The open constitution and its enemies: competition, rent seeking, and the rise of the modern state

Oliver Volckart
Max-Planck-Institut zur Erforschung, von Wirtschaftssystemen, Unit 1: International Economics, Kahlaische Strasse 10, 07745 Jena, Germany

Received 20 August 1998; received in revised form 23 March 1999; accepted 31 December 1999

Abstract

The article presents a simple non-mathematical model that helps to explain how states emerged in medieval and early modern Central Europe. Classical feudalism is modelled as an essentially state-less political system, that is, as a market for military security characterized by intensive competition. The emergence of states is interpreted as the consequence of rent seeking taking place in this market after the medieval growth of population and the simultaneous reduction in transaction costs changed the market power of the parties contracting for the supply of security. ©2000 Elsevier Science B.V. All rights reserved.

JEL classification: H1; H4; N4

Keywords: Constitutional economics; Constitutional history; State formation

1. Introduction

The fact that German medieval and early modern politics were characterized by intensive competition has often been noticed but never analyzed from an economic point of view. Occasionally it has even been perceived that this competition played an important part in the rise of the modern state. As early as in 1943, Theodor Mayer, one of the most distinguished scholars of medieval German history, noted that “the numerous struggles between king and nobility can be correctly understood only when they are interpreted as competition for the creation of the fundaments and forms of the emerging state, but not as a struggle for power within an already existing state” (Mayer, 1943, p. 1). Mayer’s statement shows that the existence of states in the modern sense of the word — that is, of political organizations with a territorially defined monopoly of force and the competence of creating ultimately binding legal rules — cannot be taken for granted. In other words, the assumption shared by most economists and economic historians that the use and control of violence was a natural
monopoly (cf. Lane, 1958, p. 402; North and Thomas, 1973, p. 30) does not agree with the facts of constitutional history. In Central Europe states in the above sense of the word are a rather young phenomenon: they go back only to the 17th or 18th centuries (Vierhaus, 1985, p. 450f; Boldt, 1990, p. 30; Moraw, 1995, p. 54f).

With this article I want to contribute to clarifying the question of how modern states emerged in Germany.¹ The paper starts out from the proposition that this is impossible without taking premodern political competition into account. By that I do not mean competition between or within territorially defined political units that initially did not even exist. Rather, several individuals or organizations within one geographical region were supplying the same goods which today have been monopolized by the state, among these goods being military security. The political system which served as a frame for their activities — feudalism — was based on the fact that protection was provided within bilateral contracts as a non-public good, that is, as a good which cannot be defined by non-rivalry in consumption and impossibility of exclusion. In feudalism, there were no institutions limiting the freedom to enter into agreements about the provision of military security. The only relevant restriction was a simple kind of budget constraint: Potential lords needed at least so much land that they could grant part of it as a fief or a peasant’s holding. As there were no institutions restricting the entry into the feudal market for security, the constitution of the high Middle Ages was an ‘Open Constitution’ in the true sense of the word.²

In contrast to Mayer’s statement cited above, the article shows that the emergence of the modern state was not so much the result of competition among premodern political authorities itself than of the successful endeavors of some authorities to restrict competition by creating discriminating institutions.³ In analogy to activities on product markets, such endeavors can be interpreted as a kind of rent seeking. The rules that allowed the appropriation of rents prevented potential suppliers of military security from providing this good. In consequence of the removal of their competitors, the suppliers who were not excluded had the chance to realize profits in excess of those they could have made under competitive conditions. Seen from this perspective, the emergence of the modern state appears as the result of a special kind of rent seeking.

¹ Constitutional historiography claims that in Western Europe modern states emerged in principle in the same way as in Germany (Moraw, 1995, p. 55). Therefore, the model presented here might be helpful to explain state formation in, e.g., England or France, too. To test the model against the history of these countries is, however, beyond the scope of this article. For some tentative remarks see Footnote 13 below.

² In the context of German constitutional history, this term was coined by Peter Moraw. He, however, is using it with a slightly different meaning: Moraw (Moraw, 1989, p. 21) does not argue economically but sees the ‘Open Constitution’ as ‘characterized by the reduction of the institutionalized components to a minimum, by the participation of very few persons in all-German politics, and by the very few duties of the members of the Empire’.

