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Jurisdictional Competition and the Evolution of Legal Orders

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Abstract

This paper investigates the historical evolution of Western legal institutions and the persistent conflict between state sovereignty and private, stateless legal frameworks such as the modern united nations. We explain this by referring to the $5.8 billion ICSID award in Tethyan Copper Company v. Pakistan as a contemporary stimulus, the inquiry explores how the Western legal tradition despite having shared medieval roots is still fragmented into incompatible institutional orders. The analysis explores the Ecclesiastical Foundation of law itself , where the Papal Revolution birthed "legal science" and the internal logic of jurisprudence, the Bifurcation of State Law where divergent architectures emerged to prevent judicial subversion furthermore, how the law merchants utilized a private reputation based system (Lex Mercatoria) to substitute for official state courts which were having several conflicts with state courts, enforcing compliance via social capital rather than legal action. The paper finally concludes that modern international arbitration represents a return to a Neo-Medieval cooperative legal order. While the state maintains a dominance over territorial control , the "stateless" merchant order has successfully institutionalized a dominance on global commercial and geopolitical trust, prioritizing operational effectiveness over sovereign will.

Introduction

In 2016, an international tribunal ordered the government of Pakistan to pay $5.8 billion to the Tethyan Copper Company a sum nearly equivalent to a state-level IMF bailout not within a traditional courtroom, but through the International Centre for Settlement of Investment Disputes .This case identifies a significant contemporary dilemma. The most significant exercises of legal power today often bypass state judiciaries entirely, operating instead through private, "stateless" frameworks. This paper explores the historical origin of such legal institutions that first emerged between 1100 and 1700 to mitigate transaction costs and information asymmetry. The central research question asks why the Western legal tradition, despite a shared medieval root, fragmented into the divergent architectures of the English Common Law and the Civil Law interconnecting it with modern international law norms such as *Res Inter Alios Acta*, and why a separate, private legal order the Lex Mercatoria persisted alongside them. To contend this we first explore the Ecclesiastical Foundation of legal science, with Harold Berman's analysis of the Papal Revolution to understand the birth of "legal science" as a regulatory mechanism and emergence of canon law and its modern influence. It then analyses the "Incentives of Adjudicators" model by Glaeser and Shleifer to explain the political divergence between decentralized juries in England and centralized codification in France interconnecting it with modern global order. Finally, the analysis applies Milgrom, North, and Weingast's theory of "Private Ordering" to the Merchant Alternative, demonstrating how medieval trade networks created the precursor to modern arbitration, concluding that the current resurgence of private justice is a return to a medieval cooperative legal order.

Literature Review

The scholarly consensus regarding the very emergence of proper legal institutions begins with the research work of Harold Berman , whose *Law and Revolution* identifies the eleventh-century Papal Revolution as the foundational "Big Bang" or base of modern jurisprudence . Berman argues that the struggle for ecclesiastical autonomy forced the Church to develop the first systematic, professionalized body of law in the West Canon Law. By treating law as a "science" , a coherent, with its own internal logic the Church created a regulatory blueprint that secular monarchs were subsequently forced to emulate in a high-stakes struggle for political legitimacy and tax revenue and also to eliminate the irrational practice of folklaw , such as the Trial by Ordeal but Harold also argued that Germanic law was not wholly rejected, and the parts that were rejected were not dropped all at once. The new jurisprudence was not a creation ex nihilo. It was a conscious reaction against the past (often in the name of a still older past), but it was also a re-creation of preexisting institutions and institutional ideas which he argued by stating that folk law helped maintain the communitarian character of the society which is vital for the modern legal institutions. Insofar as Berman establishes this shared structural root, the subsequent fragmentation of this tradition into the distinct "legal families" of Common Law and Civil Law requires an analysis of the political incentives facing the European state which argues how one law cannot be applied to all nations.

