérique, la majorité trace un cercle formidable autour de la pensée. Au dedans de ces limites, l'écrivain est libre; mais Malheur à lui s'il ose en sortir. Ce n'est pas qu'il ait à craindre un autodafé, mais il est en butte à des dégoûts de tous genres et à des persecutions de tous les jours. La carrière politique lui est fermée: il a offensé la seule puissance qui ait la faculté de l'ouvrir. On lui refuse tout, jusqu'à la gloire. Avant de publier ses opinions, il croyait avoir des partisans; il lui semble qu'il n'en a plus, maintenant qu'il s'est découvert à tous; car ceux qui le blâment s'expriment hautement, et ceux qui pensent comme lui, sans avoir son courage, se taisent et s'éloignent. Il cède, il plie enfin sous l'effort de chaque jour, et rentre dans le silence, comme s'il éprouvait des remords d'avoir dit vrai'.

⁷⁷ Cf. Paul Cliteur, *Moreel Esperanto. Naar een autonome ethiek* (Amsterdam: De Arbeiderspers, 2007) 148-149.

recognition by the emperor that a 'new religion' – denoted as 'Augsburgian' – existed on German soil in such clauses as, for instance:

§ 15. In order to bring peace to the Holy Roman Empire of the Germanic Nation between the Roman Imperial Majesty and the Electors, Princes and Estates, let neither his Imperial Majesty nor the Electors, Princes, etc., do any violence or harm to any estate of the empire on the account of the Augsburg Confession, but let them enjoy their religious belief, liturgy and ceremonies as well as their estates and other rights and privileges in peace; and complete religious peace shall be obtained only by Christian means of amity, or under threat of punishment of the Imperial ban.

§ 16. Likewise the Estates espousing the Augsburg Confession shall let all the Estates and Princes who cling to the old religion live in absolute peace and in the enjoyment of all their estates, rights, and privileges.⁷⁸

In later years, historians have concluded that what in fact this agreement amounted to, was the principle of *cuius regio, eius religio*: *whose realm, his religion*. And of

⁷⁸ The German text reads: § 15 Und damit solcher Fried auch der spaltigen Religion halben, wie aus hievor vermelden und angezogenen Ursachen die hohe Nothdurfft des H. Reichs Teutscher Nation erfordert, desto beständiger zwischen der Röm. Rayserl. Maj., Uns, auch Churfürsten, Fürsten und Ständen des H. Reichs Teutscher Nation angestellt, aufgericht und erhalten werden möchte, so sollen die Kayserl. Maj., Wir, auch Churfürsten, Fürsten und Stände des H. Reichs keinen Stand des Reichs von wegen der Augspurgischen Confession und derselbigen Lehr, Religion und Glaubens halb mit der That gewaltiger Weiß überziehen, beschädigen, vergewaltigen oder in andere Wege wider sein Conscientz, Gewissen und Willen von dieser Augspurgischen Confessions-Religion, Glauben, Kirchengebräuchen, Ordnungen und Ceremonien, so sie aufgericht oder nochmals aufrichten möchten, in ihren Fürstenthumen, Landen und Herrschafften tringen oder durch Mandat oder in einiger anderer Gestalt beschweren oder verachten, sondern bey solcher Religion, Glauben, Kirchengebräuchen, Ordnungen und Ceremonien, auch ihren Haab, Gütern, liegend und fahrend, Land., Leuthen, Herrschafften, Obrigkeiten, Herrlichkeiten und Gerechtigkeiten ruhiglich und friedlich bleiben lassen, und soll die streitige Religion nicht anders dann durch Christliche, freundliche, friedliche Mittel und Wege zu einhelligem, Christlichem Verstand und Vergleichung gebracht werden, alles bey Kayserl. und Königl. Würden, Fürstl. Ehren, wahren Worten und Pön des Land-Friedens. § 16. Dargegen sollen die Stände, so der Augspurgischen Confession verwandt, die Röm. Kays. Mai., Uns und Churfürsten, Fürsten und andere des H. Reichs Stände der alten Religion anhängig, geistlich und weltlich, samt und mit ihren Capituln und andern geistlichs Stands, auch ungeacht, ob und wohin sie ihre Residentzen verruckt oder gewendet hätten (doch daß es mit Bestellung der Ministerien gehalten werde, wie hie unten darvon ein sonderlicher Articul gesetzt,) gleicher Gestalt bey ihrer Religion, Glauben, Kirchengebräuchen, Ordnungen und Ceremonien, auch ihren Haab, Gütern, liegend und fahrend, Landen, Leuthen, Herrschafften, Obrigkeiten, Herrlichkeiten und Gerechtigkeiten, Renthen, Zinsen, Zehenden unbeschwert bleiben und sie derselbigen friedlich und ruhiglich gebrauchen, geniessen, unweigerlich folgen lassen und getreulichen darzu verholffen seyn, auch mit der That oder sonst in ungutem gegen denselbigen nichts fürnehmen, sondern in alle Wege nach Laut und Ausweisung des H. Reichs Rechten, Ordnungen, Abschieden und aufgerichten Landfrieden jeder sich gegen dem andern an gebührenden, ordentlichen Rechten begnügen lassen, alles bey Fürstl. Ehren, wahren Worten und Vermeidung der Pön, in dem uffgerichten Land-Frieden begriffen.' 'Augsburger Reichsabschied ('Augsburger Religionsfrieden')', 25 September 1555. The translation is provided by Emil Reich (ed.), *Selected Documents Illustrating Mediaeval and Modern History* (London: P.S. King & Son, 1905) 230-232. Available online at <http://pages.uoregon.edu/sshoemak/323/texts/augsburg.htm>.

course, deciding in matters of *religion* meant in fact deciding a variety of political and legal questions: it meant, in other words, *whose realm, his law*: a dramatic increase in independent government. This treaty of 1555 thus symbolizes a break with the Medieval conception of rulers as 'local embodiments of a universal authority'⁷⁹ (church or emperor), a conception that had been inherent in the very idea of the 'respublica christiana'.

With Christianity ceasing to be a single creed, rulers necessarily became representatives of a particular locality, independent from other localities. The birth of the modern state thus coincided with the abandonment of universal jurisdiction, and comes down to the raising and upholding of borders.

But with the Augsburg agreement, the religious unrest in Europe had by no means been brought to an end. Throughout the second half of the 16th and most of the 17th century, the Holy Roman Empire, but France, the Low Countries, Denmark, Sweden and England as well, continued to struggle for internal unity and for religious and political independence. The Holy Roman Empire for instance descended into the devastating Thirty Years' War in 1618, of which historians estimate the death toll over 20% of the entire population.⁸⁰ After the English King Henry VIII broke with the Catholic Church in 1534, England faced more than a century of severe internal conflict culminating in a civil war and the execution of King Charles I in 1649, only to be resolved after the accession to the throne of the Dutch stadtholder William III in 1688.

The Netherlands, in the meantime, had been struggling for eighty years with the Spanish rule, in part over their right to religious freedom. In doing so, they also experienced one of the first successful acts of religious terrorism of modern times, when Balthasar Gérard murdered their prince William of Orange in 1584, claiming to act in the name of the Catholic Church. France faced similar challenges in these years. A high point was reached in 1572, when throughout the kingdom several thousands of French Protestants, including many leading figures, were murdered. The massacre had a deeply divisive effect on the aristocratic class, and the attempts of King Henry IV to bring reconciliation to

⁷⁹ Jeremy A. Rabkin, *Law without nations? Why constitutional government requires sovereign states* (Princeton: Princeton University Press, 2007) 51.

