OUTLINE — LECTURE 18

HUMANISTS AND REFORMERS

Humanism in Context:

The Italian Renaissance and Humanism:

See Jakob Burckhardt (1818–1897), The Civilization of the Renaissance in Italy (first ed. 1860)

Giotto di Bondone (Florence, c.1266–c.1337)
Fra Angelico (Florence, 1387–1455)
Michelangelo Buonarroti (Florence-Rome, 1475–1564)
Raphael Santi (Urbino-Rome, 1483–1520)
Sandro Botticelli (Florence, c.1444–1510)
Giovanni Bellini (Venice, c.1426–1516)

Origins of legal humanism (in the order covered in the lecture):

Lorenzo Valla, c.1407–1457 and the Donation of Constantine
Andreas Alciatus, 1492–1550, teaches at University of Bourges, founder of the mos gallicus (the “French style”) as opposed to the mos italicus (the “Italian style”)
Angelo Poliziano, 1454–1494, return to the codex Florentinus (6th c. manuscript of the Digest) Willelmus Budaeus (Guillaume Budé), 1467–1540, Adnotationes ad pandectas (1st ed. 1507)
Ulricius Zasius, 1461–1535

Lorenzo Valla’s contribution to jurisprudence, if such it may be called, was in demonstrating, by methods of textual criticism that were becoming dominant in his time, that the Donation of Constantine could not have been written in the 4th century. In the first place, the vocabulary that it uses is not the vocabulary of genuine 4th century imperial edicts of which a number survive. Secondly, the manuscript tradition showed that the document was not recorded before the 8th century. (It is now dated around 730.) This focus on manuscripts and textual criticism was carried much further and to much greater effect in the generation after Valla by Angelo Poliziano (1454–1494), who was the first person since the 11th century seriously to examine the codex Florentinus, the late sixth or early seventh century manuscript of the Digest. He did so in order to determine if the Vulgate text of the Corpus Iuris Civilis was accurate. Poliziano was particularly effective because of his knowledge of Greek, for there is quite a bit of Greek in the Corpus Juris Civilis, and quite a bit more that can be best be explained on the basis of Greek sources. There is, for example, a huge work called the Basilica, which is a translation of the Digest into Greek, with considerable commentary.

Pride of place, however, among the early humanist studies of the law must go to Guillaume Budé and his famous Adnotationes ad pandectas published in 1507. Budé was, as his name implies, a Frenchman. He was not trained as a jurist but as a humanist. He approached the Corpus with a profound knowledge of the Classical languages and of Roman history. He demonstrated, much to his great delight, that much that was in the gloss could not possibly be right, granted the language and the history in which the material was set. Budé trained Alciati in the techniques of humanist philology, but Alciati, in many ways, rejected the teaching of his master. Alciati continually taught that juristic texts must be studied professionally. It is not enough to know that Cicero never uses a word in a particular way; one must also recognize that the Roman jurists, of whom Cicero was not one, had their own technical vocabulary. Further, Alciati rejected the claim that the humanists—who may have been joking—made when they said that the modern jurists were violating the law when they interpreted Justinian’s text. (Recall that Justinian had forbidden
commentaries on his text.) Rather, according to Alciati, interpretation is essential to understand the meaning of the text. Grammar and philology are handmaidens of interpretation. Nonetheless, like his contemporary and friend Desiderius Erasmus with the Bible, Alciati’s effort was essentially one at getting at the original meaning of the text, shorn of its centuries of commentary and aided by the tools of history and philology. In this regard Alciati was much like his contemporary Ulricus Zasius, who brought many of the same methods to the teaching of Roman law in Germany. Zasius’s efforts, however, were not to have the immediate practical effects that Alciati’s were to have, and this for political reasons which we will talk about next week.

