

## OUTLINE — LECTURE 18

### HUMANISTS, REFORMERS, AND CUSTOMARY LAWYERS: THE 16TH CENTURY, PARTICULARLY FRANCE

#### Introduction: *Lex Dei quam praecepit Dominus ad Moysen*

*The Law of God (Lex Dei) Which the Lord Commanded unto Moses*, also known as *Legum mosaicarum et romanarum collatio*, “a comparison of Mosaic and Roman laws.” Edited by Pierre Pithou, first ed., Paris, 1572.

The *Lex Dei* is a compilation of sources from the Hebrew Bible and Roman law, made probably in the early years of the fourth century. The author was probably a Jew, and the work is important for its quotations from the Roman jurists and for what it tells us about the comparative interests of the compiler.

Pierre Pithou, 1536–1596, humanist, Catholic Gallican, supporter, ultimately, of Henry IV.

Christofle de Thou, 1505–1582, first president of the *parlement* of Paris, dedicatee

#### *Dedicatory epistle*

To the most famous and most generous man, Christofle de Thou, knight, first president of the court of the kingdom, and senator of the sacred consistory [perhaps a reference to de Thou’s position as *conseiller* of the *Conseil privé*], Pierre Pithou greeting!

There is no single reason why I offer these remains of old authors of the law to you, most generous president, but this one seems particularly just: that it was fitting that these [remains] (which to some may perhaps seem to be brought forth against the interdict of the prince Justinian), be defended by some more holy [i.e., respected.] name against the calumnies and foolishness of most ungracious men, who either pretend [not to know] or in fact do not know that whereas he prohibited comparison and reading aloud in court among his people, we in truth keep the majesty of the Roman laws so courteously that we nonetheless allow them to have no license [i.e., authority] among us except what we concede to their reason and equity, not to their authority and sanction. Whose name, in truth, could be chosen that would be more noble for this defense than yours? Since, finally, under your presidency this purer jurisprudence has been received for the court’s use, and since you so hold and so guide the rudder of our law in that highest tribunal of Gaul, that like that very great man of old, you can not unworthily be called the *soma* [body] of the Senate [parlement] and, indeed, in some sense, the *empsychos nomos* [the law in spirit]. And also that you can claim by a certain right that is yours a share in our works, of all of which you are the chief patron, or rather father, when your highest humanity clearly persuades you that the name of goodness is more pleasing to you than the name of power. . . . May you therefore receive this gift from a man most dedicated to your virtues, not any great thing, but one nonetheless that may at this time benefit you and through you the public utility, you who will perhaps some time in the future be even more distinguished as a man to whom God has given the spirit of a good citizen, and whom He confirms, increases, instructs, aids, protects out of His singular clemency in

every way he can. Fare you well, most generous man. Paris, the Kalends of October, MDLXXII [i.e., 1 October 1572].

## **The 16th Century in General**

### **The Italian Renaissance and Humanism:**

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

### **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**

See Harold Berman, *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (2003)

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, Maximilian 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’)

1564–1567, 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 ggson of Charles V thru Louis, duke of Orléans

1515–1547, Francis I, 1st cousin once removed of Louis XII, gggson 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

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

Lorenzo Valla, c.1407–1457 and the Donation of Constantine

Andrea Alciati, 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)

*compare* Desiderius Erasmus (Gerrit Gerritszoon), 1466/9–1536

Ulricus Zasius, 1461–1535

Lorenzo Valla's contribution to jurisprudence 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 Iuris Civilis*, and quite a bit more that can be best 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 Ulrich 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.