⁸⁰ Geoffrey Parker writes: 'Earlier estimates that the war destroyed half or two-thirds of the German population, are no longer accepted. More recent estimates are much more conservative, suggesting that the population of the Holy Roman Empire may have declined by about 15 to 20 per cent, from some 20 million before the war to about 16 or 17 million after it', in: Geoffrey Parker, *The Thirty Years War* (New York: Routledge, 1997) 188. Other historians have made different estimations. Norman Davies estimates the loss to have been about 8 million, in: Norman Davies, *Europe. A History* (Oxford: University Press, 1996) 568. C.V. Wedgwood confirms this, when he estimates that the German Empire probably numbered about twenty-one million people in 1618, and thirteen and a half million in 1648 (a loss of 35%), in: C.V. Wedgwood, *The Thirty Years War* (New York: The New York Review of Books, 1938). Alan McFarlane confirms these figures in *The Savage Wars of Peace: England, Japan and the Malthusian Trap* (Oxford: Blackwell Publishers, 1997).

this internal strife resulted in his assassination in 1610 by the Catholic fanatic François Ravallac (see also chapter 1.2).

The year 1648 marks a crucial moment in all these conflicts. In that year, two treaties were signed in Münster, one between the Low Countries and the Empire (and its constituting estates), another between France and the Empire (again together with its constituting estates). A third treaty was signed in Osnabrück, between the Empire (and its estates) and Sweden. Altogether, these treaties are generally referred to as the 'Peace of Westphalia'.⁸¹

Heinz Duchhardt observes that 'the 1648 order of peace consists of two components, the one regulating and balancing the circumstances within the complex organism of the Holy Roman Empire and proving extraordinarily enduring and stabilizing, the other being a rather vaguely perceivable political philosophy which was hoped to bring about a long-term European peace'.⁸² This consisted in:

Particularly Richelieu's conception of a security system of all European states based upon the principle of the inviolability of frontiers and thus upon the settlement of the territorial status quo.⁸³

The agreements concerning the internal sovereignty of the German states, however, were especially significant. While the Treaty of Osnabrück explicitly reconfirmed the religious peace that was concluded in 1555,⁸⁴ and declared such things as that adherents to the Augsburgian religion would receive rights and justice in the same way (...) as Catholics,⁸⁵ it also determined that states would have the right to administer their own schools and churches, and so on.⁸⁶ 'Taken together', Lesaffer writes, 'the constitutional and religious settlement amounted to the construction of a highly federative Empire based on the principles of territorial sovereignty and sovereign equality of the *Stände*' (i.e. the estates).⁸⁷ This was applied to the relations between European states more generally in

⁸¹ The significance of 'Westphalia' has been disputed in recent studies: A. Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', in: *International Organization*, vol. 55, issue 2 (Spring 2001) 251–287; Randall Lesaffer, 'The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', in: *Grotiana* NS 18 (1997) 71–96; Karl-Heinz Ziegler, 'Der westfälische Frieden von 1648 in der Geschichte des Völkerrechts' in Meinhard Schröder (ed.), *350 Jahre westfälischer Friede* (Berlin, 1999) 99–117; Karl-Heinz Ziegler, 'Die Bedeutung des westfälischen Friedens von 1648 für das europäische Völkerrecht', *Archiv des Völkerrechts* 37 (1999), 129–51; Benno Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (London: Verso, 2003).

⁸² Duchhardt (1993) 16.

⁸³ Duchhardt (1993) 16.

⁸⁴ 'Die im Jahre 1555 geschlossene Religionsfriede'. Osnabrücker Friedensvertrag (Instrumentum Pacis Osnabrugensis), 24 October 1648, article V, § 1.

⁸⁵ 'Recht und Gerechtigkeit in derselben Weise und ohne Unterschied (...) wie den Katholiken.' *Ibidem*, article IV, § 56.

⁸⁶ *Ibidem*, article V, § 7.

⁸⁷ Lesaffer (1997) 71–96, there 72.

later years, and accounts for at least one reason that 1648 is so significant in the development of modern sovereign states. 'Though [it] was not present in the text,' Lesaffer continues, 'the treaties introduced the idea of sovereign equality among the states of Europe. This was however a broad extension of the recognition of the equality of the German *Stände* regardless of their religion.'⁸⁸

The Westphalian treaties taken as a whole, moreover, contained agreements among several European powers; while the treaty of Münster was between the Empire and France, and the treaty of Osnabrück between the Empire and Sweden, both contained references to the other treaty, and thus implied a '*société des nations*' between them, as scholars have concluded.⁸⁹ Moreover, the presence of third parties implied a guarantee by such a 'society of nations,' which became common from then on in the course of the 17th century (and still is regular practice today).

Recent scholarship has argued plausibly that a nuanced understanding of the significance of the treaty of Westphalia is necessary, and that it is only with hindsight that it can be regarded as the 'moment of birth' of the modern state. Osiander even goes so far as to speak of the 'Westphalian myth.'⁹⁰ It may nevertheless safely be contended that with the end of the Thirty Years' War and the significant decrease of the idea of an overarching, Christian unity within Europe, the modern state system received an important impulse.⁹¹

But while the powers of central governments increased, and the power of the pope decreased, Europe in the age of 'absolutism' remained politically decentralized and monarchs did not remotely have the powers to influence the life of their inhabitants in the way governments do today. Nevertheless, as one scholar put it, the monarchy always sought 'a supreme, independent, secular authority'. Rivalry with the Vatican and with the papacy's claim for ultimate jurisdiction 'was the germ of the modern conceptions of sovereignty',⁹² and it was the persisting desire of 'nie wieder Krieg' – never again so destructive a civil war – that inspired scholars all through Europe to draw up the contours of the sovereign state and defend the need for a shared allegiance to it.

⁸⁸ *Ibidem*.

⁸⁹ Lesaffer (1997) 71–96, there 73.

⁹⁰ Osiander (2001) 251–287.

⁹¹ The term 'Concert of Europe' was introduced at the Vienna peace congress in 1815; before that, the formula 'balance of powers' was used, which had been introduced with the peace of Utrecht of 1713. Durchhardt (1993) 16ff.

⁹² Hall (1984) 7.

1.2. AVERTING CIVIL WAR

In many respects, these 'modern conceptions of sovereignty' were first voiced by Niccolò Machiavelli (1469-1527).⁹³ Although credit should be given to Marsilius of Padua for having introduced, some two centuries earlier, several key concepts of modern political thought in his *Defensor Pacis*, Machiavelli applied the idea of political and legislative power as a corporate body, not as a personal privilege, to political doctrine.⁹⁴ He thus broke with the Medieval tradition of understanding power in terms of an eternal chain of mutual obligations,⁹⁵ dependent upon reciprocal personal favors instead of institutions, and had defended in *Il Principe* a political realism, to be conducted by the prince of Florence but generally applicable to all rulers at all times, justifying political means from an autonomous *ragion di Stato* (*raison d'état*), namely in terms of their ends.