Some key events:

mid-15th century, the “invention of movable type” (Gutenberg Bible, 1455)
1492, Columbus ‘discovers’ America
1519, Charles I of Spain, grandson of Maximilian I and Mary of Burgundy, and of Ferdinand and Isabella, becomes Charles V, Holy Roman Emperor
1517, Luther nails the 95 theses to the door of the church at Wittenberg
1524–5, the German Peasants’ War (der deutsche Bauernkrieg)
1545–1563, Council of Trent
1555, Peace of Augsburg, cuius regio, eius religio
1572 (August 24), St. Bartholomew’s day massacre
1588, Defeat of the Armada
1598, Edict of Nantes, religious toleration for Protestants in France
1618–1648, Thirty Years’ War, ends with Peace of Westphalia

Reformers


John Wyclif, c. 1325–1384
Jan Hus, c. 1369–1415
Martin Luther, 1483–1546
Ulrich Zwingli, 1484–1531
John Calvin, 1509–1564

The Empire:

1493–1519, Maxmilian I, married Mary of Burgundy, dau. of Charles the Rash, their eldest son Philip m. Joanna, dau. and heiress of Ferdinand and Isabella of Aragon and Castile, their eldest son was
1519–1556, Charles V
1556–1564, Ferdinand I, brother of Charles (‘Austrian Hapsburgs’)
1564–1576, Maximilian II, son of Ferdinand and Anne heiress of Bohemia and Hungary
1567–1602, Rudolf II, son of Maximilian II

Spain:

1516–1556, Charles I (V), as above
1556–1598, Philip II, son of the above (‘Spanish Hapsburgs’)

France:

1483–1498, Charles VIII
1498–1515, Louis XII, b-in-law of Charles VIII, and ggsen of Charles V thru Louis, duke of Orléans
1515–1547, Francis I, 1st cousin once removed of Louis XII, ggsen of Charles V, through the
cadet branch of Orléans line (Angoulême)
1547–1559, Henry II, son of Francis, m. Catherine de Medici
1559–1560, Francis II
1560–1574, Charles IX
1574–1589, Henry III, all three brothers and sons of Henry II, with Henry III’s death Valois male
line extinct
1589–1610, Henry IV of Navarre, descendant of Louis IX thru Robert who married the heiress of
Bourbon, m. (1) Henry II’s youngest dau. Margaret and (2) Marie de Medici; their son was:
1610–1643, Louis XIII

Political Ideas:

See John Figgis, Studies of Political Thought from Gerson to Grotius (1st ed. 1907)

Conciliarists:

compare Marsilius of Padua, c. 1275–c. 1342
compare William of Ockham, c. 1288–c.1347
Ailly, Pierre d’, 1350–1420 (theologian conciliarist), salus populi suprema lex (“the safety [or
salvation] of the people is the supreme law”)  
Zabarella, Francesco, c.1335–1417 (cannonist conciliarist) 
Gerson, Jean, 1363–1429 (theologian conciliarist)
Nicholas of Cusa (Cues), 1401–1464, De concordantia catholica (humanist, philosopher, moved
away from conciliarism)

The council failed. It failed because it failed to deal justly with the problem of Jan Hus, because
attention was turned away from it once the pope again became one, and because it lost all
credibility when it appointed the last anti-pope. But it left a legacy, drawn immediately from
Marsilius of Padua, and less directly from Ockham and Wyclif, for civil societies—the
constitutative nature of the people, Walther Ullmann’s famous ascending theory of power. Now
we must be careful here. The constitutive nature of the community has little or nothing to do
with individual rights. That is a separate idea, one that may have existed at the time but which
could not develop into its modern form until the idea of the state had been developed. The
conciliarists also left an important legacy of instrumentalism. Jean Gerson and Pierre d’Ailly
were both, in some sense, utilitarians. The salvation of the people is the supreme law, salus populi
suprema lex. The necessity of the church knows no law. This was their answer to the arguments
that no one could judge the pope and that only the pope can call a council. The present situation,
they said, is destroying Christianity; it must be stopped. We still have not reached the idea of the
state. But the conciliarists left elements that could be turned into the idea of the state. Nicholas of
Cusa (Cues) (1401–64) is perhaps the last significant political thinker to see Christendom as a
single organic unity with pope and emperor both limited by law. His De concordantia catholica
(a title that is normally translation as “On Catholic Concordance,” but which is really
untranslatable) was written at the height of the council of Basel in 1432. What would follow
would be very different.