## **HOMOLOGATION OF CUSTOM AND RECEPTION**

### **Homologation of Custom:**

1453—Charles VII (ordonnance of Montils les Tours)  
 1495—coutume of Ponthieu  
 1509—coutume of Orléans  
 1510—coutume of Paris  
 1498–1574—285 coutumiers published  
 1580—Revised edition of the coutume of Paris  
 1582—death of Christofle de Thou, first president of the Parlement of Paris and anti-Romanist

### **Les grandes ordonnances:**

*Ordonnance de Villers-Cotterets* (Francis I, Poyet, 1539)—general reform particularly in procedure for gracious acts.  
*Ordonnance d’Orléans* (Charles IX, l’Hôpital, 1561)—inheritance and civil procedure.  
*Ordonnance de Moulins* (Charles IX, l’Hôpital, 1566)—a kind of statute of Frauds.  
*Ordonnance de Blois* (Henry III, 1579)—marriage.  
*Ordonnance de 1629 (= Code Michaud)* (Louis XIII, Michel de Marillac)—extension of feudal tenure.  
*Ordonnance de 1667 sur la procédure civile (= Code Louis)* (Louis XIV, Colbert)—close to a codification.  
*Ordonnance criminelle* (Louis XIV, Colbert, 1670)—less successful but along the same lines.  
*Ordonnance du commerce (=Code Savary or Code Marchand)* (Louis XIV, Colbert and Savary, 1673)—general commercial code.  
*Ordonnance sur le commerce de mer (=Code de la marine)* (Louis XIV, ?Colbert, 1681)—perhaps the most influential beyond the borders of France.  
*Ordonnance de 1731 sur les donations* (Louis XV, D’Aguesseau).  
*Ordonnance de 1735 sur les testaments* (Louis XV, D’Aguesseau).  
*Ordonnance de 1747 sur les substitutions* (Louis XV, D’Aguesseau).

*Code civil* (Napoléon, 1804).

### **The Alciateani:**

Andreas Alciatus, 1492–1550

#### *Editors of texts:*

Jacobus Cujacius (Jacques Cujas), 1522–1590

Pierre Pithou, 1539–1596

François Pithou, 1544–1621

Dionysius Godofredus (Denis Godefroy), 1549–1622

Jacobus Godofredus (Jacques Godefroy), 1578–1652

#### *Civilians and commentators:*

Éguinaire Baron, 1495–1550, comparativist

Antoine de Govéa (Gouveanus), 1505–1566, historian

François Connan (Connanus), 1508–1551, general classification

Franciscus Duarenus (François Douaren), 1509–1559, systematizer

François Baudouin (Balduinus), 1520–1573, historian and comparativist

Hugo Donellus (Hugh Doneau), 1527–1591, systematizer

#### *Lawyer-Historians and Theorists:*

François Hotman, 1524–1590

Jean Bodin, 1530–1596

Étienne Pasquier, 1529–1615

### **Customary Lawyers:**

Charles Dumoulin, 1500–1566, the ‘French Papinian,’ systematizer of the custom of Paris

Guy Coquille, 1523–1603, custom of Nivernais treated comparatively

Antoine Loysel, 1536–1617, maxims arranged according to the *Institutes*

Louis Charondas Le Caron, 1534–1613, historical inquiry into the custom of Paris

Charles Loyseau, 1566–1627, treatises on specific topics

### **Later Figures**

Jean Domat, 1625–1695

Gabriel Argou, 1640–1703

Joseph Pothier, 1699–1772

### **The Titles of the Custom of Paris (1580)**

Tit. 1—On Fiefs (art. 1–72)

Tit. 2—On Quit-rents (*censives*) and seigneurial rights (73–87)

Tit. 3—Which goods are movable and which immovables (88–95)

art. 91. Fish being in a pond or in a ditch is regarded as immovable; but when it is in a shop (*boutique*) or reservoir, it is regarded as a movable.