³ A comprehensive overview over state formation models hitherto developed is presented by Tilly who is distinguishing between several main approaches: The ‘statist model’ presents state formation chiefly as a consequence of events within particular states, whereas ‘geopolitical arguments’ claim that interstate relations influence state formation. ‘Mode of production analyses’ represent the form of government as a function of the way production is organized within its territory, and ‘world system analyses’ stress the division of labor in world economy (Tilly, 1990, p. 6–11). Evidently, the focus of these models of state formation is rather on the growth and evolution of government; the a priori existence of some kind of minimal state is always taken for granted. Tilly’s own model which is stressing military competition and the acquisition of coercive means by rulers is based on a similar assumption: the rulers and conquerors he is analyzing have, if no monopoly of force, then at least a clear comparative advantage of its employment (Tilly, 1990, p. 14ff).
Analyzing this kind of rent seeking requires first studying political and social conditions as they were when competition was not yet restricted. I am here assuming that this was the case in the high Middle Ages, that is, roughly in the time between the 11th and the 14th centuries. Therefore, in the first main part of this paper (chapter 2) I will present a model of the classical feudal system existing at that time. Starting out from the hypothesis that actors on the supply side as well as on the demand side of the market are always interested in restricting competition among themselves — that is, in reducing the openness of the system, I will then analyze what were the results of the competitive processes when a number of the assumptions contained in the model are dropped (chapter 3). These assumptions are a low density of population and high transaction costs. The study will close with the time when in most parts of Germany monopolies of force were established, that is, with the 17th or 18th centuries. In a final part (chapter 4) I will briefly sum up the model and hint at some of its implications for German history.

2. The political economy of the feudal system

2.1. Assumptions and actors of the model

In 1980, Richard Posner published an article on the ‘Theory of Primitive Society’ where he presented a model of society that in many respects bears close similarity to conditions as they were in high medieval central Europe. This model is based on the assumption of high transaction costs, that is, of costs connected with the creation, use, or change of institutions or organizations (cf. Furubotn and Richter, 1991, p. 8). Here, they consisted mainly of high information costs that were due to the lack of familiarity with natural laws and to the lack of writing (Posner, 1980, p. 5ff). Writing was used in high medieval Europe, of course, but as its knowledge was mainly restricted to the clergy, the conclusions Posner reached on the basis of his assumption are valid for the society analyzed here, too: due to the lack of written records governments were weak, most consumption goods could not be stored because technology did not allow this, and trade was weak because of the high risk connected with non-simultaneous transactions (Posner, 1980, p. 9).

Still, archaic society in Germany — as in all Europe — shows a number of peculiar traits that are not explicitly contained within Posner’s model. Because commerce was weak, money played only a small role in economic relations. Moreover, the population was extremely small, its growth being limited by the low productivity. Most important, however, were the peculiarities in the field of politics. In comparison to Posner’s model, European society at the close of the Dark Ages was characterized by extreme military insecurity that was caused on the one hand by the wars among the successors of Charlemagne, and on the other hand by the incursions of Vikings, Magyars, and Moslems. Of course the degree of insecurity differed in different places and times, but it nevertheless contributed not only to the high transaction costs — again, especially information costs — but also gave rise to an extremely high demand for military protection that formed the basis for the political
relationships emerging in medieval Europe. These relationships, today called feudalism, were defined by the Belgian historian François Louis Ganshof (Ganshof, 1964, p. XVI) as “a body of institutions creating and regulating the obligations of obedience and service — mainly military service — on the part of a free man (the vassal) towards another free man (the lord), and the obligations of protection and maintenance on the part of the lord with regard to his vassal. The obligation of maintenance had usually as one of its effects the grant by the lord to his vassal of a unit of property known as a fief”.

Ganshof’s brief description points out the central trait of feudalism which consisted in the contractual exchange of military services against military protection and a fief. Nevertheless, a number of comments are in order. First it should be noted that the lord, when granting a fief, transferred only certain property rights to his vassal, usually those called usus and usus fructus in property rights theory (cf. Furubotn and Richter, 1991, p. 6). Other rights, for example the right to reclaim the fief at the death of the vassal or to impose an inheritance duty, were retained by the lord (Ganshof, 1964, p. 129ff).

Another point that needs to be taken into account is that though the term ‘vassal’ was only used for noblemen who performed military services for their lord, similar relationships existed with members of other social groups. Both lords and vassals concluded contracts with peasants who were obliged to render services—in their case agricultural labors—in exchange for the security provided for them (Ganshof, 1964, p. 25). In principle it did not matter whether the peasant was free and able to dispose of a piece of property of his own which he transferred to his lord, retaining certain rights for himself, or whether he was unfree and therefore obliged to work for his lord who now settled him on a piece of land.

Furthermore, relations based on implicit contracts concerning the supply of security did not only exist among lords, vassals and peasants, but in principle within every household managed by an individual who was economically independent. The members of the household — relatives and servants — depended on its head for a certain measure of protection. In this respect, conditions in the households of peasants, vassals, and lords were alike (Brunner, 1992, p. 211ff).

One last remark is necessary. Ganshof’s definition of feudalism might give rise to the impression that the lord’s part of the contract consisted in supplying protection to his partners. This is not altogether correct: hardly anybody would have been able to that on his own (Fenoaltea, 1975, p. 388). Lords who had concluded contracts exclusively with peasants depended on the support of other noblemen. What they really did was therefore organizing the military activities of other individuals. Like modern entrepreneurs they provided the organization that their partners required to overcome the dilemma arising from the freerider.