All by himself:
Machiavelli, Niccolo, 1469–1527, The Prince

How different is perhaps best illustrated by Machiavelli. Machiavelli picks up on the notion that
the salvation of the people is the supreme law, that necessity knows no law, and applies it to the
secular state. (At least the Machiavelli of The Prince; the Machiavelli of the Discourses is quite
different, but the Discourses, by and large, was not well known outside of Italy in the 16th
century.) It must be recalled that Machiavelli lived in a time in which the political situation in
Italy was one of almost constant internecine warfare, where the careful balances that had been established in the earlier middle ages no longer served to maintain the peace. If we are appalled by Machiavelli’s lack of a public morality, we must remember that he was faced with what he regarded as a desperate situation. For Machiavelli the state becomes an end in itself. The goal is efficiency of government. Machiavelli abandoned entirely the idea of natural law, the idea that there is a law above kings and princes. The consequences of his ideas for international law were disastrous. In domestic political theory, his notions lead to absolutism. In this he relied on the idea that can be found in much earlier political thought (Bartolus has it, but so does Bracton) which will later be called the inalienability of sovereignty. The prince is not bound by concessions that he has made. Machiavelli is the first thinker since the ancients to make a radical distinction between public and private morality. Machiavelli’s thought had few followers, though many princes behaved as if they were following his theories.

**Lutherans:**

Luther, Martin, 1483–1546
Melanchthon, Philipp Schwarzerd called, 1497–1560

Most thinkers in the 16th century were willing to adopt Machiavelli’s notion of the state, but unwilling to abandon law and morality entirely. Luther’s thought on political matters is complicated and not completely consistent. He clearly believed in a religious state in which all coercive power was in the prince. He has a notion of liberty of conscience, but he also believed in non-resistance, i.e., that one could not resist an order of the prince. Liberty of conscience does not give a right of revolution. He still does not see the church and state as separate societies, perhaps no one did until the end of the century. That is what leads to the principle of *cujus regio eius religio*. Luther’s position on non-resistance was strongly influenced by his fear of the chaos that he believed would result if the radical Protestants, particularly the Anabaptists, were successful. He strongly opposed the German Peasants’ Revolt, which happened shortly after the reform began (1524–27). Philip Melanchthon the most influential Lutheran after Luther himself ultimately came to espouse the notion of Roman law as a means of achieving peace. The practical effect of their ideas was to destroy the power of the emperor. Another was to reduce the complexity of the world. Both Luther and Melanchthon strongly opposed corporate religious organizations, such as monastic communities. Indeed, they were both quite anti-clerical. In their hands the notion of divine right of kings was an anti-papal idea, and it did not necessarily lead to absolutism.

**Politiques:**

L’Hôpital, Michel de, 1507–1573, *Traité de la réformation de la justice*
Bodin, Jean, 1530–1596, *Six livres de la république*
*compare* Coras, Jean de, 1515–1572
Pasquier, Etienne, 1529–1615, *Recherches de la France*

The French *politiques* are more legal than their royalist English counterparts. Jean Bodin, Etienne Pasquier and Michel de l’Hôpital were all lawyers, Bodin a practicing lawyer, Pasquier a high magistrate in the chambre des comptes, and l’Hôpital Catherine de Medici’s chancellor. Bodin’s ideas of sovereignty are anticipated by Jean Coras, himself a lawyer and a member of the parlement of Toulouse, but a Protestant. He was killed in the St. Bartholomew’s Day massacre. Neither Bodin nor Coras was an absolutist. Both Bodin and Corras saw the sovereignty of the prince as limited by both natural and divine law. Bodin, however, was at pains to emphasize, as Hostiensis had about the pope, both that the prince cannot be judged and that he is the source of all positive law. In the thought of the *politiques*, sovereignty is justified on historical grounds: the monarchical succession is derived by some rather curious history from the Salic law. The *politiques* embraced religious toleration if it were necessary to for the maintenance of the state.
The professional lawyers, by and large, and the Parlement, supported Henry IV. L’Hôpital wrote a famous *Treatise on the Reformation of Justice* in which he argued that the king was the only one who could prevent corruption of justice.