Tit. 4—On Complaint in case of seisin and of novelty and simple seisin (91–98)

Tit. 5—On Personal actions and on *hypothèque* (99–112)

Tit. 6—On Prescription (113–128)

Tit. 7—On *retrait lignagier* (129–159)

Tit. 8—Judgments, executions, gages (160–183)

- Tit. 9—On Servitudes and reports of juries (184–219)
- Tit. 10—Community of goods (220–246)
- Tit. 11—On Dower (247–264)
- Tit. 12—On Guardianship of nobles and bourgeois (265–271)
- Tit. 13—On Gifts and mutual gift (272–288)
- Tit. 14—On Testaments and their execution (289–298)
- Tit. 15—Of Succession in the direct line and in the collateral (299–344)
- Tit. 16—Of Public proclamations [*criées*] (345–362)

### **Narrative to Accompany the Outline given Above**

1. What I want to do now to start off with is staggering in its superficiality, but I think it needs be done so that we have some idea of where the traditional historiography suggests we are going. The traditional historiography sees virtually every development in the law from 1500 to 1800 on as being one step on the road to codification. No place is this characteristic of the historiography more notable than it is in France. This is for good reason. A great deal of what happens in the 16th, 17th and 18th centuries in France can be viewed as preparatory for codification.
2. Focusing on codification in any one country runs a number of risks, not the least of which is that it tends to make us lose sight of the common elements in the intellectual tradition that are Europe wide and also the curious moves that take place from one intellectual center to another. In the MA we noted the transnational character of the intellectuals. This characteristic continued during the early modern period despite the increasing importance of the nation as an entity. The continued importance of the study of Roman law in the universities, and, to a lesser extent canon law, was, if not a cause of this phenomenon, certainly an aid to it. We might also mention that well into the 18th century intellectuals wrote in Latin, at least some of the time.
3. To focus, then, on France and on the main elements in the story: Codification in France comes about in stages that are best seen by setting what is going on “legislatively” side by side with what it going on in the academies and in doctrinal writing by the practicing lawyers. The outline lays out the main pieces.
4. Chronologically the customs come first; indeed, we have seen that they go back to the Middle Ages, to a point when French legal development is virtually indistinguishable from English. The earliest event on our outline is the *ordonnance* of Montils les Tours of 1453, which calls for the redaction of the customs of the customary jurisdictions, i.e., those in roughly the northern 2/3 of France. The redaction movement, however, really doesn’t take off until the 16th century, at which point the French universities are fully into the humanist movement. The 16th century in France sees three parallel intellectual developments, all of first importance for our story. (1) The French humanists are the leaders in editing texts that seek to restore the true antiquity. (2) The French commentators on the Roman law lead the way in the systematization of the classical Roman law. (3) The customary lawyers begin the slow process of bringing the customary material as it is being redacted under an umbrella of principle largely, though not exclusively, derived from Roman law.

5. Parallel with, though somewhat later, comes a movement in the direction of systematization by means of royal ordinance or edict, the so-called *grandes ordonnances*. We'll talk about those in lecture tomorrow.
6. In the meantime, the intellectual effort had largely petered out in France. Domat in the 17th c. and Pothier in the 18th are regarded as giants because there is so little else with which to compare them. But the commentaries of Domat and Pothier were highly influential when France ultimately came to codify at the end of the 18th century.
7. So let us turn to the codification of custom. Perhaps we ought to call it by its proper name homologation of custom, homologation here means 'sanctioning'. The call for codification is old. It goes back even before Charles VII. Charles was, as you remember, the Jeanne d'Arc king, the man who finally pushed the English out of France in 1453. That the call for codification of custom should come to the fore at that time, at a time of political triumph is not surprising; law has long been thought to express the unity of the people, and France was anything but unified politically in 1453. The forces that underlay the move for codification are complicated. They include the professional lawyers, who wanted to have something to hold onto, and who also didn't want to be subject to the enquête into custom, a process which in some areas meant that laymen came in and told the lawyers what the custom was. They certainly included some royalist forces who suggested that the king could control the customs, but he must know what they are before he can control them, but they also include some of the bourgeois who sought certainty in the law particularly in those areas where there had never been a private redaction of the custom. On the other hand, the custom was a source of local pride and a source of privilege among those who were privileged. They allowed a non-professional element to survive, an element of localism, even if the element of localism was the localism of local oligarchies. The resulting system had to appear to be neutral, and in almost all areas the customs were redacted by royal commissioners who were told what the customs were by assemblies of the local estates. In some areas there was considerable participation of local professionals, judges and lawyers; in other areas, lay people predominated. Sixteenth century Frenchmen cared intensely about their customs (compare the tenacity with which the Spanish stuck, and in some areas still stick, to their local *fueros*). We have already said that the process of redaction of custom invariably changes a truly customary law. One might doubt how customary the law was in 16th century France but in some areas it probably still was. Some of the 285 areas that had redacted customs were very small out-of-the-way places. The process of redaction, even if it was totally in the control of the estates, changes the law. What one has after redaction is not the same as what existed before. But because the redaction took place under the supervision of royal commissioners there was tendency toward harmonization, even where it was unconscious. If I am working on my fifth commission, I am likely to ask the questions that the four previous juries have answered, even if that means that the juries in the fifth area will be answering a question that never occurred to them before.
8. We have spoken of the forces that lay behind the move for redaction of custom in the 15th century, but in fact virtually no customs were redacted in the 15th century.