This divergence is most persuasively articulated by Glaeser and Shleifer in their *Incentives of the Adjudicators*. They argue that the architectural split between the English and French systems was a defensive response to social disorder and local coercion which explained one law cannot be applied to all nations and also is not optimal for each nation. In twelfth-century France, where the crown was relatively weak and local lords could easily bully or bribe local juries, the sovereign was forced to adopt a centralized model characterized by state-appointed judges having a top to bottom code. Conversely, in England, a more secure and centralized crown could afford to delegate authority to decentralized, community based juries, fostering a system of adversarial precedents rather than top to down codes having a bottom to top code. Regarding the subsequent divergence of legal families, Glaeser and Shleifer also contended that the "efficient choice of legal system depends on the vulnerability of the adjudicator to pressure," an insight that fundamentally challenges the feasibility of a unified global law. Because the French model was specifically engineered to prevent "the subversion of justice by the powerful," However, as state led systems became increasingly tied to nationalistic politics, a third, parallel order emerged to facilitate the expanding world of global trade.

This "private alternative" is explored in the seminal research of Milgrom, North, and Weingast (1990), who investigate the Lex Mercatoria (Merchant Law) as a stateless institutional response to the inefficiencies of both Church and State courts. By analyzing the medieval Champagne Fairs, they demonstrate how merchants solved the problem of "trusting a stranger" through a multilateral reputation mechanism, effectively a private judicial database that could blacklist cheaters from future trade. This scholarship bridges the historical divide by proving that legal institutions can flourish through private ordering, bypassing the state's monopoly on violence in favor of commercial efficiency. When synthesized, these works reveal why modern global legal harmonization remains a near-impossible task: the initial "jurisdictional competition" between the Pope, the King, and the Merchant locked in specific, incompatible institutional blueprints. Because a nation's entire professional infrastructure from its law schools and bar associations to its civil service hierarchies is built upon these medieval foundations, the transaction costs of switching between legal families are prohibitively high. Consequently, we are left with a modern world that is institutionally "stuck"; state-led systems remain anchored in their historical paths of Civil or Common law, while the powerful actors of global commerce increasingly opt out of these clashing state judiciaries in favor of a "Neo-Medieval" private order modern International Commercial Arbitration which serves as the final, functional proof of the persistence of the merchant-led alternative.

Emergence of legal symmetry

The Structural evolution of western law finds its primary incitement in the eleventh century “Papal Revolution”. Which Harold Berman articulated as the big bang of modern jurisprudence. Prior to this revolution the European law was like an asymmetrical mosaic of folklaw and tribal customs which were portraying that law does not have its internal logic. Adjudication was decentralised which meant that not every place had the same degree of law and order adjudicators relied on orthodox trials such as the “ordeal” rituals of water and fire where the community preferred an irrational divine verdict rather than rationalised verdict. The Gregorian Reform declared by Pope Gregory VII, tend to centralise the administrative state by attempting to decouple the Church’s hierarchy from secular lay investiture, Gregory VII effectively invented the modern concept of an autonomous, centralized state. The legal manifesto for this revolution was the "Dictatus Papae" (1075), a series of twenty seven assertions that fundamentally altered the Western constitutional DNA. In this declaration, the Pope made several unprecedented legal claims: that the Roman Church was founded by God alone, that the Pope alone could depose or reinstate bishops, and most crucially, that "he alone has the power to frame new laws according to the needs of the times." Before this declaration the pope did not claim the title of vicar of Christ but called himself the vicar of St. Peter. This last assertion represented the idea of legislative sovereignty. By declaring that law was not merely an ancient custom and not amendable and to be "found", but a legal tool that could be "made" and "revised" to solve problems. The Pope was no longer just a spiritual leader; he was a supreme legislator whose "plenitudo potestatis" allowed the Church to operate as a state-like entity with its own independent legal jurisdiction. After this claim of sovereignty the west required an intellectual and logical framework to sustain which the Pope failed to explain as in how this germanic law will be structured because as Berman argued Germanic law was never fully abandoned as it provided a necessary foundation for the new legal tradition that superseded it, furthermore a framework was required with could give law its internal logic the monk Gratian who was also the father of the Canon law synthesized this logic into the *Concordia Discordantium Canonum*, known as the Decretum . Gratian’s work revolutionized law from an oral tradition into a "legal science" by applying the scholastic method to reconcile a millennium of contradictory scripture, papal letters, and council decrees. By treating law as a growing system (*corpus juris*) as also argued by Pope Gregory VII having with its own internal logic, Gratian established that legal outcomes were no longer the result of arbitrary whim or tribal consensus and Ordeal rituals, but were derived from a specialized body of knowledge that required university training specifically at the nascent University of Bologna . This professionalization created the first true "legal class," a cadre of canonists who viewed the legal system as a living organism capable of infinite adaptation to social complexity. Which as stated by Berman also helped in constructing new sophisticated legal systems first for the church and then for the secular political orders -- canon law, urban law, royal law, mercantile law, feudal and manorial law. Eventually, in the period from the sixteenth to the twentieth centuries, a series of great revolutions -- the German reformation, the English Revolution, the American Revolution, the French