---

4 A number of scholars, notably Mann (Mann, 1989, p. 13) and Hall (Hall, 1995, p. 235f), stress the importance of Christianity for the emergence of competitive markets in medieval Europe: religion is supposed to have provided a common social identity that supported the general recognition of a number of institutions regarding property rights and their exchange. In contrast to this, my hypothesis is that, as the parties partaking in the market for security expected to co-operate repeatedly, their interest in establishing a reputation as trustworthy and reliable was often sufficient to prevent defection even in the absence of a common social identity. Cf. p. 5 below.

5 The contractual interpretation of this relationship is disputed; it is claimed that there was no element of voluntariness on the side of the peasants (North and Thomas, 1971; cf. Kahan, 1973, p. 95f; Fenoaltea, 1975, p. 389f). It is useful to analyze relations as they were at the moment of the conclusion of the contract as distinct from later developments. An initial voluntariness does not preclude later opportunistic behavior.
problem connected with collective action (Olson, 1965, p. 11). Lords were prepared to do this as long as their gain in security — and in agricultural products that otherwise could not be grown — was greater than the costs arising from their organizational efforts (cf. Hardin, 1982, p. 39). Feudal contracts created authority relations as vassals and peasants transferred the right to control certain of their activities to their lord (cf. Coleman, 1990, p. 72f). The lord entered into obligations, too, but the fact that he provided the organization necessary for the provision of security precluded any authority his partners might have over him.

The costs incurred when acquiring information about where and when military security was needed and whether vassals fulfilled their contractual obligations frequently led to the creation of supplementary feudal relations or even to the total dissolution of the original contracts. The higher these costs were (possibly because of a temporary or local rise in military insecurity), the more advantageous did it become to provide protection within smaller organizations that could be set up and were able to be on the spot more quickly. High enforcement costs prevented lords from hindering their vassals to organize military security on their own. In effect, anybody who was physically and economically able to do that — who, in other words, could fight and who had land that could be granted to vassals or peasants — had the chance to become a lord himself (Brunner, 1992, p. 209f). This leads to a central hypothesis of this study: The kind of political system preceding the modern state, that is, feudalism in its classic form as described by Ganshof, was based on the fact that there was freedom of contract in respect of the provision of military security.

High information costs were furthermore responsible for military security being not a public good. At first sight it might here be supposed that military technology was the important or even decisive factor. However, this was not the case, as shown by a comparison between conditions in Antiquity and in the high Middle Ages. Rome (which had an excellent road network and a functioning postal service so that information costs were comparatively low) provided security as a public good, whereas feudal knights were unable to do that in spite of the fact that their military technology was more advanced than Rome’s (e.g., because of the use of the stirrup). What was really relevant in this context were the information costs. Because of them, lords were unable to react quickly enough to military threats to be able to provide security for whole territorial units. Instead, their offer of security applied to specific individuals with whom they concluded pertinent contracts which they either fulfilled by trying to protect their partners on the spot or by allowing them to seek refuge within their fortification.

From this security individuals, whether peasants or vassals, could be excluded. To do that a lord just needed to refuse to protect this person or to exclude him from the fortification he defended together with his vassals (Fenoaltea, 1975, p. 388). Within castles, space was limited so that the criterion of rivalry in consumption applies, too, at least when a certain number of persons was reached. It can be imagined, of course, that especially in the direct vicinity of the castle there were positive external effects from which individuals profited even when they had entered into no agreement with the lord. Still, excluding these persons was possible at comparatively low costs. Altogether in a study of high medieval political economy military protection can therefore be treated as a private good.

The assumptions of high military insecurity and high transaction costs lead to the conclusion that political rule in its modern form as the authoritative and monopolistic supply of certain public goods did not exist in the high Middle Ages. Archaic rule can rather be defined
as providing a nexus for contractual relations between political entrepreneurs who offered to organize military security and individuals who made use of this offer. Graphically, feudal relations may be depicted thus:

*A simplified model of a feudal organization*

Every lord has direct relations with peasants; the lords on the top two levels have relations with vassals, too. None of the individuals shown here has a monopoly of force in any given geographical area. What is distinguishing this kind of organization from a modern federal state is that there is no clear division of competencies between individuals on different levels and that no one has the competence to create ultimately binding legal rules (there is no ‘federal government’).

2.2. Political competition in feudalism: the process of exchange

That in feudalism the provision of military security was characterized by freedom of contract points to the fact that there was a market for this good where actors on the supply side and on the demand side competed with each other. Competition was a complex phenomenon as most vassals were lords themselves and most lords had other lords above them. Still, for simplicity’s sake its analysis can be restricted to a study of how lords competed for vassals and for peasants, and of how vassals competed for peasants. Just as competition on product markets, feudal political competition can be subdivided into two distinct but interlocked processes: on the one hand, there was a process of exchange that linked the supply and the demand sides of the market, and on the other hand, there was a parallel process which consisted of the activities of actors on one and the same side of the market. In the process of exchange, buyers chose goods or services provided by the sellers; in the parallel process, sellers tried to improve their situation vis-à-vis their competitors (Hopmann, 1967, p. 88f).