Yet Machiavelli did not ask the question, as M.J. Tooley puts it, 'what a state is and how it is constructed'.⁹⁶ His main subject was how political power functions, how it could be used and maximized. Nor was the specter of a civil war, of the kind that all of Europe went through, as we have seen, by the end of the Middle Ages, predominant in his mind. A more general and systematic

⁹³ The dominant view is that the rediscovery of Roman law formed a first impulse for this development. The Roman conception of the state as a corporate body possessing permanent as well as ultimate authority, independent of its temporary occupants (a notion known as *plenitudo potestatis*), as well as the monopoly of legislation, however, also formed a major inspiration for papal ambitions. William D. McCready writes: 'When the term *plenitudo potestatis* (...) came to be used in connection with the papacy, it did not necessarily imply a claim to complete temporal sovereignty, but simply spiritual sovereignty with temporal consequences, plus temporal sovereignty in the Papal States and certain other special areas. But by the late 13th and early 14th centuries the term had taken on a wider significance, at least for the papal hierocratic theorists. (...) What was meant was that the pope had a supreme authority in temporal affairs, and that he had this supremacy, not because of the beneficence of any temporal ruler, but simply because of the authority inherent in the papal office itself'. W.D. McCready, 'Papal Plenitudo Potestatis and the Source of Temporal Authority in Late Medieval Papal Hierocratic Theory', in: *Speculum*, Vol. 48, No. 4 (Oct., 1973) 654-674. Cf. Arthur Nussbaum, *A Concise history of the law of nations* (New York: The Macmillan Company, 1961) 39ff; B. Holland, 'Sovereignty as *Dominium*? Reconstructing the Constructivist Roman Law Thesis', in: *International Studies Quarterly*, vol. 54, issue 2 (June 2010) 449-480.

⁹⁴ Cf. Harvey C. Mansfield jr., 'On the impersonality of the modern state: a comment on Machiavelli's use of *Stato*', in: *The American Political Science Review*, Vol. 77, No. 4. (Dec., 1983) 849-857.

⁹⁵ Bertrand de Jouvenel speaks of the 'ladder of commands' that was typical for the Medieval political worldview. In: *Sovereignty. An inquiry into the political good* (Indianapolis: Liberty Fund, 1997) 204. Cf. Arthur O. Lovejoy, *The great chain of being. A study of the history of an Idea* (New York: Harper & Brothers, 1936).

⁹⁶ Jean Bodin, *Six books of the Commonwealth*. Abridged and Translated by M.J. Tooley (Oxford: Basil Blackwell, 1955) 16. David Held writes: 'Bodin was not the first to make [the case for a central authority]; for example, Machiavelli (1469-1527), a significant influence on Bodin, had done so earlier. But unlike Machiavelli, Bodin developed this notion into what is commonly regarded as the first statement of the modern theory of sovereignty', in: Held, *Political theory and the modern state. Essays on state, power and democracy* (Cambridge: Polity Press, 1989) 219.

discussion of statehood, as a concept, and of the great danger of civil war that it should prevent, was first taken up by Jean Bodin (1530-1596) in France, and then continued by Johannes Althusius (1577-1638) in the Holy Roman Empire, and Thomas Hobbes (1588-1679) in England. The consequences of the international state system that emerged out of the peace agreements of the seventeenth century were first analyzed by Hugo Grotius (1583-1645) in the Republic, by Samuel Pufendorf in the Holy Roman Empire (1632-1694), and were synthesized in the middle of the 18th century by the Swiss diplomat Emer de Vattel (1714-1767).⁹⁷ It would strike later commentators that the leading authors in this field since the 17th century were mostly Protestants.⁹⁸ Karl von Kaltenborn-Stachau, the significant 19th century historiographer of international law, even went so far as to denote international law as 'a Protestant science'.⁹⁹ It is not hard to see why: as international law implies sovereign states, it inevitably meant a diminution of the power of the Vatican and a diminishing of the unity of Europe (is it surprising, then, that the major Eurofederalists in the 20th century were Catholics?¹⁰⁰).

Despite persistent rumors at the time that he had become a protestant, as were most other theorists of sovereignty, Jean Bodin always claimed to be an adherent to the Catholic faith.¹⁰¹ Systematic thinking about modern statehood begins with him.¹⁰² His starting point was the war of all against all that has become commonplace in political theory ever since (and that was no doubt inspired by the religious conflict France went through at the time). Breaking with the Aristotelian notion that because man is a social animal, 'the state exists by nature',¹⁰³ Bodin wrote in his main work, *Six livres de la République* (1576), that 'reason and common sense alike point to the conclusion that the origin and foundation of commonwealths was in force and violence'.¹⁰⁴ He continued: 'the first generations of men were unacquainted with the sentiments of honor, and their highest endeavor was to kill, torture, rob, and enslave their fellows (...) Force, violence, ambition, avarice, and the passion for vengeance, armed men

⁹⁷ Vattel was baptized as 'Emer'. Modern commentators have mistakenly Germanized his name as 'Emerich'.

⁹⁸ Nussbaum (1961) 136.

⁹⁹ Quoted and discussed in Nussbaum (1961) 136.

¹⁰⁰ For instance Jean Monnet, Alcide de Gasperi, Robert Schuman, Konrad Adenauer, and Jacques Delors. Apart from the different religious traditions, the Northern European states also had another legal inheritance from that of Roman law. Both the anglo-saxon common law and the Germanic tribal law may have rendered the inhabitants of Northern Europe different instincts than the former subjects of the Roman empire.

¹⁰¹ Cf. S. Baldwin, 'Jean Bodin and the League', in: *The Catholic Historical Review*, Vol. 23, No. 2 (July 1937) 160-184.

¹⁰² J.H. Franklin, 'Introduction, An outline of Bodin's career', in: Bodin, *On Sovereignty. Four chapters from the Six books of the Commonwealth*. Edited and translated by Julian H. Franklin (Cambridge: Cambridge University Press, 1992) ix-xv.

¹⁰³ Aristotle, *Politics* (London: Penguin Classics, 1992) book I.

¹⁰⁴ Bodin (1955) 56 (Book I, chapters VI and VII concerning the citizen).

against one another (...) The result of the ensuing conflicts was to give victory to some, and to reduce the rest to slavery'.¹⁰⁵

This being the origin of man's political existence, 'we can say then that every citizen is a subject since his liberty is limited by the sovereign power to which he owes obedience'.¹⁰⁶ Bodin goes on to, in his own words, 'carefully define' the term 'sovereignty', which, being 'the distinguishing mark of a commonwealth', and while 'an understanding of its nature [is] fundamental to any treatment of politics, no jurist or political philosopher has in fact attempted to define [...]'.¹⁰⁷

Bodin identifies two essential characteristics of sovereignty: the perpetual character of the sovereign power, and its absoluteness. It is 'the distinguishing mark of the sovereign that [it] cannot in any way be subject to the commands of another ...'.¹⁰⁸ The prince (or sovereign) can therefore not even be bound by his own rules, and the autonomy of communities existing within the sovereign state should be regarded as fundamentally limited. This included thus the power to legislate at will.¹⁰⁹

It is this element of Bodin's thought that critics called his 'absolutism', and Bodin inspired the attempts of both Richelieu and Louis XIV to centralize state power.¹¹⁰ Moreover, Bodin claimed that no 'right to revolution' existed, not even if the monarch usurped his power:

If the prince is sovereign absolutely, as are the genuine monarchs of France, Spain, England, Scotland, Ethiopia, Turkey, Persia, and Moscovy (...), then it is not the part of any subject individually, or all of them in general, to make an attempt on the honor or the life of the monarch, either by way of force or by way of law, even if he has committed all the misdeeds, impieties, and cruelties that one could mention.¹¹¹

The *Vindiciae contra tyrannos*, published by an anonymous author under the pseudonym Stephen Junius Brutus in 1579, emphasized this point of Bodin's theory in contradicting it, and claimed that the sovereign was only the guardian of rights he could not break or alter himself, and that the ultimate source of authority was not the state, but the people.