That the redaction took place and that it was as complete as it was is largely the work of one man, Christoffle de Thou, the dedicatee of Pithou's *Collatio*. Part of the reason for de Thou's interest in seeing to it that the job was done was purely professional. A collection of codified customs made the job of the *parlement* of Paris, of which he was the first president, easier, or at least doable. It was, as you will recall, a court that largely devoted itself to hearing appeals from the customary regions of France. Part of it, however, had to do with a phenomenon that we're going to see more of. Fear that if the job weren't done French customary law would disappear in favor of Roman law. Part of the fear of Roman law was the old dislike of its association with the emperor, but the answer, as Pithou points out, had long been found to that: *rex Franciae imperator in regno suo*: the king of France is emperor in his own realm. De Thou well knew this, and I suspect that his fear of Roman law was much more like the fear of some of the English lawyers in the same period. French customary law was an intellectual mess, and in an intellectual age messiness was not desirable. The French customary legal profession was in danger. Someone would come along and say that the way to get a unified orderly legal system was to junk the customs entirely and adopt Roman law. What de Thou feared then was what has been called a reception of Roman law. There was even a suggestion that this had happened in the Empire with the establishment of the *Reichskammergericht* in 1495, a tribunal that was supposed to apply Roman law rather than attempting to apply the multiplicity of German customs. Recent work with the actual decisions of the *Reichskammergericht* suggests that customary law may have remained pretty important in the 16th century, and that is probably a partial answer to the question that I posed on Monday as to why Ulricus Zasius did not have the effect in Germany that Andreas Alciatus had in France.

9. If the codification of custom occurred as a result of the efforts of de Thou, it was able to hold its own intellectually because of the efforts of lawyers who had been trained in Roman law. We have already said something about legal humanism and about the leading role that France played in it. We focused on Alciatus and on the lawyers at the University of Bourges to illustrate the beginnings of the movement. We will say something later about the political thought of lawyers in the same period. Let us see where legal humanism went from the time of Alciatus for those lawyers whose principal concern was not political theory. What follows is a run-through of the names listed on the outline as 'Alciatani', followers of Alciatus.
10. The immediate successors of Alciatus as professors of law at the University of Bourges were Éguinaire Baron, François Douaren, and Jacques Cujas. They could not have been more different, and to say that they, particularly the first two, did not get along is to put it mildly. I have characterized Baron as a comparativist, Douaren as a systematizer and Cujas as an editor of texts. That certainly describes the principal thrust of their work, and it allows one to see how the line of editors of text will run from Cujas to the Pithou brothers, to the Godefroi, father and son, to the elegant jurists of the Dutch school of the 17th century and, more ultimately, to the legal historians of today. But Cujas was not only the teacher of the Pithou brothers; he was also the teacher of Loysel and of Pasquier, and that should immediately give us pause in thinking that the editors of texts of the 16th, if not the



17th, century were pure academics, despite the fact that the Pithou brothers and the Godefrois did not teach.