Regarding exchange between lords and vassals, it can be assumed that both parties found the contracts advantageous, at least at the moment of their conclusion. However, because of the scarcity of labor lords were more interested in establishing feudal relationships than vassals. In principle, everybody able to fight and owning land that could be granted as a fief or a peasant’s holding could become a lord as well as a vassal. Still, individuals who were prepared to organize military security needed more than one warrior to provide protection, whereas every warrior needed only one lord. For this reason the market power of potential vassals was relatively great — a fact that may explain why lords had to grant them not only

---

6 As Jensen and Meckling (Jensen and Meckling, 1976, p. 310) note, just as most organisations firms are “legal fictions which serve as a nexus for a set of contracting relationships among individuals”. In this respect, too, feudal organizations resembled modern firms.
protection within their castles but fiefs, too. In the absence of any superior authority with the competence to enforce feudal contracts vis à vis defective partners — that is, against vassals who refused to fight when called upon and against lords who failed to protect vassals — the agreements were probably stabilized by reputation and by the threat of exclusion from the security organization.  

In spite of this stabilizing factor, the process of exchange — that is, the choice between several suppliers — was connected with few costs for actors on the demand side of the market. Because of the private character of security, a vassal did not need to be mobile: He did not have to cross a territorial border whether he was to be excluded from his lord’s supply of protection, or whether he wanted to choose another lord. Usually, he had property of his own that was only supplemented by his fief (Ganshof, 1964, p. 67). Therefore, anybody who did not live too far away to contribute to its protection was eligible as a lord.

In comparison to a world of closed territorial units, the fact that mobility was no necessary condition for choice among lords lowered costs. These were primarily not transaction costs, as acquiring information about alternatives, formulating the contract, and enforcing it would have required resources even when the vassal would have had to be mobile. What was influencing his calculus were rather the migration costs — a fact that should not be underrated in view of the poor infrastructure, and that contributed to the intensity of competition.

Intensity of competition was high, too, because the vassal did not make specific investments that made it difficult to terminate a once established relationship (about the importance of specific investments for the intensity of competition see Williamson, 1985, p. 30). As a knightly vassal might forcibly appropriate the property rights over his fief which the lord had reserved for himself, he was able to use a castle he had built even after he had dissolved his original feudal contract and had chosen a different lord (cf. Ganshof and Verhulst, 1966, p. 309). In spite of the loss of reputation a vassal incurred through this behavior, competition among lords is frequently testified in medieval sources because resources vassals spent on fortifications or for other purposes were no specific investments that prevented them from exiting to a different lord. Any analysis of this competition must, though, take the fact into account that the protection provided within feudal organizations was rather a means than an end in itself. Of course, security was a physical necessity, but moreover it was a precondition for agricultural production, the increase of which was the real aim of political actors. Consequently, relations to peasants were essential for both lords and vassals.

Exchange between them and peasants was mutually advantageous, too. Peasants who entered into a feudal relationship with a lord improved their situation. If they were free and had property of their own, the protection supplied to them was a distinct improvement over the near anarchic conditions under which they would otherwise have had to live. If they were unfree, being settled on a peasant’s holding which they could work for themselves enlarged their freedom of action. The lord, on the other hand gained the labor of hitherto independent peasants, and furthermore certain property rights applying to their land (as for instance the right to impose an inheritance due), but no rights over the output produced there. How this

---

7 The medieval merchant guilds that were organizations for the provision of military security, too, were based on the same mechanisms (cf. Volckart and Mangels, 1999).
were to be used, could be determined by the peasants themselves, so that their incentives
to productive activities were not negatively affected. When the lord granted a holding to
unfree peasants who before had had a slave-like status, he increased their productivity, as
the property rights granted to them lessened their incentives to shirk (cf. Homann, 1989,
p. 45).

For peasants choice among lords was more costly then for vassals. Unlike vassals, they
needed to be mobile to make use of the option to exit to a different lord. In contrast to
vassals who specialized in fighting, peasants concentrated on agricultural labor. They were
increasingly unable to use force and had consequently fewer chances to usurp the property
rights over their holdings that the lord had reserved for himself. Because of their military
inferiority, resources they spent on improving the quality of the land had the character of
specific investments which reduced the intensity of competition. Still, as because of the
scarcity of labor many lords were prepared to bear the costs of informing peasants about
opportunities they provided for them (for example by assigning agents to recruit settlers:
Ganshof and Verhulst, 1966, p. 295; Aubin, 1966, p. 462), exit costs altogether seem to
have been low in spite of the fact that transaction costs in general were high.

