CHAPTER THREE

THE ROLE OF WAR AS A LEGAL INSTRUMENT IN THE MIDDLE AGES

It is only really possible to understand the legal context of medieval warfare in light of the moral and metaphysical understandings that underpinned it. As such, this chapter will draw on the ideas explored in the previous chapter and show how they manifested themselves in the legal frameworks that provided the rules and shaped the expectations of those concerned with war in the Middle Ages. This chapter will concentrate upon two related areas, beginning with an examination of the concept of the feud, the legal reasoning behind it and the way violence was used and increasingly restricted within it. From here the chapter will move on to look at the rise and fall in the use of the judicial ordeal, concentrating in particular on the duel and its relationship with the feud. This will set up the legal context of medieval warfare that can then be explored from the different angles explored by each of the following chapters, and tested, where appropriate, with the different perceptions of surprise and deception within this framework.

Force or might of arms has always been used to resolve disputes but in the Middle Ages, certain types of violence came to be placed within a formal context. Feuds were an accepted way of recovering or asserting legal rights. Battle, whether between individuals or groups, was seen as a legal contest with extensive rules governing its use. Alternative legal procedures were gradually developed to replace both of these instruments. However, the contest itself was not necessarily abandoned but merely moved into an alternative, and more restricted, environment. The formation of the modern state is closely linked to the way that the right to resort to violence for private ends was gradually restricted and monopolised until it was only an accepted legal practice when carried out with a king’s authority.

Background

The period in question is long and extremely complicated. The geographical area of Western Europe encompassed a multitude of legal
systems that developed at different rates and were influenced in different ways by local conditions. The fall of the old Roman state led to its division, in the west, among several Germanic tribal kingdoms. While culture became dominated by the Roman church and the Latin language, the legal systems here returned (where they had changed at all) to local and customary Germanic law. The development of feudal law from about the eighth century onwards, with its stress upon personal relations, landed property and lack of written, formal legislation, is related to this rather than Roman Law.¹ The canon law of the Church was the only legal code that did not vary considerably from place to place. Even so, for a long time it was primarily concerned with church affairs and in particular administrative matters, and so had little influence upon most people’s lives. However, ecclesiastical law did become increasingly important when the church began to extend its influence into secular areas. With the crowning of Charlemagne in 800, ‘the entwining of the interests of church and state … [became] a distinctive and a fundamental element in the organisation of medieval society’². The Church’s law was based upon Roman law but had a flavour of its own thanks to its distinct rules and ideas. This meant that Roman law was never entirely lost. As intellectual life began to blossom once more with the growing prosperity towards the middle and end of the period, Roman law again became increasingly important, fusing with customary and feudal law, and gradually incorporating their values into written law once more. Thus the distinction between the different kinds of law is not always clear and any generalisation needs to be seen in this context with the recognition that Western Europe cannot be seen as a single legal entity but rather as a complex mosaic where many things may look similar but may also have a specific, and local, flavour or articulation as different areas developed in subtly different ways and at different speeds.

The complicated situation was further confused by ‘vertical dividing lines’ that separated freemen from serfs, townsmen from countrymen, churchmen and students from laymen, and members of guilds from those who were unaffiliated. Each group had a distinct network for applying their rules, it being the norm that ‘everyone should be tried by

² Ibid., p. 22.