11. Similarly there is nice line that runs from Connan who proposed the first classification scheme for Roman law to Douaren and Doneau who worked on the refinement of the systematic treatment of Roman law, with strong influences from natural law, and whose work ultimately leads to Domat, “the civil laws in their natural order,” as he entitled his great book. But Douaren and Doneau were also interested in history. Both of them taught feudal law at the university of Bourges, as well as Roman law. Their Protestant leanings fit uneasily with the Jansenist Domat and much more comfortably with the historian Hotman.
12. The fact is that these guys defy easy classification. It is better to look at trends in their thought, themes that they play with together, one emphasizing one more at the expense of the other. Let us try to outline some themes and let them fall where they may:
  - a. There is no question that the French displayed a considerable interest in system. Their system might come directly out of Roman law texts, as did Connan’s, or it might come out of study of the customary law, as did Dumoulin’s. The two could not have been more different in their views about what was an appropriate law for France. Dumoulin opposed any direct importation of Roman law into French law. Connan took a much more nuanced position on the issue. (None of the Romanists argued for direct importation; Doneau probably comes the closest.) But Connan and Dumoulin’s interest in system overarched the specific body of law from which they derived that system. The initial efforts of the customary lawyers at system owes relatively little to Roman law (see Mats, p. XVI–7).
  - b. The titles of the custom of Paris: (look at them on the outline; what follows is a commentary on their organization):
    - i. Mixture of public and private. Fiefs, seignorial rights, public proclamation.
    - ii. No attempt to follow J.I. Is there an order at all?
      - tit. 1–3—things
      - tit. 4–9—may be seen as belonging to the law of actions (The *retrait* being viewed as an action; servitudes are out of order, but the report of juries makes sense as being law of actions.)
      - tit. 10–15—persons and succession combined
      - tit. 16—pure public law
    - iii. The achievement is being able to organize things in titles, the middle-level generalizations of the English
    - iv. Almost total absence of the law of obligations
    - v. The one provision on animals (article 91) is miles from Roman law in what it says about the animal but very close in the classification issue that it raises.

- c. If it did nothing else, the effort made clear that much was missing from the customary law. Systematization could fill in those gaps with Roman categories and Roman law, as was the tendency of Gabriel Argou in the late 17th century, or it could search the customary law for material to fit into the Roman system, as is illustrated by Antoine Loysel's *Institutions*, or it could leave the system of customary law intact, as did Guy Coquille, both of whom came earlier in the 17th century. We will deal with these authors in more depth in a later lecture. The tendency, however, increasingly over time was to impose the system of Justinian's *Institutes*. In part, this was owing to the fact that that made it easier for university-trained lawyers to learn the customary law. This is one reason that Argou's treatise was so popular. In part it was because the system of the *Institutes* was felt to correspond to a natural classification. Whatever the reason, the system itself was much broader than its contents. One could argue for Roman law and use the classification of the *Institutes*, but one could equally well argue for customary law using the same classification.
- d. The humanists were nothing if not broad-gauged. Their interest in history led them at once into the depths of classical textual criticism and into the wildest speculations about Celtic law and Germanic law. There is no question that they debated fiercely among themselves about the wisdom that was revealed in their sources, some arguing as Pithou does in his epistle to De Thou, that by examining how Roman law actually reflected the society in which it was found one could learn principles for contemporary French society, some arguing as Cujas seems to have at times, that the discovery of the real Roman law would also involve the discovery of what should be restored, some arguing as Hotman did that the study of the real Roman law would show how badly Justinian had compiled his texts and how a return to the Gallish and Germanic law would be truer to the French spirit. The range of possible positions was great, but they all believed that that there was a point to be learned for modern law from the study of the past. Most of them, too, though not all, were willing to concede that there were non-Roman materials that were worthy of study, even if they did not do it themselves. It is for this reason that a recent scholar named Donald Kelley has been able to suggest that Baron and Cujas really belong together and that three of the four intellectual streams that issued from them jointly, the editors of texts, the historian-theorists, and the customary lawyers are really part of the same movement. Only the systematizers, with their tendency toward abstraction, belong, in Kelley's view, in a category by themselves.
- e. I'm not sure that this is right. Part of my reason for so thinking will not become apparent until next week when look at the institutional treatises of the 16th century and of the slightly later period. But I think that we have already said enough to indicate why the systematizers are so important for all three efforts, the historical, the comparative and the customary. The historical effort and the customary are initially efforts to recover what had been lost or was in danger of being lost. In the case of the *Corpus Iuris*, the text was there but, in the humanists view, the proper understanding of it had been obscured by centuries of commentary that had made the texts mean things that they had not meant originally. In the case of the customary lawyers the effort was one, in many