Another critic of Bodin, the German scholar and Calvinist Johannes Althusius (1577-1638) argued in the same vein. In the preface to the first edition of his main work, the *Politica methodice digesta*, or *Politics*, he stated that:

¹⁰⁵ *Ibidem*.

¹⁰⁶ *Ibidem*.

¹⁰⁷ Bodin (1955) 56 (Book I, chapter VIII concerning sovereignty).

¹⁰⁸ *Ibidem*.

¹⁰⁹ Bodin (1955) 80ff (Book I, chapter X).

¹¹⁰ Though it seems fair to say that these were the aims of the absolutist regimes, in practice, they stayed far behind on them.

¹¹¹ Bodin (1992) 115 (Book II, chapter 5).

I maintain the exact opposite [from Bodin], (...) I concede that the prince or supreme magistrate is the steward, administrator, and overseer of these [sovereign] rights. But I maintain that their ownership and usufruct properly belong to the total realm or people.¹¹²

Althusius argues, while laying out a systematic bottom-up approach of 'the commonwealth' (i.e. the state), that while society consists of the individual citizen and the state, it also has a wide variety of intermediary bodies, such as guilds, cities, and provinces with their own prerogatives. In this sense, Althusius remains near to the medieval idea of society, and clearly conflicts with Bodin (and later with Hobbes). Nevertheless, Althusius concedes to the Bodinian notion of supreme authority – the notion of sovereignty, separating the medieval idea of politics from modern statehood. Their dispute is not over the question whether sovereignty ought to be centralized, but rather over the question who ultimately possesses it. 'If law and freedom from law by a supreme power, are accepted in this sense, I concede to the judgment of Bodin (...). But by no means can this supreme power be attributed to a king or optimates, as Bodin most ardently endeavors to defend', Althusius repeats. 'Rather it is to be attributed rightfully only to the body of a universal association, namely, to a commonwealth or realm, and as belonging to it. From this body (...) every legitimate power flows to those we call kings or optimates.'¹¹³

Thus while the Frenchman had emphasized a top-down *étatist* approach to political power, the German Althusius took a bottom-up approach, in which sovereignty derives from the people. A difference that would also divide the French and the Germans in discussions over nationality, about two hundred years later (and two paragraphs further down this book).

For both Bodin and Althusius, however, modern political organization required the precedence of secular law over religious law. As Jean Bodin wrote, it is central to citizenship to submit to the ultimate authority of one sovereign, and as long as this is done, different 'communities' may exist, enjoying a degree of toleration and self-government.¹¹⁴ It is the plurality of the law, the overlapping of jurisdictions; indeed the prevalence of personal ties over institutional arrangements, and therefore the fluidness of competencies which was characteristic of the feudal order,¹¹⁵ that had to give way to the more centralized, institutionalized,

¹¹² The first edition of the book appeared in 1603, but a later and revised edition was published in 1614.

¹¹³ Johannes Althusius, 'Politics', in: F.S. Carney, *The politics of Johannes Althusius*. An abridged translation of the Third Edition of *Politica Methodice Digesta, atque exemplis sacris et profanes illustrata* and including the prefaces to the First and Third editions (London: Eyre & Spottiswoode, 1965) 67.

¹¹⁴ Bodin (1955) 59ff (Book I, chapter VI).

¹¹⁵ Robert Cooper, *The breaking of nations. Order and chaos in the twenty-first century* (London: Atlantic Books, 2004) 8: 'In the particular circumstances of medieval Europe, empire had become

and hierarchical legal order of the modern state. Even though it would take until well into the eighteenth and nineteenth centuries for national codifications to emerge: these legal systems themselves were the logical and ultimate expression of ideas born two centuries earlier.

Bodin and Althusius indeed both seem to have been permeated with the insight that Europe, especially on matters of religion, would never regain its unity – indeed, for a Calvinist like Althusius, this was not even an attractive idea. Attempting to prevent political entities from descending into civil wars or breaking up into weak localities, the aim was to conceive of political authority in a way that enabled it to stand above the different factions of society. Political power thus became more abstract, yet also more pervasive.

An example of the conflict France went through around this time is formed by the events following the early morning of August 24th, 1572, when about a hundred Parisian noblemen undertook the royally sanctioned¹¹⁶ assassination of one hundred protestant noblemen. This marked the beginning of the St. Bartholomew's Day massacres, which were to sweep through the country and take at least several thousands of lives.¹¹⁷ France was seriously threatened with civil war, and it was prevented certainly in part by the religious and political virtuosity of King Henry IV, who, after converting from Protestantism to Catholicism,¹¹⁸ issued the edict of Nantes in 1598, granting religious tolerance to Protestants. Jean Bodin, when writing his treatise on sovereignty, was well aware of the conflicts dividing France at the time. Himself having been under suspicion of Calvinist sympathies several times,¹¹⁹ Bodin also wrote a series of imaginary conversations between adherents of seven different beliefs: a proponent of natural religion, a philosophical skeptic, a Jew, a Muslim, a Catholic, a Lutheran, and a Zwinglian,¹²⁰ who in the end agreed to cohabitate peacefully.¹²¹ The morale was that political authority can exist independently of, and indeed stand above all these different faiths and these different people adhering to them.¹²² Cardinal Richelieu – as we have seen before – argued in the same vein, when in 1617, he laid down in an instruction to a minister that no Catholic should be

loose and fragmented. A tangled mass of jurisdictions competed for control: landowners, free cities, holders of feudal rights, guild of the king. Above all the Church, representing what remained of the Christian empire, still held considerable power and authority, competing with the secular powers.'

¹¹⁶ That is King Charles IX (1560-1574).

¹¹⁷ T.F.X. Noble et al., *Western Civilization. The continuing experiment* (Boston: Houghton Mifflin Company 1998) 547ff.

¹¹⁸ Famously declaring that "*Paris vaut bien une messe*". Cf. Heinrich Mann, *Die Jugend des Königs Henri Quatre* (Reinbek bei Hamburg: Rowohlt Taschenbuch, 1964).

¹¹⁹ Franklin (1992) ix-xv.

¹²⁰ Ulrich Zwingli (1484-1531) was a priest who was important in the Swiss reformation.

¹²¹ Franklin (1992) ix-xv.

¹²² A comparable argument is developed by Cliteur (2007).

so blind 'to prefer, in matters of state, a Spaniard to a French Protestant'.¹²³ on the contrary, the national loyalty of the citizen had to take clear primacy over whatever religious loyalties he might feel.

