OUTLINE — SECTION 9

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Humanists, Humanism and the Law

We repeat here in abbreviated form the list of sixteenth-century French humanists, who figured in the lecture on Homologation and Reception. What we are going to do today will show, if nothing else, the dangers of trying pigeon-hole these men into specific subject categories.

The Alciateani:

Andreas Alciatus, 1492–1550

Civilians and commentators:
Éguinaire Baron, 1495–1550, comparativist
Antoine de Govéa (Gouveanus), 1505–1566, historian
Franciscus Duarenus (François Douaren), 1509–1559, systematizer

Lawyer-Historians and Theorists:
Jean Bodin, 1530–1596

Customary Lawyers:

Charles Dumoulin, 1500–1566, the 'French Papinian,' systematizer of the custom of Paris
Charles Loyseau, 1566–1627, treatises on specific topics

1. Ulpian on *merum imperium* and *mixtum imperium*—*Mats.* XI, p. 5, D. 2.1.3.

Ulpian, *Edict, book 1*. *Imperium* is pure or mixed. To have pure *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas*. *Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio*. Such jurisdiction also includes the power to appoint a judge.

2. Azo on the topic of *merum imperium*, the horse story again—*Mats.* XI, p. 3, Azo on C.3.13.

Does this pure power (*merum imperium*) pertain only to the prince? And some say that he alone has it. And it is said to be pure in him because he has it without any magistrate over him (*sine prelatura alicuius*). But certainly exalted magistrates also have pure power if the definition of the law that I have just given is good. For even the governors of provinces have the power of the sword, as [D.1.18.6.8]. Municipal magistrates, however, do not have it, as [D.2.1.12]. I say, however, that full or most full jurisdiction pertains to the prince alone, but pure power also to other exalted *podestà*, although on account of this I lost a horse, which was not equitable.

3. Odofredus on the problem of *imperium*—*Mats.* XI, p. 5, Odofredus on D. 2.1.3.

Whence [a story about] the lord Henry the father of Frederick II who was ruling forty years ago: At that time Sir Azo and Sir Lotarius were teaching in this city and the emperor called them to him for a certain business, and while he was riding one day with them, he posed this question: "Gentlemen, tell me to whom pure *imperium* pertains." Sir Azo said to Sir Lotarius, "You tell me." Although Sir Lotarius was a better knight, nonetheless, Azo was better in our law. (And you ought to know that Sir Lotarius greatly loved the

ladies, and gazed on them freely, although afterwards he was made archbishop of Pisa, and on account of him two decretals were written [X 2.2.12; X 2.26.17 (neither of which has anything to do with scandalous behavior of the archbishop)].) And since Sir Lotarius said: "Since Sir Azo wants me to speak first, I tell you that pure *imperium* pertains to you alone and to none other." Afterwards the emperor asked Azo, "What will you say?" Sir Azo said, "In our laws it is said that other judges have the power of the sword, but you have [it] by excellence. Nonetheless, other judges have it too, such as governors of provinces [D.1.18.6.8], [and] much more so other greater [magistrates]. Insofar as you have not revoked the jurisdiction of magistrates, others can exercise pure *imperium*." When they had returned to the palace, the lord emperor sent Sir Lotario a horse, and nothing to Sir Azo. Whence Sir Azo said in the summary of this title, "I say that pure *imperium* belongs to the prince alone by excellence; nonetheless others can exercise pure *imperium*, such as the governors of provinces; and much more so the greater judges according to [D.1.18.6.8]. On account of these words we lost a horse, which was not equitable, because I spoke the law well and not Sir Lotarius."

4. Bartolus, who basically agreed with Azo, drew a large of distinctions. He distinguishes among *merum imperium*, *mixtum imperium* and *iurisdictio simplex*. The distinction between *imperium* and *iurisdictio simplex* is that the former involves discretion, while the latter is mere following of the law. He then creates six different kinds of *imperium*, based on the amount of power that the holder has. *Maximum merum imperium* involves the power to declare general law. The other gradations involve the penalties that may be imposed, ranging from capital punishment to small fines. The same gradations are used with *mixtum imperium*, which roughly corresponds to what we would call civil jurisdiction. *Iurisdictio simplex* also has six degrees, probably more for symmetry than for logic, because a judge who has such power has no authority to declare general law. He may act only when asked to act and cannot act of his own motion.