cases, of producing a text where no text had previously existed. The result of the former effort could have been to make Roman law irrelevant to sixteenth-century France; the result of the latter effort could have been to enhance the divisions between areas of customary law, to lead to fragmentation rather than unity. Neither happened. It did not happen in the first place because the comparatists showed first the substantial areas of commonality in the French customs and ultimately the substantial areas of commonality between the customs and the Roman law. If one stops there, however, one ends up with a body of rules that may or may not be interconnected. It was the function of the systematizers to show what the overarching interconnections were, first in Roman law and then between the Roman law and the customs. Codification not only in the late eighteenth century but also in the seventeenth century was to combine Roman law and customary law. It would not have been possible to do this in a coherent way were it not for the fact that the systematizers had produced a structure that was broader and more abstract than that which the ancient Roman lawyers had themselves produced.

### **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 constitutive 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

**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.

**Azo, *Summa Codicis* 3.13** (On the jurisdiction of all judges): 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 [(probably) 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.

**Odofredus, Commentaria in Digestum 2.1.3: Imperium.** Here it is customary to ask to whom does pure *imperium* pertain? ... 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 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. ...

**Bartolus:** 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 the first degree does not include the power to make general law.

**Alciatus, Andreas**, 1492–1550, 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 Alciatus 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. Public is still not completely separated from private, and reconciliation with reality is difficult, but we’re on our way.

**Dumoulin, Charles**, 1500–1566, “[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.

**Govéa (Gouveanus), Antoine de**, 1505–1566, and **Duarenus, Franciscus** (François Douaren), 1509–1559: Both of these writers 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 the same thing as the *officium iudicis*, indeed they were not even exercised by the same person.

**Baron, Éguinaire**, 1495–1550: In addition to the distinction between judicial and extrajudicial power Baron distinguished between judges who have discretionary power and those who do not.

### **Bodin on the Emperor and the Horse:**

**Bodin, Jean**, 1530–1596. His *Six livres de la république* (1576 French, 1586 Latin) is the most important book on political thought between Machiavelli and Hobbes. His theory of *imperium* is sophisticated. Ultimately, however, he 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.

*Six livres de la république* 3.5: [5] And hereof arises a notable question, which is not yet well decided, viz.: Whether the power of the sword (which the law calls *merum imperium* or mere power) be proper unto the sovereign prince and inseparable from the sovereignty and that the magistrates have not this *merum imperium* or mere power but only execution thereof, or that such power is also common unto the magistrate to whom the prince has communicated the same. Which question was disputed between *Lothair* and *Azo*, two of the greatest lawyers of their time. And the emperor Henry the seventh [VI] chosen thereof judge, at such time as he was at Bononia, upon the wager of an horse, which he should pay, which was by the judgment of the emperor upon the aforesaid question condemned. Wherein *Lothair* indeed carried away the honor, howbeit that the greater part and almost all the rest of the famous lawyers then held the opinion of *Azo*, saying that *Lotharius equum tulerat sed Azo aequum* (*Lothair* had carried away the horse, but *Azo* the right) nevertheless many have since held to the opinion of *Lothair*.<sup>1</sup> so that the question remains yet (as we have said) undecided, which for all that deserves to be well understood, for the consequence it draws after it, for the better understanding of the force and nature of commanding, and the rights of sovereign majesty. But the difficulty thereof is grown, for that *Lothair* and *Azo* neither of them well knew the estate of the Romans, whose laws and ordinances they expounded; neither took regard unto the change in that estate made by the coming in of the emperors. Certain it is, that at the first, after the kings were driven out of the city, none of the Roman magistrates had power of the sword over the citizens; indeed that which much less is, they had not so much power as to condemn any citizen to be whipped or beaten, after the *lex Portia* published at the request of Cato the tribune of the people 454 years after the foundation of the city [198 B.C.; it made



