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The General Influence of Roman Institutions of State and Public Law

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- I. Introduction
- II. *Ius publicum*
 - 1. Classical Roman law
 - 2. The later development of *ius publicum*
 - 3. Summary
- III. Institutional and Constitutional Questions
 - 1. Sovereignty and the power of the Emperor
 - 2. General theories of imperium and *iurisdictio* in Classical Roman law
 - (a) *Imperium*
 - (b) *Iurisdictio*
 - (c) Conclusions
 - 3. The later development of Public Law concepts - Use of the Roman texts and terms
 - 4. Bartolus
 - 5. Jean Bodin
- IV. Conclusions

I. Introduction

The influence on posterity of Roman public law seems an obvious and promising topic, at least at first glance: prominently displayed in the first

fragment of the Digest is *Ulpian's* celebrated remark that there are two branches of the study of law, public and private¹. The significance of this division in the civil law tradition is almost impossible to exaggerate. The leading 16th-century legist *Charles Dumoulin*, for example, described it as "the prime and supreme division of jurisprudence"², and it remains absolutely fundamental to many civilian systems of law today. The Roman jurist *Ulpian* can claim to have been the first to postulate this fundamental divide. These are encouraging beginnings.

Yet this same topic might instead seem fraught with lack of promise and interest, for it is a commonplace that the Roman jurists were most uninterested in public law³. No extended discussions survive of constitutional checks and balances or means for keeping a magistrate or other authority within the proper bounds of his jurisdiction. Nothing of significance survives of the few jurists who are said to have been experts in public law. So there may be just a hint that, when in that celebrated text *Ulpian* distinguishes public from private law, he does so in order to clear it out of the way, together with *ius naturale* and *ius gentium*, and to leave the stage clear for the entry of the proper business of law, private law. It was perhaps considerations of this sort that led *Savigny* to take the view that Roman public law had not been received into modern legal systems. *Koschaker*, although less extreme, still thought Roman public law too much bound up with its own time to have formed the basis for modern public law⁴.

More recently, however, attitudes have come to be somewhat more positive. *Coing* has urged that it is mistaken to suppose that the medieval jurist rigorously distinguished between private and public law and determined that only private law was appropriate for reception. What was received was the whole of Roman law, public and private, every text being fair game for the elucidation of any point or principle⁵. Once that is accepted, it becomes clear that Roman public law can be expected to have had its influence; although, since Roman writings on private law are much greater in volume and sophistication, their impact must be expected to be greater. This

¹ *Ulp.* D. 1, 1, 1, 2.

² *Omnia quae extant opera*, vol. I, Paris, 1681, at p. 738.

³ *F. Schulz*, *History of Roman Legal Science*, 1946, at pp. 81, 138.

⁴ *F.C. von Savigny*, *System des heutigen römischen Rechts*, vol. 1, Berlin, 1840, Bk. 1, Chap. 1.3; *P. Koschaker*, *Europa und das römische Recht*, 4th ed., 1966, at p. 270. <88>

⁵ *H. Coing*, *Die Anwendung des Corpus iuris in den Consilien des Bartolus*, in: *L'Europa e il diritto romano: Studi in memoria di Paul Koschaker*, vol. 1, 1954, at pp. 71-93.

paper, however, is concerned only with the influence of public law.

A difficulty in any study of the influence of ideas or institutions is where to draw the finishing line. A further difficulty, where space is not unlimited, is at which staging posts to stop on the way. No doubt any choice would seem arbitrary. This essay surges through centuries of jurisprudence at alarming speed, halting only to glance at the case of the Glossators and Commentators and then at that of *Jean Bodin*. Why precisely there? The medieval lawyers display extreme fidelity to the Roman texts; *Bodin* exhibits a critical and comparative attitude informed by humanism. If the balance on the question of Roman influence is to be weighed judiciously, both of these very different approaches have to be considered.

The next section discusses what the Romans understood by public law and the historical significance of the divide between public and private law. Section III considers specific cases of Roman influence at a constitutional or institutional level. Some of these have been closely examined in histories of political thought; they are dealt with briefly. Less well-worked is the stratum of what would now be called administrative law, so closer attention is paid here to the Digest texts touching on the notion of an office; the powers accorded to the holder of that office; what happens when the office holder exceeds those powers; and the concepts of power (*imperium*) and jurisdiction themselves. Section IV sets out some general conclusions.

II. *Ius publicum*

1. *Classical Roman law*

"Public law is concerned with the Roman state (*status rei Romanae*), while private law is concerned with the interests of individuals, for some matters are of public and others of private interest. Public law comprises religion, priesthods, and magistracies"⁶. This is *Ulpian's* definition of *ius publicum*, and the only Roman one which survives. As noted at the outset, the divide which it postulated between public and private law was of the greatest significance, for it contained the germ of an idea that there was a sphere of law whose special concern was the state and its <89> administration. When we come to the question of the content or distinguishing features of public law,

⁶ D. 1, 1, 1, 2. <89>

however, it has to be admitted that the Roman sources were less far-reaching and less helpful. *Ulpian* lists three elements of public law: religion, priesthoods and magistracies, and the list seems to be intended to be exhaustive. Only the last of these elements looks much like public law to modern eyes, but this single word does not provide much guidance.