5. Alciatus is the first jurist of whom I aware who suggested that Lotharius really had the better of the argument. Alciatus suggests two things: (1) that *merum imperium* belongs to the prince alone as *ius proprium*, thus confirming the opinion of Lotharius, and (2) that the power to make law is unrelated to *merum imperium*. Now Aliciatus does not deny that the prince has the power to make law, but he sharply separates, in a way that probably truer to the Roman texts, legislative from judicial power. Alciatus's holding raises problems, because he recognized that both in Rome and in his own day there were those who had criminal jurisdiction by virtue of their office. His answer was, as others had suggested before him, that these people were delegates. He advanced the argument, however, by noting that they were delegates of the law that created their office, not of the prince personally. He also held that they had only a usufructuary right in public power.

6. Writing on the custom of Paris in 1539, Charles Dumoulin followed Alciatus closely: "[B]y the *ius commune* and *ius gentium* all jurisdiction of this realm is the king's since not the least jurisdiction may be exercised unless by him or in his name and authority. No other may have ownership of any jurisdiction or have jurisdiction in his own right or name, unless only a special jurisdiction by the mediate or immediate investiture or concession of the king. And even in the case of any inferior *dominium* by special law, the king remains vested with the recognition of that jurisdiction and its dependence on himself mediately or immediately and with the right of final appeal, from the final sentence of the inferior lords to himself or his judges." Dumoulin also seems ready to separate the property of public power from the property of the realm. His notion, as it had been in many theorists before him, was that sovereignty was inalienable. When the king granted a castellany to someone, the property in the castle passed irrevocably to the grantee, but when he granted *imperium* along with it, that grant was revocable.

7. Antoine Govéa and François Douaren (1547) introduced further refinements. Both notice that the Roman sources make a relatively sharp distinction between *imperium* in the sense of command, what we might call executive power, and *iurisdictio*, the power to organize a legal process. They also noted that at least in the formulary procedure, the *officium ius dicentis* was not the same thing as the *officium iudicis*, indeed they were not even exercised by the same person. Éguinaire Baron, who succeeded Douaren as professor at

Bourges, introduced a different distinction: In addition to the distinction between judicial and extrajudicial power Baron distinguished between judges who have discretionary power and those who do not.

8. Thus, by the time we reach Bodin much of the preliminary work had been done. Bodin ultimately sides with Azo, but with a difference. He makes much use of Baron's distinction between discretionary and non-discretionary judicial power. Like Alciatus, he regards the true rule as being that the magistrate's power is usufructuary only. He recognizes that in France such power is inheritable, but he regards this as an abuse. In all, he does a remarkable in reconciling his theory with the known facts of both Roman and French public law.

9. The story of Azo and Lothair appears again in the work of Charles Loyseau, whose importannce as a political and social thinker has gained ground in recent years. To him belongs the credit of having so sharply separated public from private ownership that it is possible for him to tame the inheritance of public power, which he still regards as an abuse, but as a fact.

3. Bodin on the problem of *imperium—Mats.* XV, pp. 5–13, *Six livres de la République* 3.5.
(This is the most important book on political thought between Machiavelli and Hobbes. The paragraphs marked with an asterisk are particularly relevant to the story of the emperor and the horse.)

1. 1st para. Remarks on law, anticipations of legal realism?
2. 2d para. One can have jurisdiction without *imperium*, e.g., the sentences of bishops.
3. 3d para. One can have police power without the power to judge.
4. 4th para. But the highest power is the power of life and death, and the emphasis here is on discretion, on pardon, an attribute of sovereignty
5. *5th para. Azo and Lothair. Lothair is right if he is talking about certain periods of the Republic. (Note the confidence of the humanists that they have the true clue about what was going on in Rome.)
6. *6th para. Azo was right as a general matter of Roman law, just look at D.1.21.1 (Azo's key text). And it is clear from D.49.19.13 that the Roman magistrates had discretion.
7. 7th para. All of this depends on the question of property in public office. It exists in France, though more than a suggestion that it is a usurpation.
8. 8th para. Excursus on the constables and marshals of France. [Distinguish between feudal jurisdiction and venality of offices, which B. does not do. The *paulette* does not come until 1604.]
9. 9th para. There is no question that the higher Roman magistrates had discretion and the power to delegate. [They go together in B's mind, though he may have been capable of separating them]. But the property in office is a property in trust. [Note the use of the word *bail*].
10. 10th para. Main distinction between discretionary and non-discretionary power. But the property in office is a property in trust. [Note the use of the word *bail*].
11. [It goes on, but this should suffice to get the basic outlines of the argument.]

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