Revolution, the Russian Revolution -- transformed the Western legal tradition, leaving its Germanic "background" farther and farther behind.While these historical revolutions shaped the legal evolution of the west the immediate institutional development of the Papal revolution in its radical re engineering of its judicial procedures The definitive rupture in this evolution occurred at the Fourth Lateran Council (1215), where the Church forbade the clergy from performing the religious blessings necessary for these ordeals to carry legal weight why you may ask, the reason is that the church started viewing these rituals as institutional liabilities that lacked the precision required for a complex, property-owning bureaucracy. This vacuum of legitimacy necessitated a pivot toward the Inquisitorial Procedure, a rationalized framework that transferred the locus of authority from the "Hand of God" to the "Mind of the Judge." This new system prioritized human cognition over mystical signs like the formal examination of witnesses, and the judge's proactive investigation into the facts of a case (*ex officio*). By establishing "truth" as a product of systematic inquiry rather than a supernatural sign. This procedural shift weaponized the ecclesiastical jurisdiction. In the competitive era of Medieval Europe, the Church began to offer a superior legal structure. Litigants recognised that rationalised courts offered a higher degree of personal security than the unpredictable "folklaw" of secular lords. This provoked a phenomenon of jurisdictional arbitrage, where individuals even in purely commercial matters brought their cases before Church courts. The Church's ability to provide a "science" of proof made it the preferred place for those seeking to minimize transaction costs of conflict. Ultimately, this ecclesiastical foundation provided the "operating system" for the modern state. Secular monarchs, witnessing the Church's success in using systematic law to centralize power, were compelled by competitive necessity to emulate this blueprint. They began to hire university trained lawyers and adopt the Church's investigative techniques to build their own royal judiciaries. Consequently, the Papal Revolution "locked in" the fundamental institutional path for the West law would henceforth be a bureaucratic enterprise. However, while the Church provided the shared structural root, the secular states of Europe would soon modify this blueprint into two fundamentally incompatible architectures, driven by the specific political incentives of their sovereigns.The resulting environment was one of intense jurisdictional competition, where the Church's courts by offering a more sophisticated and predictable legal product effectively acted as a market leader in a crowded arena of pluralistic authorities. This "legal pluralism" meant that a twelfth-century litigant often possessed the agency to choose between competing systems: the local customary court, the royal court, or the ecclesiastical court. By adopting the ecclesiastical ideology of written records, hierarchical appeal, and professional advocacy, the state began to treat law not as a sacred inheritance but as a vital administrative tool for state building. Monarchs in England and France began the process of professionalizing their own judiciaries by importing university-trained "legists" to translate the Church's systematic approach into secular power. This competitive pressure ensured that the ecclesiastical blueprint, the focus on rationality, hierarchy, and a specialized legal class became the permanent architecture of Western governance, even as the specific political needs of different crowns began to pull that architecture into the fundamentally divergent paths of the Common Law and Civil Law traditions.