scourging subject to *provocatio*].<sup>2</sup> By which law the people took this power, not from the magistrates only, but deprived even itself thereof also, so much as it could, giving the condemned leave for whatsoever fault or offense it were, to void the country and go into exile; and that which more is, there was not any one magistrate which had power to judge a citizen, if once question were but of his honor, or good name, or of any public crime by him committed, for then the hearing thereof was reserved unto the commonalty or common people, but if it concerned the loss of life or of the freedom of a citizen none might then judge thereof but the whole estate of the people in their great assemblies, as was ordained by those laws which they called sacred.<sup>3</sup> ... [A page and half discussing criminal jurisdiction in the Roman Republic is omitted.]

<sup>1</sup> [Bodin cites Alciatus, *Paradoxa* 2.6; Dumoulin, *In consuetudines Parisiensis* 1.1.5.58.]

<sup>2</sup> [Bodin cites: Livy 10; Cicero, *Pro Rabirio*; Salust, *Catalina*.]

<sup>3</sup> [Bodin cites: Cicero, *Pro Rabirio*; Cicero, *Pro domo sua*.]

[6] ... But if the state of the commonweal being changed and the power of judgment and of giving of voices being taken from the people, yet for a certain time this manner and form of judicial proceedings continued, even after that the form of the commonweal was changed from a popular estate into a monarchy, as a man may see in the time of *Papinian* the great lawyer who gave occasion unto *Lothair* and *Azo* to make question of the matter in these words by him set down as a maxim: “Whatsoever it is that is given unto magistrates by decree of the senate, by special law, or by constitution of the princes, that is not in their power to commit unto other persons, and therefore (says he) the magistrates do not well in committing that their charge unto others, if it be not in their absence; which is not so (says he) in them that have power, without the limitation of special laws, but only in virtue of their office, which they may commit unto others, albeit that they themselves be present.”<sup>4</sup> And thus much for that which *Papinian* says, using the words *exercitionem publici iudicii* [roughly, exercise of criminal jurisdiction], as if he should say, that they which have the sovereign majesty have received unto themselves the power of the sword and by special law giving only the execution thereof to magistrates. And this is the opinion of *Lothair*. By which words yet *Azo* understands the right and power of the sword itself to have been translated and given unto the magistrates. Now there is no doubt but that the opinion of *Lothair* was true, if he had spoken but of the ancient praetors of Rome, and so kept himself within the terms and compass of *Papinian*’s rule, but in that he was deceived that he supposed that the maxim or rule of *Papinian* to extend to all magistrates which have been since or yet are in all commonweals, who yet for the most part have the hearing of murders, robberies, riots, and other such like offenses and so the power of the sword given unto them even by virtue of their offices. For the emperors and law-givers having in the process of time seen the inconvenience and injustice that arise by condemning all murderers unto one and the self same punishment or else quite to absolve them, and so the like in other public crimes also, thought it much better to ordain and appoint certain magistrates who according to their conscience and devotion might increase or diminish the punishment as they saw equity and reason to require. ... [Bodin then outlines the history of imperial delegation of criminal jurisdiction, including to the *praefectus praetorianus* (whom Knoll calls “the great provost”), provincial governors and other magistrates with extraordinary power.] Now it is plain by the maxims of the law that the magistrates which had power extraordinarily to judge might condemn the guilty

parties to such punishments as they would; yet so, as they exceed not measures. For so *Ulpian* the lawyer writes, he exceeds measure, who for a small or light offense inflicts capital punishment, or for a cruel murder imposes a fine.<sup>5</sup> Whereof we may then conclude that the great provost and the governors of provinces and generally all such magistrates as have extraordinary authority to judge of capital crimes (whether it be by commission or by virtue of their office) have the power of the sword, that is to say, to judge, to condemn, or acquit, and not the bare execution of the law only, whereunto they are not in this respect bound as are the other magistrates unto whom the law has prescribed what and how they are to judge, leaving unto them the naked execution of the law, without the power of the sword.