Johannes Althusius insisted on the distinction, well known from Augustine, and reformulated by Aquinas, between the universality of morals and the particularity of temporal legal arrangements. In the words of Thomas Hueglin: 'Althusius claimed (...) that the distinction of what is general moral law and what is particular temporal provision was a political one and therefore a matter of secular government'. Although Althusius emphasized the importance of religion as a general moral code, the purpose was, 'not to turn back to the medieval duality of church and state (...)'. Hueglin continues:

On the contrary, it seems to me much more plausible to see in the *Politics* an attempt of excluding the church as an unwanted interloper in secular matters. Even though, or perhaps precisely because the staunch Calvinist and church elder Althusius was convinced that the Christian religion, particularly in its Reformed version, was the only true religion, he might have understood that the place which this religion could occupy in his political theory was that of a civil moral code.¹²⁴

¹²³ J.C.L. Simonde de Sismondi, *Histoire des Français*. Vol. XXII (Paris: Treuttel et Würtz, 1839) 388-389: 'L'instruction contient un résumé rapide de ce qu'avoit fait la reine pour maintenir la paix du royaume, de ce qu'avoit fait le prince pour la troubler; elle rappelle les nombreux mariages qui de siècle en siècle avoient uni les familles royales de France et d'Espagne; elle declare "que nul Catholique n'est si aveugle d'estimer, en matières d'État, un Espagnol meilleur q'un Français Huguenot"'. Sismondi notes a page before that 'Richelieu, qui avoit dressé lui-même avec beaucoup de soin l'instruction de Schomberg ...'. This episode is also discussed in Henry Thomas Buckle, *History of Civilization in England*. 2nd edition, vol. 1 (New York: D. Appleton and co., 1859) 387-388: 'It might have been expected that when Richelieu, a great dignitary of the Romish church, was placed at the head of affairs, he would have re-established a connexion so eagerly desired by the profession to which he belonged. But his conduct was not regulated by such views as these. His object was, not to favour the opinions of a sect, but to promote the interests of a nation. His treaties, his diplomacy, and the schemes of his foreign alliances, were all directed, not against the enemies of the church, but against the enemies of France. By erecting this new standard of action, Richelieu took a great step towards secularizing the whole system of European politics. For, he thus made the theoretical interests of men subordinate to their practical interests. Before his time, the rulers of France, in order to punish their Protestant subjects, had not hesitated to demand the aid of the Catholic troops of Spain; and in so doing, they merely acted upon the old opinion, that it was the chief duty of a government to suppress heresy. This pernicious doctrine was first openly repudiated by Richelieu. As early as 1617, and before he had established his power, he, in an instruction to one of the foreign ministers which is still extant, laid it down as a principle, that, in matters of state, no Catholic ought to prefer a Spaniard to a French Protestant. To us, indeed, in the progress of society, such preference of the claims of our country to those of our creed, has become a matter of course; but in those days it was a startling novelty'. As will be discussed in chapter 6, Richelieu's view nowadays becomes increasingly rare again as a consequence of multiculturalism.

¹²⁴ Thomas O. Hueglin, 'State and Church in the Political Thought of Althusius', available online at http://polis.unipmn.it/seminari/calvino2009/files/Hueglin7_05_09.pdf. The quoted chapter from the *Politics* that Hueglin refers to is XXXff.

Thomas Hobbes likewise defended the state's political supremacy over religious claims. When he wrote his main contribution to political theory, *Leviathan* (1651), it was in many respects a logical follow-up of earlier works scrutinizing the relation of man to nature, and man to man,¹²⁵ working in the tradition Machiavelli had set out. Hobbes had therefore already built an intellectual structure, rationalizing all phenomena, in the typical Enlightenment manner, *ab initio*. For Hobbes, the most devastating political situation was the anarchy in the state of nature. In the first part of *Leviathan*, *Of Man*, Hobbes sets out his view of greedy human nature and the state of war of all against all when there is no sufficiently powerful state.¹²⁶ In the second part, *Of Common-wealth*, he then proceeds to sketch the outlines of what would have to be required to let man step out of this state of nature and into the civilized condition. Essential in this would be to renounce all claims to natural rights, as none exist in the state of nature anyway. More powerful than any other organization on the state's territory, the *Leviathan* of state power could then truly stand above its subjects and bring order to them through its laws.¹²⁷ Concerning the relationship between church and state, Hobbes argued plainly that since revelations can only be convincing to those who have received the revelation themselves, it should be the political power that is allowed to determine what the church should, in the last instance, teach.¹²⁸

¹²⁵ Most notably his book *The elements Law. Natural and Politic* (1640) Edited with a preface and critical notes by Ferdinand Tönnies (London: Frank Cass & Co, 1969).

¹²⁶ Thomas Hobbes, *Leviathan* (1651). Edited with an introduction by C.B. Macpherson (London: Penguin Books, 1985) 183ff: Part I, Ch. XIII, 'Of the *Naturall Condition* of Mankind, as concerning their Felicity, and Misery'.

¹²⁷ The commonwealth in fact begins already to be formed in Part I, especially Ch. XIV, 'Of the first and second *Naturall Lawes*, and of *Contracts*', but goes on in more depth in Part II.

¹²⁸ Hobbes (1985) 409ff: Part III, Ch. XXXII, 'Of the Principles of *Christian Politiques*': 'When God speaketh to man, it must be either immediately; or by mediation of another man, to whom he had formerly spoken by himself immediately. How God speaketh to a man immediately, may be understood by those well enough, to whom he hath spoken; but how the same should be understood by another, is hard, if not impossible to know. For if a man pretend to me, that God hath spoken to him supernaturally, and immediately, and I make doubt of it, I cannot easily perceive what argument he can produce, to oblige me to believe it. (...)'. And 428: Part III, Ch. XXXIX, 'Of the *Signification in Scripture* of the word Church': '... a Church, such a one as is capable to Command, to Judge, Absolve, Condemn, or do any other act, is the same thing with a Civil Common-wealth, consisting of Christian men; and is called a *Civill State*, for that the subjects of it are *Christians*. *Temporall* and *Spirituell* Government, are but two words brought into the world, to make men see double, and mistake their *Lawfull Sovereign*. It is true, that the bodies of the faithfull, after the Resurrection, shall be not onely Spirituell, but Eternal: but in this life they are grosse, and corruptible. There is therefore no other Government in this life, neither of State, nor Religion, but Temporall; nor teaching of any doctrine, lawfull to any Subject, which the Governour both of the State, and of the Religion, forbiddeth to be taught: And that Governor must be one: or else there must needs follow Faction, and Civil war in the Common-wealth, between the *Church* and *State* (...)'.