Bifurcation of Law

Post the Papal revolution new legal institutions emerged as we learned from Harold's *Law and Revolution.* In this new era of legal symmetry instead of local chieftains ruling on the basis of orthodox ideas there were official adjudicators and jurors trying to follow the principle of *Lex non novit patrem, nec matrem; solam veritatem* meaning law only knows the truth, but why i used the "trying" was because there were certain regions on the globe which were not able to follow it if they followed the same system as Rome. In the 12th century, if you were a local juror or a weak local judge, a powerful lord (a "bully") could threaten to kill you or burn your house if you didn't rule in his favor so even if law knows the truth the juror has to pretend it doesn't. This conundrum was argued by Glaeser & Shleifer in their work *Incentives of the Adjudicators* which explains the western law divergence which argues that legal structures are designed to solve the problem of judicial subversion which directly connects with principle of *Lex non novit patrem, nec matrem; solam veritatem* because if there is judicial subversion law will not know the truth. This best can be explained by Glaeser and Shleifer; they articulated that In France, local "bullies" were so powerful due to the various revolutions that they could easily subvert a local jury or a weak judge. To counter this, the King changed the adjudicator's incentives. He replaced the jury with a professional judge who was a royal employee. To ensure this judge wasn't bribed, the King gave him "Bright-Line Rules" . The judge's incentive was to follow the letter of the law strictly to avoid being punished by the King, rather than making an "unfair" decision that might be influenced by a local lord. Whereas in England, the King was strong enough to protect judges and juries from local lords. Therefore, the threat of "subversion" was low. The King could afford to give adjudicators more discretion. The judge and jury were incentivized to find the "just" outcome based on local custom and precedent, because they weren't living in fear of being murdered by a local baron for their verdict. This clearly explains how legal structure cannot be the same throughout the world if law wants to be fair. This idea is also visible in present day international law norms especially the *Res Inter Alios Acta* which means that agreements between some parties should not affect or bind those who are not involved (third parties) as in actors who are not directly involved the case or law cannot be applied to them. Which is pretty rational I might say, taking example of the current concept of state attribution which majorly refers to the *The Nicaragua vs United States of America Case* and it is applied to numerous conflicts even with actors who are not even part of the ICJ. Why is it wrong is that there is a specific incentive for states to not want to be part of the tribunal. Under the doctrine of Sovereign Equality, no state is subject to the jurisdiction of an international tribunal without its express consent. This is known as the principle of *consensus*. While the ICJ operates under the rule of *pacta sunt servanda* (agreements must be kept), a state that has not submitted to the Optional Clause (Article 36(2) of the ICJ Statute) remains insulated from Compulsory Jurisdiction. The incentive here is to avoid an obligation to litigate. By remaining *ex curia* (outside the court), a state ensures that any future dispute remains a matter of bilateral diplomacy rather than a binding legal adjudication. This clearly explains how the western law divergence is basically a predecessor of *Res Inter Alios Acta* which is a very significant international law norm in the current global order. The bully conundrum also persists but is solved in a similar approach. The evolution from local subversion to international non-participation reflects a persistent fear of judicial capture. Just as the 12th-century French judge adhered to "Bright-Line Rules" to avoid the wrath of a local baron, modern states view the principle of State Consent and *Res Inter Alios Acta* as their primary defense against Judicial Activism. In this context, a state’s refusal to submit to the ICJ’s compulsory jurisdiction is not merely an act of isolationism, but a calculated response to the risk of jurisdiction being used as a tool of abuse of power because understanding ICJ’s idea of state attribution might not work in the case of politically unstable country. If a state perceives that the international "adjudicators" might be susceptible to the political "bullies" of the UN Security Council, it will exercise its *jus dispositivum* (discretionary law) to remain outside the court's reach, ensuring that its vital interests are not subject to a forum where the "truth" might be subverted by geopolitical pressure.