2.3. The parallel process and the consequences of competition

As mentioned above, the primary aim of lords and vassals in the parallel process, that
is, in competing among each other for peasants, was to create conditions that allowed
them to increase their agricultural output. Every lord and vassal stood at the head of his own
agricultural enterprise, his manor, that he worked partly with unfree laborers and partly with
peasants with whom he had concluded feudal contracts and who rendered him agricultural
services (Brunner, 1992, p. 207f, 218). The manor’s output depended on how much land
the lord could productively use. In principle, he had to find the optimal combination of land
worked under his own supervision, land given out as peasants’ holdings, and land granted to
vassals. If he kept too much under his own supervision, the labor services he received from
his peasants were insufficient to work it; if he transferred too much to his peasants — which
was attractive for reasons of productivity — there was not enough left to grant to his vassals
in order to provide the necessary security, and if he gave too much to his vassals, they were
able to outdo him economically. However, as long as the population was so small that land
was abundant, feudal lords had a strong incentive not only to concentrate on working their
own demesnes but also to try and gain as many peasants and vassals as possible.

In the parallel process, a lord had few options. When competing for vassals, he could
improve his own position for example by demanding fewer military services then other lords.
However, in this way he impaired the quality of his security organization. His other option
was to grant larger fiefs or more comprehensive property rights. In competition for peasants,
basically the same parameters were important. However, because of their specialization in
agricultural work, it seems plausible that the quality of the protection organized by the lord
was more important for peasants then for vassals. A lord could directly influence this quality
only by concluding contracts not only with peasants, but with vassals, too; otherwise he
depended on cooperating in the security organization of his own lord. Therefore, the most
important parameters were the price he demanded for his services and the property rights he
transferred to the peasants. Here, an institutional competition (fundamental: Tiebout, 1956; Hirschman, 1970; Wohlgemuth, 1995; Streit, 1996) did not develop. In classical feudalism, lords had no competence to create legal rules (Ebel, 1958/1988, p. 16–20; Wolf, 1973, p. 517); they were no greater providers of new institutions than of other public goods. In the high Middle Ages, restrictions of conduct were consciously created only within the frame of contracts that were mutually advantageous. Therefore, competition for labor induced many lords to reduce their peasants’ obligations or to grant them nearly comprehensive property rights — including, for example, the right to inherit their holdings (cf. Ganshof and Verhulst, 1966, p. 327).

Altogether in the high Middle Ages a lord who did not want to lose his labor force had to improve his peasants’ situation. His freedom of conduct was therefore restricted less by abstract legal, moral, or ethic institutions then by the existence of other lords and therefore by his own interest. Here, too, competitive conditions contributed to the reduction of social and political discrimination (cf. Friedman, 1962/1982, p. 109): they were the factor behind the decreasing importance of the distinction between free and unfree peasants. Without a central political authority influencing this process, a ‘mobile agrarian society’ developed where ‘almost always horizontal mobility was the condition of vertical mobility’ (Irsigler, 1976/1977, p. 10; cf. Ganshof and Verhulst, 1966, p. 294).

As a preliminary result of this study it can be noted that social and political conditions during the high Middle Ages were characterized by intensive competition. Military security, today monopolized by states, was no public good; there was a market for protection the entry of which was not institutionally restricted. In fact, every economically independent individual acted as a supplier on this market as he provided protection at least to the members of his own household. If he was economically able to enlarge his household and to extend his supply for instance by employing more servants or concluding contracts with more peasants or vassals, he competed with other suppliers. This was a sign of the openness of the high medieval political system. Still, unavoidably in a stateless social order, there was no authority to safeguard this openness. In other words, there was no authority that enforced institutions ensuring open access to the supply side of the market for protection or that prevented the emergence of rules that restricted entry. This was of prime importance for future development.

3. Rent seeking and the rise of the state

3.1. Population size and the intensity of competition

At the beginning of chapter 2, I specified a number of assumptions — among them a small population and high transaction costs — that I will now drop. First, the competitive processes described in the previous section will be analyzed under the assumption that there was a high density of population, as was really the case at the close of the 13th and

---

8 High medieval law was a mainly unintentionally developed and non-codified customary law. Judicial courts, composed of peasants or vassals, played an important part in its development (Willoweit, 1980, p. 108).
the beginning of the 14th century. As will be shown, this was a necessary condition for successful attempts to appropriate rents arising on the market for military security.

One of the main consequences of the change of the relative prices of labor and land resulting from the growth of population was that it gave lords the chance to reformulate the contracts they had concluded with peasants and vassals. Under the conditions of a small population, their compliance with these contracts was mainly due to the fact that their partners could threaten convincingly to exit to a different supplier of security. However, by the end of the high Middle Ages the scarcity of land and the correspondingly large supply of labor had blunted this threat. Unused land was hard to find; moreover, lords lost their interest in contracting with more peasants when they received enough labor dues to work their demesnes. Under these conditions, it was possible for lords to renegotiate agreements, that is, to impose new contracts with unfavorable terms for their peasants. Two consequences of this development should be distinguished: as land was a good in limited supply, lords could appropriate a rent for granting it to peasants. And as exit was now difficult for peasants, lords had enough bargaining power to demand higher prices for their organization of security, too. This development affected knightly vassals in a lesser degree than peasants. As mentioned above, the vassals’ ability to fight allowed them to forcibly appropriate the property rights over their fief which their lord had reserved for himself. They still did not need to be mobile to exit to a different lord. Still, altogether a high density of population caused a reduced openness of the feudal constitution because it made it difficult for actors on the demand side of the market for protection to choose between suppliers.

