CHAPTER FOUR

THE STATE AND THE LAW

It may be stating the obvious to say that law is intimately connected to politics, since those who exercise political power can determine who creates law and how it operates. Nevertheless, with the possible exception of very recent times, governments have not by and large been preoccupied with law creation. On the other hand, at the very time when the Church began to use a single codex of canon law as the basis for its claims to judicial rights and taxes, works that emphasised the king’s place as divinely appointed guardian of law within the political domain appeared. Foremost among these was John of Salisbury’s *Policraticus* of 1159, in which he argued that the king should act as minister to the Church in carrying out coercive functions which it could not. Views of the king as lawmaker or law-enforcer within the political community, a situation brought about by natural law as a force for good in preventing the disintegration of society, were subsequently developed in the light of Aristotle by philosophers such as Thomas Aquinas and John Duns Scotus. Not surprisingly, kings who claimed spiritual sanction themselves were less than willing to subscribe to theories that subjected them to the Pope, and little is found of this in Friedrich II’s *Constitutions of Melfi* (1231) or the preambles to the numerous law-codes that appeared throughout Europe in the twelfth and thirteenth centuries. Some went further than simply ignoring the claims of the Pope: following the battle between Emperor and Pope known as the Investiture Contest, certain clerks in secular employ represented the king as the highest authority and the embodiment of justice.¹

Whether perceived as servant of the Universal Church or not, in the centuries following the ‘rediscovery’ of the corpus of Roman law at the end of the twelfth century the king was increasingly represented as a fount of justice. Even if medieval kings themselves rarely

¹ See Chapter 11.3 for a further discussion of the representation of kings as justice personified.
took part in compiling law-books, they were keen to have them compiled in their name. Medieval European law developed from Roman law, and like Roman law was largely the work of jurists, in this case with an ecclesiastical training. The majority of legal practice was inherited or created through imitation. When new legislation was required the codifiers borrowed from other codes. Certainly individual regulations might be adjusted to favour king or state, but there was no wholesale invention and imposition of new ones. It was not necessary, or even possible in the conditions of medieval Europe, for all legal and fiscal procedures to be written down. Relatively complex illiterate societies can be regulated by oral tradition. The main impetus for the collection of laws in written form in medieval European states was the creation of new circumstances arising from religious and social change, especially Christianisation, the Church being the major transmitter of literacy, and subsequently from pressure to standardise by central administration. Periodic codifications produced by governments were usually intended to make law more accessible (not least to king and nobility), and were derived from existing practice.

The reduction of customary law to writing and its combination with legal traditions of the Roman and Byzantine empires was a very slow process. Divergent customs prevailing in different regions usually made the unification of laws throughout a given realm impossible, even when a sufficiently powerful monarchy existed to attempt law codification. Furthermore, such attempts were frequently opposed by the nobility, since codification would tend to favour royal power by determining questions of disputed jurisdiction in the king’s favour. Hence general codification could be instituted only by powerful monarchs, and attempts did not begin in northern and eastern Europe until the thirteenth century. The majority of medieval law codes in these regions belong to the fourteenth and fifteenth centuries, Magnus Lagaboter of Norway being the only king able to create a true national law code before 1300. Other collections of written laws (sometimes called codes) were created out of necessity, primarily to handle matters that could not be dealt with under customary procedures.

2 In central and eastern Europe only Casimir III of Poland and Stefan Dušand of Serbia (somewhat unsystematically) were able to codify laws, and then not until the mid-fourteenth century. The Danish *fyske lov* was arguably also intended to be a national code.

3 See, for instance, Franklin and Shephard 1996 pp. 219–25 on the *Russkaya Pravda*. 