The mutation, then, of the medieval to the modern conception of statehood, could be signified as the breaking of the 'great chain of duties'¹²⁹ into several smaller yet stronger chains, attached, at least theoretically, to a final zenith point – the sovereign. As Bertrand de Jouvenel summarizes it in his book *On Sovereignty*: 'In the Middle Ages, men had a very strong sense of the concrete thing, hierarchy; they lacked the idea of that abstract thing, sovereignty'.¹³⁰ Indeed, the Europe of the Middle Ages had, because of feudal decentralized rule and religious uniformity, been both essentially *regional* and *unified*.¹³¹ Europe was often referred to as the *respublica Christiana*, a religious-political unity, without clear jurisdictional demarcation lines.¹³² In the 16th and 17th centuries, Europe lost this religious unity, while the different regions gradually developed into more centralized political entities. And even though these new 'states' have often recognized their shared interests, the idea of forming a single political unity with the pope at its top, was definitely lost. A clear example of how political power took ultimate privilege over religious leadership was the England of Henry VIII. In a dramatic attempt to realize the desired annulment of his marriage, which the Vatican denied him,¹³³ he declared himself head of the Church of England in 1534. Other states made comparable arrangements. With the claim to *universal rule* abandoned, it was replaced with a claim to a monopoly on *territorial* jurisdiction and ultimate political power in the capital of that territory, and it is this transition that marks the fundamental divide between the feudal order and modern statehood. The British diplomat and former advisor to Javier Solana, Robert Cooper, is right to write in his book on supranationalism: 'Thus Europe changed from a weak system of universal order to a pattern of stronger but geographically limited sovereign authorities without any overall framework of law'.¹³⁴ It seems indeed that Tocqueville was right when he said that 'in running over the pages of our history, we shall scarcely find a single great event of the last seven hundred years that has not promoted

¹²⁹ In the words of Augustin Thierry, as quoted by Jouvenel (1957) 171.

¹³⁰ Jouvenel (1957) 171.

¹³¹ Rabkin (2007) 47–48: '... medieval Europe surely could not sustain any notion of sovereign states. (...) Feudal conditions made it impossible to distinguish sovereign powers from other kinds of authority. (...) There were different peoples, speaking different languages, but no distinct nations or territorial states to define their boundaries.'

¹³² Randall Lesaffer, 'Peace treaties from Lodi to Westphalia', in: Randall Lesaffer (ed.), *Peace treaties and international law in European History, From the Late Middle ages to World War One* (Cambridge: Cambridge University Press, 2004) 11.

¹³³ Pope Clement VII (1523–1534) was under control of Charles V, who opposed the annulment as Henry VIII's wife was Charles' sister Catherine.

¹³⁴ Cooper (2004) 8. See also: Hall (1984) 4–7; and Spruyt (2002) 127–49.

equality of condition'¹³⁵ – and, we may add (entirely in Tocquevillian spirit), the likewise increase in the power of the state.

Essential, however, to the character of the modern state, is its power ultimately to make, administer and execute the law.¹³⁶ While in general these powers increased, it is not before the end of the *ancien régime* and the introduction of democratic politics, that states fully assumed these powers.

Voltaire was still able to ridicule the legal diversity that existed up until the 18th century: 'we [in France] have more laws than the whole of Europe taken together; almost every village has its own'.¹³⁷ Whomever had to travel from Bretagne to the Languedoc, Voltaire wrote satirically, 'changes laws more often than he changes horses'.¹³⁸ And indeed,

Is it not absurd and dreadful that what is true in one village may be found false in another? By what strange barbarity is it possible that fellow countrymen do not live under the same law?¹³⁹

It was because London had been destroyed and rebuilt after the great fire, Voltaire contended, that it had become 'worthy of being inhabited'. 'Observe in Paris the area of *les Halles*, of *Saint-Pierre-aux-Boeufs* and of the *rue Brise-Miche* or *Pet-au-Diable*, and contrast that with the *Louvre* or the *Tuileries*: then you get an impression of our laws'. Voltaire saw chaos in the old neighborhoods of Paris and admired the newer *quartiers* symbolized by the Louvre. He confronted the French with the following choice: 'If you want good laws; burn the ones you have and make new ones'.¹⁴⁰

Opposing the Enlightenment vision thus expounded by Voltaire, stands the Medieval view, expressed by Montesquieu when he emphasized in his *De l'esprit des lois* that cultural diversity was such that uniform laws would result

¹³⁵ Alexis de Tocqueville, *Democracy in America*. The Henry Reeve Text as revised by Francis Bowen, Volume 1 (New York: Vintage Books, 1990) 5.

¹³⁶ As will be further discussed in chapter 2.

¹³⁷ 'Nous avons plus de lois que toute l'Europe ensemble; presque chaque ville a la sienne'. Voltaire, 'Dialogue entre un plaideur et un avocat' (1751), in: Ibidem, *Oeuvres complètes de Voltaire*, vol. XXIII, 'Mélanges II' (Paris: Garnier Frères, 1879) 493-496.

¹³⁸ 'Change de lois plus souvent qu'il ne change de chevaux'. Voltaire (1751) 493-496: '... il en est ainsi de poste en poste dans le royaume: vous changez de jurisprudence en changeant de chevaux'.

¹³⁹ 'N'est-ce pas une chose absurde et affreuse que ce qui est vrai dans un village se trouve faux dans un autre? Par quelle étrange barbarie se peut-il que des compatriots ne vivent pas sous la même loi?' Voltaire (1751) 493-496. The 'avocat' in the fictional dialogue that this quote is from, goes on to explain how the different regions of France belonged to different 'barons', and that it is impossible 'que la loi soit partout la même, quand la pinte ne l'est pas'.

¹⁴⁰ 'Digne d'être habitée' (...) Voyez à Paris le quartier des Halles, de saint-Pierre-aux-Boeufs, la rue Brise-Miche, celle du Pet-au-Diable, contraster avec le Louvre et les Tuileries: voilà l'image de nos lois'. (...) 'Voulez-vous avoir de bonnes lois; brûlez les vôtres, et faites-en de nouvelles'. Voltaire, 'Dictionnaire Philosophique: Lois' (1765), in: *Oeuvres complètes de Voltaire*, vol. 33. 'Dictionnaire Philosophique – Tome I' (Paris: Antoine-Augustin Renouard, 1819) 170.

in despotism.¹⁴¹ Montesquieu's 'final emphasis was on a pluralist conception of society', Norman Hampson writes in his study of 18th century French political thought,¹⁴² and Montesquieu praised 'the prodigious diversity' of the laws and customs within the French kingdom.¹⁴³

The very idea of the social contract, enabling the members to design *from scratch* the laws they intend to live under, not only contends with the Medieval view as voiced by Montesquieu, but is also uniquely suitable for centralized codifications of the kind propounded by Voltaire. Several interpretations have been given to this idea, of course (as will be discussed further in chapter 8). John Locke emphasized, for instance, the inalienable rights of the individual citizens including their right to be represented. Rousseau, in his 1771 advise to the Polish kingdom, underlined the importance of the duties of citizenship, in order that the defense of particular social or class interests 'does not penetrate society at the cost of its patriotism, and that the Hydra of hair-splitting does not destroy the nation.'¹⁴⁴

Rousseau further argued that the kingdom of Poland needed three codes of law only, 'l'un politique, l'autre civil, et l'autre criminel' – all three 'as clear, short and precise as possible.'¹⁴⁵ It was essential that these codes should be taught in schools and universities, and that what remained of customary and Roman law would be discarded: 'we have no need of other bodies of law. (...) When it comes to Roman law and its customs, whatever still exists of it must be removed from the schools and the tribunals. People should not recognize any other authority than the laws of the state; these laws ought to be uniform in all provinces.'¹⁴⁶

Without the French Revolution, these ideas would never have been realized, and Napoleon marked the definitive breakthrough thereof, when he

¹⁴¹ Montesquieu, *De l'esprit des lois* (1748) (Paris: Éditions Garnier Frères, 1961), for instance Vol. II, Book XXIX, chapter 18, *Des idées d'uniformité*: 'les memes mesures dans le commerce, les memes lois dans l'État, la même religion dans toutes ses parties. Mais cela est-il toujours à propos sans exception? Le mal de changer est-il toujours moins grand que le mal de souffrir? Et la grandeur du genie ne consisterait-elle pas mieux à savoir dans quell cas il faut l'uniformité, et dans quell cas il faut des differences? A la Chine, les Chinois sont gouvernés par le ceremonial chinois, et les Tartares par le ceremonial tartare: c'est pourtant le peuple du monde qui a le plus la tranquillité pour object. Lorsque les citoyens suivent les lois, qu'importe qu'ils suivent la même?'