<sup>4</sup> [D.1.21.1pr, a very free quotation but accurate in substance. More literally, the text reads: “Any powers specially conferred by statute or *senatus consultum* or imperial enactment are not transferable by delegation of a jurisdiction. But the competence attached to a magistracy as of right is capable of delegation. Accordingly, magistrates are held to be in the wrong if they delegate their jurisdiction insofar as they are charged with the conduct of a criminal court [*publici iudicii habeant exercitationem*] under a statute or a *senatus consultum*, such as the *lex julia de adulteriis* and any other like acts. The most powerful proof of this point is that it is expressly envisaged by the *lex Julia de vi* that anyone to whom its enforcement belongs may delegate that function if he goes away. Accordingly, he may only delegate after the commencement of his absence, since otherwise there would actually be a delegation by someone present in the city. ...” The puzzling provision in the *lex Julia de vi* may be explained as a special statutory authorization to delegate (which would not exist if the statute had not expressly allowed it) and which is being read narrowly in the light of the general rule.]

<sup>5</sup> [D.49.19.13: “*Ulpian, Appeals, Book 1*: Nowadays [a judge] who is hearing a criminal case *extra ordinem* may lawfully pass what sentence he wishes, whether heavier or lighter, provided only that he does not exceed what is reasonable in either direction.”]

[7] And thus much briefly concerning the question between *Lothair* and *Azo*, for the fuller and more plentiful declaration whereof it is needful for us yet to search farther. [The Latin employs terms from Ramist logic, making it clear that Bodin means that *Lothair* and *Azo* were disputing a subordinate point which can only be clarified by extending it into a general proposition.] Where it is first to be enquired whether the magistrates’ office be proper unto the commonweal or unto the prince or unto the magistrate himself together with the commonweal? Then whether the power granted unto the magistrates be proper unto the magistrates in that they are magistrates or else be proper unto the prince, the execution thereof only belonging unto the magistrates or else be common unto them both together? Now concerning the first question, there is no doubt, but that all estates, magistrates, and offices do in properly belong unto the commonweal (excepting in a lordly monarchy),<sup>6</sup> the bestowing of them resting with them which have the sovereignty (as we have before said) and cannot by inheritance be appropriate unto any particular persons, but by the grant of the sovereign and long and separate consent of the estates, confirmed by a long lawful and just possession. As in this kingdom, the dukes, marquises, counts and such others as have from the prince the government of the castles in sundry provinces, and so the command of them, had the same in ancient time by commission only, to again be revoked at the pleasure of the sovereign prince, but were afterward by little and little granted unto particular men for term of their lives and after that unto their heirs male, and in process of time unto females also, insomuch as that ultimately, through the negligence of princes, sovereign command, jurisdictions, and powers may lawfully be set to sale, as well as may the lands themselves, by way of lawful buying and selling, almost in all the empires and kingdoms of the west, and so are accounted of, as other hereditary goods, which may lawfully be

bought and sold. Wherefore this jurisdiction or authority which for that it seems to be annexed unto the territory or land (and yet in truth is not) and is therefore called *praediatoria*, and is proper unto them which are possessed of such lands, whether it be by inheritance or by other lawful right and that as unto right and lawful owners thereof, in giving fealty and homage unto the sovereign prince, or state, from whom all great commands and jurisdictions flow, and in saving also the sovereign rights of the kingdom and the right of last appeal.

<sup>6</sup> Tooley (p. 92) translates “despotic monarchy,” which probably captures the sense.