Modern arbitration emergence

While the Church and State legal institutions were popularised, a stateless legal order emerged to resolve the inherent issues of expanding commerce: the Lex Mercatoria, or Merchant Law. This system did not rely on the coercive dominance of a sovereign, but rather on the principle of Ubi societas, ibi jus (Where there is society, there is law) which meant that rationally law cannot be only bound to the state. As analyzed by Milgrom, North, and Weingast, the revival of trade in the late Middle Ages introduced a dual institutional crisis that neither Canon nor Civil law could efficiently address because they were limited to the states. First, as trading communities grew in scale, the organic ability for merchants to monitor one another's behavior within each community diminished. This expansion created an environment where new institutions were required to mitigate the specific types of cheating made possible by the anonymity of larger markets. Second, the rise of inter-regional trade introduced the risk of hit and run opportunism. Institutions were needed to prevent reneging by merchants who might exploit a contract in one location and then disappear into another region, effectively becoming judgment proof because they were never to be seen again which was identified as a big loophole because as the western law divergence suggests that law is not static so the laws of the region where the merchant went to also might protect him. This problem challenged the traditional legal maxim Actor sequitur forum rei (the plaintiff must follow the forum of the defendant), as the costs for a cheated merchant to track a fleeing supplier across fragmented feudal borders were prohibitively high. The functional core of this merchant alternative was the transformation of reputation into a liquid asset. Theoretically, a reputation for honesty serves as an adequate "bond" for compliant behavior, provided that the trading community remains informed about the past conduct of its members. Well-informed traders could effectively enforce the principle of Fides servanda est (Good faith must be kept) by boycotting or ostracizing those who violated community norms. However, Milgrom et al. posit that the primary obstacle to this private ordering was the costliness of information. In a vast network of traveling traders, an individual merchant could not easily or cheaply identify which strangers were reliable and which were "violators" which poses a similar problem to the information asymmetry of ancient law. This raises a fundamental question regarding the necessity of a formal legal structure: if ostracism was an effective way to enforce judgments, why was a formalized legal system needed at all? The answer lies in the role of the private judge as an informational hub. A cheated merchant might obtain a judgment against a supplier, but that judgment was practically useless if the supplier never returned to the specific Fair where the dispute occurred. The "Law Merchant" solved this by centralizing the records of non compliance. By creating a private judicial database, the system ensured that a default in one location became a permanent mark against the merchant's reputation across the entire Fair network which tended to solve the asymmetry. Crucially, it must be analyzed that the Lex Mercatoria and its modern derivatives in international arbitration are fundamentally not jus cogens in nature. Unlike the peremptory norms of international law such as the prohibition of genocide or slavery from which no derogation is permitted, the Merchant Law operates as jus dispositivum. It is a discretionary, consensual body of rules that parties can modify, waive, or opt out of through contract. It does not seek to impose a universal moral mandate; instead, it provides a functional framework for those with the *animus obligandi* (intention to be bound).

Conclusion

The Western legal tradition is a composite of three institutional blueprints Ecclesiastical, Secular State, and Mercantile each "locked in" by jurisdictional competition. The $5.8 billion ICSID award against Pakistan serves as the empirical validation of this cooperative global order. While the Pakistani Supreme

Court operated under a State Blueprint , the tribunal operated under the Merchant Blueprint . The state's territorial tool was neutralized by the merchant's informational database. Legal harmonization still remains an impractical task because these historical architectures were designed to mitigate different localized risks. The modern resurgence of private arbitration is a return to a "Neo-Medieval" order where powerful actors opt out of state judiciaries in favor of functional efficiency. Ultimately, the tradition proves that the most enduring institutions are those that solve the problem of trusting a stranger through information rather than force. Ultimately, the Western legal tradition has come full circle. We have transitioned from the fragmented folklaw of the pre-11th century, through the centralized state-building era, and back into a Neo-Medieval legal pluralism. In this modern order, the most significant exercises of legal power often occur outside the state, within private, informational frameworks that prioritize commercial efficiency over sovereign will. The central obstacle to global legal harmonization is not a lack of shared values, but the institutional path dependency of systems designed a millennium ago to solve localized political risks.

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