JEAN BODIN ON THE EMPEROR AND THE HORSE

[Much of this material before we get to Jean Bodin is derived from a remarkable doctoral dissertation, still well worth reading: Myron P. Gilmore, *Argument from Roman Law in Political Thought, 1200–1600*, Harvard historical monographs 15 (Cambridge, MA 1941).]

The Return of Emperor and the Horse:

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 deWnition 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 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. 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, an almost exact contemporary of Pierre Pithou: His *Six livres de la république* (1576 French, 1586 Latin) is the probably 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*,[1] 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*].[2] 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.[3] ... [A page and half discussing criminal jurisdiction in the Roman Republic is omitted.]

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

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

[3] [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."[4] 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 Knolles 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.[5] 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.

[4] [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.]

[5] [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),[6] 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.

[6] Tooley (p. 92) translates "despotic monarchy," which probably captures the sense.

Loyseau, Charles, 1564–1627: 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.