**Monarchomachi:**

Hotman, François, 1524–1590, *Franco-Gallia*
Duplessis-Mornay, Philippe de, 1549–1623, *Vindiciae contra tyrannos*

The *monarchomachi* were the opponents of the *politiques*. After the St. Bartholomew’s Day massacre their most notable exponents were Protestants like François Hotman and Philippe de Duplessis-Mornay. But prior to the massacre similar ideas may be found in the Catholic League. It is characteristic of the 16th century that when religions find themselves in a minority they become supporters of religious liberty, and this is a brush with which we can tar both Protestant and Catholic. Ultimately, and it takes some time, we find four ideas being developed: (1) an ascending theory of power in which eventually the basis of the state is seen as contractual; (2) civil rights as a means to an end, to preserve religion, and defended ultimately in a right of revolution; (3) natural law as the basis of civil rights; and (4) a commitment to reason rather than precedent in law. This seems quite modern, but the pieces don’t quite fit together in the modern fashion. What is needed is notion of the individual as against the state, and that we really don’t get until the 17th century.

**Neo-Scholastics:**

Casas, Bartolomé de las, O.P., 1474–1566
Vittoria, Francisco de, O.P., 1483–1546, *De Indis et de iure belli*
Soto, Domingo de, O.P., 1494–1560, *De justicia et jure*
Molina, Luis, S.J., 1536–1600, *De justicia et jure*
Mariana de la Reina, Juan de, S.J., 1536–1624, *De rege et regis institutione*
Suarez, Francisco, S.J., 1548–1617, *De legibus et Deo legislatore*

What is needed, too, is a notion of separation of church and state, and that we probably owe to the Spanish scholastics. We will have to say more about the Spanish scholastics in a later lecture. Here I would like to emphasize two points. Their work begins with the Dominicans Bartolomé de Las Casas, Francesco de Vittoria, and Domingo de Soto, the former a missionary, the latter two academics. They were all concerned with the problem of the justification of the conquest of the Indies. In the case of Las Casas it is not completely clear that the conquest can be justified, and he certainly regards the Spanish treatment of the Indians as immoral. Vittoria is more nuanced on the question whether the conquest can be justified, but he hedges his possible justifications in such a way as to make clear that much that was going on in the Spanish territories in the Indies was immoral. He got into considerable political trouble as a result. I would suggest that this leads to a distancing of church and state. De Soto’s work is more theoretical, and it is important because he regarded the *ius gentium*, probably meant in a sense close to our international law, as part of the positive law of every state. The Jesuits Juan de Mariana, Luis Molina, and Francisco Suarez at the end of the century are dealing with a different problem, the rise of the nation state and the role of the church in it. Mariana in particular has a strong notion of the sovereignty of the people as constitutive of the state. They all emphasize natural law and place less emphasis than do the *monarchomachi* on the contractual nature of the state. They also radically secularize the state. This leads to the notion of the *indirect* power of the pope. This is the answer to the question how can the church exist in a radically secularized state? Because the two kinds of powers are different. Now, true church-state separation cannot be achieved until there is toleration, and that does not come, even in France, until the end of the century. There was certainly no toleration in Spain in the 16th century. I think, however, that I have already said enough to indicate how the next step is going to be the development of the natural law school of jurisprudence in the 17th and
18th centuries.

**The Return of Emperor and the Horse:**

Alciatus, Andreas, 1492–1550  
Charles Dumoulin, 1500–1566  
Govéa (Gouveanus), Antoine de, 1505–1566  
Franciscus Duarenus (François Douaren), 1509–1559  
Baron, Éguinaire, 1495–1550  
Bodin, Jean, 1530–1596