3.2. Population size and the emergence of a law giving competence

In the course of the high Middle Ages, the effects of higher exit costs were aggravated by attempts to restrict competition for vassals and peasants and thereby further to reduce the constitutional openness. These attempts were aimed at monopolizing the market for military security and at appropriating monopoly rents arising there. As long as the entry to this market was unrestricted, it can be assumed that the prices paid by peasants and vassals for the services provided by their lords came much closer to competitive prices then the taxes modern states raise for their supply of public and non-public goods. Therefore, any restriction of competition on the supply side of the market allowed suppliers to raise their prices. Alternatively, they might form cartels the importance of which regarding modern political competition is analyzed by Streit (1996, p. 234).

It is striking that up to now attempts to appropriate monopoly rents through the creation of entry barriers to a market seem to have been studied only under conditions characterized by the fundamental division between state and society. Here, economic actors who are interested in forming policy-backed monopolies must spend resources on influencing political

---

9 Eleventh century Germany is supposed to have had a population of about 3 million; 300 years later it was about 12 million (Cipolla, 1980, p. 3). In the model presented here, the growth of population is treated as an exogenous variable. Still, it should be noted that historically this was only partially the case. True enough, there were a number of technical and organizational improvements (e.g. the heavy plough, the yoke, and the open field system) that contributed to growth and are really exogenous to the model. However, the increase in population was also a consequence of the incentive structure provided by the peasants’ changed (mostly improved) property rights and by the better military security provided for them.
actors who are in position to create institutional barriers to the entry into the market. It is this activity that is usually called rent seeking (cf Tollison, 1982). In feudalism conditions for rent seeking were quite different. Here, every economically independent individual who had land to grant to peasants or to vassals was a political actor. He did not necessarily need to spend resources to influence others. Rather, under certain conditions some participants in the market became powerful enough themselves to create institutions which excluded their competitors.

As noted above, in classical feudalism there were no authorities who had the competence to create legal rules. However, the 13th or 14th century scarcity of land gave the lords the chance not only to enforce specific orders against their peasants and in a lesser degree against their vassals, but also to create institutions. When such rules restricted the ability of vassals or peasants to act as suppliers of protection, their introduction can be interpreted as an attempt at gaining a monopolistic position on the market for security and at appropriating a monopoly rent. Nevertheless, the lords’ market power was seldom sufficient for the formation of monopolies of force and of the creation of legal rules. Frequently, his contractual partners on the demand side of the market developed a counter strategy that allowed them to avoid competing with each other. This strategy involved the collective action respectively of peasants and vassals; it was made possible by the lords’ attempts to reformulate feudal contracts which increased the opportunity costs of acting alone.

Here, it is important to note that peasants and vassals were acting on both sides of the market for protection: They did not only use the security organizations provided by their respective lords, but supplied protection to their own dependents, too. Therefore they had a two-fold motive for acting collectively: On the one hand, they were interested in obtaining a collective good, namely contractual regulations that allowed them to acquire the services their lords provided at a lower price then they would have had to pay when each acted on his own. In so far the formation of peasant or vassal organizations can be interpreted as the restriction of competition among the demanders of military protection. On the other hand, however, village communities and their counterparts formed by vassals functioned as cartels of suppliers. The regulations they negotiated with their lords did not only affect themselves but also their direct dependents. They were consciously created institutions, that is, public goods that harmonized the conditions under which the members of the peasants’ households and the contractual partners of the vassals themselves worked. In this way, they restricted competition for labor and for individuals who made use of the lords’ supply of protection. The costs of overcoming the problem of collective action were frequently borne by members of the upper stratum of the peasantry or of the territorial nobility who had a lot to gain by avoiding competition.

---

10 Modern rent seeking is blurring the distinction between state and society (or between political and economic actors) because it allows special-interest groups to influence the state’s supply of public goods (e.g. the institutional system) or to gain the competence authoritatively to supply public goods of their own. Still, the fundamental existence of the above mentioned distinction is a precondition for rent seeking in its modern form.

11 Remember that every vassal had entered into contractual relations with vassals of his own and/or with peasants, and that every peasant had done the same in respect of the members of his household.

12 This is the consequence of the formation of suppliers’ cartels in institutional competition that is stressed by Streit (Streit, 1996, p. 234).
Altogether, the most important consequence of the high density of population was a decline in the bargaining position of the demanders on the market for protection. This made their threat to exit less credible and allowed the emergence of authorities who were able to use force against their dependents. In some exceptional cases, such authorities were lords who managed to gain the competence to create institutions, but mostly they were organizations of peasants or vassals who introduced new rules for themselves and their dependents.