¹⁴² Norman Hampson, *Will and Circumstance. Montesquieu, Rousseau and the French Revolution* (London: Duckworth, 1983) 23.

¹⁴³ 'La prodigieuse diversité'. Lokin and Zwolve (2006) 181.

¹⁴⁴ '(...) ne s'enracine dans les corps aux dépens du patriotisme, et que l'hydre de la chicane ne dévore une nation'. Jean-Jacques Rousseau, 'Considérations sur le gouvernement de Pologne et la réforme projetée en avril 1772' (1772), in: *Oeuvres Choieses de J.J. Rousseau. Contrat Social ou Principes du Droit Politique*. Nouvelle édition (Paris: Garnier Frères, no year of publication mentioned) 386-387: 'Chapitre X – Administration.

¹⁴⁵ 'Tous trois clairs, courts et précis autant qu'il sera possible'. *Ibidem*.

¹⁴⁶ '... on n'a pas besoin d'autres corps de droit. (...) A l'égard du droit romain et des coutumes, tout cela, s'il existe, doit être ôté des écoles et des tribunaux. On n'y doit connaître d'autre autorité que les lois de l'Etat; elles doivent être uniformes dans toutes les provinces'. *Ibidem*.

launched a single, unified, *Code Civil* in 1804. And he was perhaps right, when he remarked that:

My glory is not that I have won some forty battles or that I have submitted kings to my will (...) Waterloo will efface the memory of all those victories (...) But what will never be effaced and will live forever, that's my *Code Civil*.¹⁴⁷

The example set by Napoleonic France was in any case followed by all Western European states. In the decades to come, they all developed their own national legal codes, completing the development of the modern state.

1.3. INTERNATIONAL RELATIONS

It is not surprising that with the gradual appearance of modern states, and with the development of a philosophical legitimation for them in the form of social contract theory, some system of 'international law' was called for, too. Parallel with the gradual emancipation of modern statehood from the medieval 'chain of duties', an autonomous doctrine of international relations emerged. The Dutch thinker and jurist Grotius can be counted among the very first to have embarked on this path. Although still with one foot clearly in the Medieval system, with his 1625 *De jure belli ac pacis*, Grotius could, in the words of James Madison, be counted as 'in some respects, the father of the modern code of nations'.¹⁴⁸ Grotius starts off from the new, sovereign state as it had emerged from the late Middle Ages in the course of the 16th and 17th centuries. 'That power is called sovereign', Grotius writes in Book I, 'whose actions are not subject to the control of any other power, so as to be annulled at the pleasure of any other human will'.¹⁴⁹

Following Bodin, Grotius affirmed that a sovereign cannot be bound by his own actions, and that there is no right to revolt. What is more, a whole people can agree to give up all their rights to an absolute ruler.¹⁵⁰ This said, Grotius introduces principles of 'natural law', which, he argued, would apply to subjects as well as states, even if they have not been formulated or could not be enforced. He goes on to accept a limited number of universal crimes, against which it is the right of other states to act – even militarily.¹⁵¹ Among the principles of

¹⁴⁷ 'Ma gloire n'est pas avoir gagné quarante batailles et d'avoir fait la loi aux rois (...) Waterloo effacera le souvenir de tant de victoires (...) Mais ce que rien n'effacera et qui vivra éternellement, c'est mon Code civil'. Charles-Tristan de Montholon, *Récits de la captivité de l'empereur Napoléon à Ste Hélène I* (Paris, 1847) 401. Quoted in: Lokin and Zwolve (2006) 210.

¹⁴⁸ James Madison, 'Examination of the British Doctrine which subjects to capture a neutral trade not open in time of peace', in: Gaillard Hunt (ed.), *The writings of James Madison*, vol. 2 (The Knickerboch Press, 1901) 234.

¹⁴⁹ Hugo Grotius, *The rights of war and peace, including the law of nature and of nations* (1625) Translated by David J. Hill (New York: M. Walter Dunne, 1901) 62: Book I, chapter III, par. 7.

¹⁵⁰ Grotius (1901) 63: Book I, chapter III, par. 8.

¹⁵¹ Grotius (1901) 247: Book II, chapter XX, par. 40ff.

natural law that Grotius deduces from reason are for instance that *pacta sunt servanda*, promises are to be kept, and that no entity could claim sovereignty over territories it could not possibly hope to control – hence the *mare liberum*, the free seas.¹⁵² Grotius' work, in the words of Arthur Nussbaum, 'certainly does not form an integrated whole. The show of erudition is far overdone, and the reasoning is often ponderous and discursive.'¹⁵³ There is a conflict in Grotius between universal morals and sovereignty, and he is unwilling or unable to fully resolve it (i.e. the conflict between universal morals and temporary legal arrangements in Augustine and Aquinas, as discussed above). Nevertheless, his analysis that the *jus gentium* of the coming age would have to be on the basis of equality and on secular principles has been of paramount importance and influence. In this context it is worthwhile to note that he argued that treaties with Christian peoples had the same standing as those made with non-Christian peoples, for instance the Saracens.¹⁵⁴

Samuel Pufendorf (1632-1694), seen at his time, despite significant differences, as 'the son of Grotius',¹⁵⁵ advanced from the Grotian starting point to develop his systematic account of natural and international law. 'Like Grotius and Hobbes', James Tully writes, 'Pufendorf took the religious differences over which the wars had been fought to be irreconcilable. Hence, a new morality able to gain the consent of all Europeans [...] would have to be independent of the confessional differences which divided them [...]'. While the former two had written in the midst of European civil and religious wars, Pufendorf was the first to reflect on the emerging state system in the second half of the 17th century. As Tully writes: 'In the specific sense, therefore, of being the first to present a comprehensive theory of the existing European state system, Pufendorf is the first philosopher of modern politics.'¹⁵⁶

In Book II, chapter 6, of his *On the Duty of Man and Citizen* (1673), Pufendorf describes 'the internal structure of states'. He analyses this as a series of agreements, between individuals, to form a union and to organize this union in a particular way. Most important for our purposes is the final agreement Pufendorf describes, that which establishes sovereignty and subjection to it. 'By this agreement', Pufendorf writes, 'he or they bind himself or themselves to provide for the common security and safety, and the rest bind themselves to

¹⁵² Which was also clearly in the interest of his native country, the Republic, of course, as was his claim that treaties concluded with the Ottoman Empire should be upheld in the same way as treaties with Christian powers. Grotius (1901) 253: Book II, chapter XX, par. 48ff. Cf. Nussbaum (1961) 110.

¹⁵³ Nussbaum (1961) 113.

¹⁵⁴ Nussbaum (1961) 110.

¹⁵⁵ Nussbaum (1961) 150.

¹⁵⁶ James Tully, 'Introduction', in: Samuel Pufendorf, *On the Duty of Man and Citizen* (Cambridge: Cambridge University Press, 1991) xx.

obedience to him or them. By this agreement, too, all submit their will to his or their will and at the same time devolve on him or them the use and application of their strength to the common defence.¹⁵⁷ Pufendorf concludes: 'Only when this agreement is duly put into effect does a complete and regular state come into being'. This state, then, lives in a state of nature with other states, as states always primarily care for their self-interest.¹⁵⁸

The Swiss diplomat Emer de Vattel (1714-1767), who brought together theoretical reflections as well as his personal experiences, analyzed the new reality in a profoundly encompassing way. In 1757, he published *Le droit des gens, ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*: 'The law of nations or the principles of natural law, applied to the conduct and affairs of nations and of sovereigns'. In this work, Vattel criticizes Grotius and Pufendorf for allowing too much leeway for princes to govern the people as they may please, and defends restraints on royal power and the importance of an elected legislature. In Book I, chapter IV, par. 39, for instance, he writes: 'It is evident that men form a political society, and submit to laws, solely for their own advantage and safety. The sovereign authority is then established only for the common good of all the citizens; and it would be absurd to think that it could change its nature on passing into the hands of a senate or a monarch. (...) A good prince, a wise conductor of society, ought to have his mind impressed with this great truth, that the sovereign power is solely intrusted to him for the safety of the state, and the happiness of the people, – that he is not permitted to consider himself as the principal object in the administration of affairs, to seek his own satisfaction, or his private advantage'.¹⁵⁹ In this, he clearly follows the Lockean amendments to the Hobbesian doctrine.¹⁶⁰

However, Vattel sees no possibilities for arranging supranational powers to ensure the just conduct of the several sovereign entities. 'Nations being free and independent', Vattel writes, 'though the conduct of one of them [may] be illegal and condemnable by the laws of conscience, the others are bound to acquiesce in it, when it does not infringe upon their [own] perfect rights. The liberty of that nation would not remain entire, if the others were to arrogate to themselves the right of inspecting and regulating her actions; – an assumption

¹⁵⁷ Pufendorf (1991) book II, chapter 6, par. 9.

¹⁵⁸ Pufendorf (1991) Book II, chapter 1, par. 11.

¹⁵⁹ Emer de Vattel, *The Law of Nations, or principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*. Edited and with an introduction by Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008) book I, chapter IV, par. 39. Cf. Francis Stephen Ruddy, *International Law in the Enlightenment. The background of Emmerich de Vattel's Le Droit des Gens* (New York: Oceana Publications, 1975).

¹⁶⁰ Cf. Vattel (2008) Book I, chapter IV, par. 51 and 54, and Book I, chapter V, par. 16.

on their part, that would be contrary to the law of nature, which declares every nation free and independent of all the others.¹⁶¹

Vattel acknowledges that every state ought 'to labour for the preservation of others, and for securing them from ruin and destruction',¹⁶² but goes on to explain that no nation can be obliged to fulfill duties towards others.¹⁶³ Nor does Vattel support punitive wars in the name of violations of natural law. He writes that 'it is strange to hear the learned and judicious Grotius assert, that a sovereign may justly take up arms to chastise nations which are guilty of enormous transgressions of the law of nature, *which treat their parents with inhumanity like the Sogdians, which eat human flesh as the ancient Gauls, etc.*'¹⁶⁴ In opposition to Grotius, Vattel states that 'men derive the right of punishment solely from their right to provide for their own safety; and consequently they cannot claim it except against those by whom they have been injured'.¹⁶⁵ He goes on:

Could it escape Grotius, that, notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts? Mahomet and his successors have desolated and subdued Asia, to avenge the indignity done to the unity of the Godhead; all whom they termed associators or idolaters fell victims to their devout fury.¹⁶⁶

In addition to these observations, Vattel distinguishes between two types of international 'law': a 'necessary' law of nations, and a 'positive' law. Necessary international law amounts to the natural law principles applying between states, and is, since it is 'founded on the nature of things (...) immutable'.¹⁶⁷ Under 'positive' law of nations, nations may draft treaties between them. But those treaties can never override the eternal principles of the 'necessary' (or 'natural')¹⁶⁸ law – the most fundamental of them being the right to non-intervention. 'Every treaty, every custom, which contravenes the injunctions or prohibitions of the necessary law of nations, is unlawful'.¹⁶⁹

¹⁶¹ Vattel (2008) preliminaries, par. 9.

¹⁶² Vattel (2008) Book II, chapter I, par. 4.

¹⁶³ Vattel (2008) Book II, chapter I, par. 5-14.

¹⁶⁴ Italics by Vattel himself. Here, a footnote is included in the text, where Vattel refers to Grotius' *De Jure Belli et Pacis*, book II, chapter XX, par. II, that I have also discussed above.

¹⁶⁵ Vattel (2008) Book II, chapter I, par. 7.

¹⁶⁶ Vattel (2008) Book II, chapter I, par. 7.

¹⁶⁷ Vattel (2008), preliminaries, par. 7.

¹⁶⁸ As Vattel writes about the necessary law: 'This is the law which Grotius, and those who follow him, call the *internal law of nations*, on account of its being obligatory on nations in point of conscience. Several writers term it the *natural law of nations*', Vattel (2008) preliminaries, par. 7.

¹⁶⁹ Vattel (2008) preliminaries, par. 7.

With Vattel, the sovereign state of the kind we have become familiar with today, has been thought out in its entirety.¹⁷⁰ It became the dominant model of jurisdiction, and was affirmed for instance by Immanuel Kant in his treatise *Zum ewigen Frieden* (1795):

The idea of the law of nations presupposes the distinction between independent states. Although this is a state of war ... it is still, according to reason, better than the fusion of those states by means of a hierarchy of power culminating in a universal monarchy. Laws which are passed for a large area lose their vigour, and such a soulless despotism, after it has hollowed out the germ of goodness, ultimately collapses into anarchy.¹⁷¹

¹⁷⁰ The principle of statehood was reconfirmed at the important peace treaties of the seventeenth and eighteenth century. It was also re-emphasized through the ideas concerning legal unification that the French *philosophes* articulated. After the disorder Napoleon had caused, the Vienna Congress restored the European State system and established the Holy Alliance to strengthen it. The Holy Alliance was a coalition set up in 1815 by Tsarist Russia, Austria and Prussia, the three major continental powers after the battle of Waterloo. Later, France and most other European nations joined, the common aim of the organization being to maintain the continental status quo. However cohesive its social results were, the political record of the organization is poor, and the different member States largely continued to set out for themselves their own political agendas, even if that would result in military confrontation (e.g. the Crimean war).

¹⁷¹ Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Stuttgart: Philipp Reclam, 2005) 32: zweiter abschnitt, erster zusatz, par. 2: 'Die Idee des Völkerrechts setzt die Absonderung vieler voneinander unabhängiger benachbarter Staaten voraus; und obgleich ein solcher Zustand an sich schon ein Zustand des Krieges ist (...) so ist doch selbst dieser nach Vernunftidee besser als die Zusammenschmelzung derselben durch eine die andere überwachsende und in eine Universalmonarchie übergehende Macht, weil die Gesetze mit dem vergrößerten Umfange der Regierung immer mehr an ihrem Nachdruck einbüßen, und ein seelenloser Despotism, nachdem er die Keime des Guten ausgerottet hat, zuletzt doch in Anarchie verfällt'.