It should be remembered, though, that medieval and early modern authorities were at best able to enforce institutions vis à vis their direct subjects. Enforcement became more difficult when the geographical distance between rulers and the ruled or the number of intermediate authorities grew (cf. Wolf, 1973, p. 542). The vassals of a lord who were themselves such an intermediate authority were seldom prepared to enforce directives that reduced their authority or that negatively affected their interests (Vann, 1984, p. 19; cf. Schremmer, 1972, p. 45, 58). Therefore, while a change in the relative prices of land and labor caused by the growth of population lead to the emergence of political authorities — thus transforming the open constitution of the high Middle Ages into the constitution of a hierarchically structured corporate society — it usually did not lead to the formation of monopolies of force and of the creation of legal rules.

3.3. The growth of product markets and the intensity of competition

In addition to the assumption of a small population, I now drop that of high transaction costs. This, too, is suggested by historical developments as literacy became more common and the familiarity with natural laws increased in the late Middle Ages. In terms of my analysis the increasing use of written records in administration and the development of a road system that allowed a quicker spread of news are of special importance. Along with the spread of a money economy they caused a sharp reduction in transaction costs, especially of information costs. It is useful to distinguish between three areas affected by these developments: the intensity of competition, the character of the goods that were exchanged, and the ability to restrict competition.

One consequence of the growth of population was the urbanization of many parts of Germany where until then towns had not existed. As a result, a market for agricultural goods developed where peasants could sell their products. This was the precondition for the replacement of labor services by payments of money which many lords introduced in the course of the high Middle Ages. Occasionally, the lords gave up working their demesnes and granted all their land to peasants, but usually they kept a smaller part for themselves (Ganshof and Verhulst, 1966, p. 313).

As shown by North and Thomas, the development was closely linked to a reduction in transaction costs (North and Thomas, 1971, p. 795). Whether this, as claimed by them, caused the reduction of labor services, we need not discuss (for criticism of this view see Fenoaltea, 1976). What is important in the present context is rather a consequence of the switch to monetary payments. Previously, lords had lost their interest in extending their supply of protection to more persons when their demand for labor services was accommodated. However, when they turned to demanding monetary payments, the old labor constraint was
no longer relevant, so that they could continue competing for individuals who made use of their supply of protection and institutions even when they received enough labor dues to work their shrunken demesnes. Therefore, in spite of land being scarce, the suppliers of military security regarded the subjects of their own vassals as potential contractual partners of their own, and their vassals as competitors who were to be excluded from the market.

3.4. Military security as a public good

This development was intensified because the character of military security changed. In classical feudalism it had been a private good. Due to the late medieval reduction in information costs, its provision increasingly gave rise to positive external effects. Not all lords were equally affected by this development. Noblemen with few vassals or peasants whose range of activity was small continued to provide security as a private good, in effect supplying it only within their castles. In contrast, lords who could dispose of large tracts of land that they had granted to many peasants from whom they received monetary rents profited from the sinking information costs, as these gave them the chance to react quickly enough to military threats to defend whole territories. They were interested in doing this because their income depended on the preservation of the labor force within their area of activity, and this labor force might be too large to take refuge within their castle.

As security was provided for whole territories, exclusion became more difficult. Consequently the incentives to freeride and the interest of the suppliers to make potential freeriders pay increased. Negotiations to internalize externalities — as analyzed by Coase — were impossible, though, because the conclusion of a contract with every single inhabitant of the territory that was to be protected would have caused prohibitive transaction costs in spite of the fact that these costs were generally being reduced (cf. Coase, 1960; Olson, 1969, p. 481). Furthermore, those intermediate authorities who supplied protection to their own subjects would have regarded this as an assault on their autonomy. When a higher authority wanted to make the subjects of its subordinate authorities pay for the protection it supplied, it needed the consent of these subordinate authorities which could be withheld especially when they were able to act collectively. Therefore, the share of taxes in the overall income of a political authority tended to be the greater, the more subordinate authorities it had and the more heterogeneous their interests were.

3.5. The restriction of competition

While the late medieval reduction in information costs allowed the transformation of military security from a private into a public good supplied on a territorial base, and the replacement of labor services by monetary payments intensified competition within these territories, how did the reduction of transaction costs affect the chances of political actors to restrict competition? Answering this question makes it necessary to study the interests of the several authorities participating in the political process. There was not only competition on the market for protection, but on the growing product markets, too. In both cases authorities had the chance to appropriate monopoly rents if they succeeded in introducing institutions
that restricted entry. Still, the interests of authorities on different levels of hierarchy were diverging — a fact that provided an opportunity for cooperation.

An authority’s interest in restricting competition on product markets was directly related to the share that the yields of its own economic activities had in its overall income. Lords who derived their income mainly from their subjects’ monetary dues were primarily interested in increasing the number of persons from whom they received payments. In contrast, authorities who had few subjects from whom they received monetary payments and who mostly depended on producing and selling on the market themselves were in the first place interested in seeking rents arising on product markets. However, to create institutions that prevented their own peasants from competing with them, they usually had to cooperate on a regional scale or over several levels of hierarchy. This opened the prospect for fruitful negotiations which became possible when transaction costs sank. Thus, in 1577 the vassals of the duke of Prussia managed to push through a law forbidding their peasants to sell grain on any but the nearest markets (Schmelzeisen, 1968, p. 391–402). Under these conditions, trading centers like Danzig and Königsberg, where grain-exporting merchants from western Europe gathered, were inaccessible to most peasants, while noblemen gained a chance to appropriate monopoly rents. Such measures were not uncommon. From the 15th century onward, sources show that there were frequent discussions between lords and vassals over the introduction of rules that were to the damage of the vassals’ subjects (Malowist, 1957, p. 31ff).

The monopolization of the supply of certain public goods by the state which emerged in this process was therefore the result of an exchange: Subordinate authorities received economic privileges or were supported in enforcing them, while they conceded a monopoly of the supply of public goods like security and institutions to their superior authorities who gained a state-like character (Oestreich, 1967, p. 70). Hence the emergence of the state did not entail the emergence of anything approaching Franz Böhm’s (Böhm, 1966) normative ideal of a private law society where relations between individuals are regulated by a private law equal for all. On the contrary, the rise of the state depended on subordinate authorities acquiring privileges relevant for activities on product markets. In exchange for these privileges, superior authorities acquired the right to exclude other suppliers from the market for security and institutions, the rules allowing them to do that being at the core of the emerging public law. Altogether, state formation was a process in which special-interest groups negotiated to the disadvantage of third parties over the distribution of monopoly rents arising either on product markets or on political markets.

4. Conclusion

The model of the rise of the modern state which I present here is based on the assumptions that in high medieval feudalism military security was a non-public good, that in its supply there was freedom of contract, that there was a market for protection, and that there was intensive competition among actors on the supply and the demand side of this market. I am interpreting the emergence of states as a process of monopolization through the creation of discriminating institutions that made it possible to exclude potential suppliers from the market for security.
The necessary conditions for creating such entry barriers were on the one hand the growth
of population, and on the other hand a reduction in transaction costs. A growing population
increased exit costs. It allowed feudal lords ex post to change contracts they had concluded
with actors on the demand side of the market. These actors reacted by forming organizations.
Thus, in the course of the high Middle Ages political authorities developed who could create
legal rules. Still, they were able to enforce these institutions — introduced with the aim to
appropriate monopoly rents — at best partially. Alone, the growth of population did not
lead to the emergence of territorial monopolies of force and of the creation of legal rules.

A further enforcement of discriminating institutions created by political authorities be-
came possible through the reduction in transaction costs. Lower information costs trans-
formed military security from a private into a public good; lower negotiation costs allowed
transactions between authorities on several levels of the feudal hierarchy. Thereby author-
ities on the lower rungs of hierarchy could exchange their right to provide security and
institutions against privileges that improved their chances on product markets. In this way,
authorities developed that held both a monopoly of force and a monopoly for the creation
of legal rules, that became, in other words, states in the modern sense of the word.

A convincing explanation of why in medieval and early modern Germany a large number
of relatively small states developed instead of one large centralized state needs a more
detailed investigation, but the model presented here might be of some help because it draws
attention to a number of factors hitherto neglected in constitutional history, notably to the
importance of transaction costs. It suggests that the all-German feudal organization that
developed in the 10th century was based — apart from dynastic chance — on linguistic and
other cultural similarities shared by the several German tribes. Such similarities tended to
reduce negotiation costs. Still, the growth of population caused the emergence of local or
regional authorities at a relatively early date, that is, towards the end of the high Middle Ages.
At this time, in Germany the enforcement of rules on a supra-regional scale was prevented
by high transaction costs.13 When the increasing literacy and the improving infrastructure
allowed a reduction in these costs, regional authorities were already firmly established, had
developed the competence to create legal rules, and supplied security as a public good.
Altogether, the political fragmentation of Germany seems to have been the consequence of
a reduction in transaction costs that occurred only after the growth of population had made
the emergence of regional authorities possible.

References

Aubin, Hermann, 1966. Medieval Agrarian Society in its prime: the lands east of the Elbe and German colonization
Life of the Middle Ages, Cambridge, New York, New Rochelle, Melbourne, Sidney, Cambridge University

13 In England and France transaction costs may have been considerably lower as both countries had been former
Roman provinces where literacy had either never disappeared or had been redeveloped at a relatively early date, and
where a rudimentary network of roads continued to exist into the Middle Ages. Because of her insular character,
in England exit costs were from the outset comparatively high; in France they seem to have risen at about the same
time as in Germany. This suggests that the respective timing of the rise in exit costs and the fall in transaction
costs may have been an essential determinant for the political structures emerging in the area under study.