Moreover, the boundary between private and public law is scarcely explored in the Roman sources⁷. To take an obvious difficulty, the Roman jurists were ambivalent on the question whether a town (*civitas*) was to be treated according to private or public law. The purist view appears in the Digest: according to *Gaius*, the term 'public' applied to the Roman people, while towns were in the same position as private individuals⁸; similarly, *Ulpian* thought that the property of towns could be described as 'public' only by an abuse of language⁹. But these clear statements neither accorded fully with views expressed in other contexts by the same jurists¹⁰ nor did they fully reflect Roman practice: for there were special legal rules and remedies which dealt with municipal property; they may not have been the same as those available to the Roman people, but neither were they the same as those open to private individuals.

Worse, the Roman jurists used the expression *ius publicum* in various senses: sometimes to denote the whole legal order of Rome, sometimes to refer to rules of law which were inderogable, and then sometimes in contexts clearly of private law: so, for example, institutions such as marriage, dowry, and tutors are said to belong to public law, but by this what appears to be meant is that they serve the public good: they are particularly important for the maintenance of civil society. Whatever else the Roman jurists suggested, it was rarely that *ius publicum* was conceived as a separate branch of the law concerned with the state or its constitution. A common theme which does, however, emerge in the jurists' references to *ius publicum*, at least from the reign of *Hadrian*, is its connexion with the common good or public interest, *utilitas publica*¹¹. That association appears in *Ulpian's* definition itself.

⁷ There is only one other text in which the terms *ius privatum* and *ius publicum* appear together, and that is simply to the effect that the jurist *Tubero* was a great expert in both: *Pomp.* D. 1, 2, 2, 46.

⁸ D. 50, 16, 16.

⁹ D. 50, 16, 15.

¹⁰ *Gai.* D. 1, 8, 1 *pr.* (ambiguous) and D. 41, 3, 9; *Ulp.* D. 43, 24, 5, 4 and D. 50, 16, 17 *pr.* <90>

¹¹ *M. Kaser*, *Ius publicum und ius privatum*, ZSS (RA) 103 (1986) 1.

2. The later development of *ius publicum*

Ulpian's tripartite definition of *ius publicum* was seized upon by *St. Isidore of Seville* and by that route surfaced in the *Decretum of Gratian*, but curiously enough <90> in neither work is there any reference to the divide between *ius privatum* and *ius publicum*. Most of the Decretists and Decretalists make no reference at all to *ius privatum*, and it seems that canon law simply did not employ any distinction between the spheres of public and private law¹². On the secular side, the notion of *ius publicum* surfaces from time to time; *Accursius* grandly pronounces that it exists to preserve the state¹³. There are reminiscences too of *Ulpian's* remarks about public utility; *Bartolus* asserted that *merum imperium* was exercised essentially in the interests of public utility; *mixtum imperium* in those of private utility. But these remarks are made essentially in passing, and the recognition of public law as a special sphere of law was slow to come. Only from about 1600 did it begin to establish itself as an independent discipline in the universities in Germany. This in itself perhaps owed something to Roman law, namely to the aridity of *Ulpian's* definition¹⁴.

But this of course did not mean that no thought was given to questions of a public nature. Discussion proceeded in the absence of the concept: there is much, for example, in *Bartolus* about questions of political legitimacy¹⁵. There was authority in the texts, as we have seen, for confining the term 'public' and the noun *res publica* to the state itself, but there was also authority for taking 'public' to refer to municipalities as well¹⁶. Advantage could be, and was, taken of this uncertainty since, from the assertion that city and municipality were like the state itself within the public sphere, it was a swift step to the conclusion that they too enjoyed political powers, *imperium* and *iurisdictio*¹⁷. There will be more to say about this later.

¹² *H. Mülljans*, *Publicus und privatus im römischen Recht und im älteren kanonischen Recht*, 1961.

¹³ Gl. *publicum* on D. 1, 1, 1, 2: "ad statum conservandum ne pereat".

¹⁴ *M. Stolleis*, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 1, 1988, at pp. 58, 75.

¹⁵ Cf. *Stolleis* (n. 14) 65.

¹⁶ Gl. on Auth. 1, 1. The debate continued among the Commentators: see *J. Canning*, *The Political Thought of Baldus de Ubaldis*, 1987, at p. 123.

¹⁷ *J. Gaudemet*, *La contribution des romanistes et des canonistes medievaux a la theorie moderne de l'état*, in: *Diritto e potere nella storia europea: Atti in onore di Bruno Paradisi*, 1982, 1, at pp. 28-9. <91>

3. Summary

The Digest therefore contained only the bare bones of the idea that there might be such a thing as an independent sphere of law embracing public matters. The unhelpfulness of the definition found there, and the exiguous treatment meted out to public law in general by the Roman jurists, do something to explain why the development of the area was slow and tentative. <91>

III. Institutional and Constitutional Questions

In the surviving Roman texts two strands of public and constitutional thinking can be separated, and it is proper to treat them separately here. The first consists of occasional assertions about sovereignty and power. These are found in both Digest and Code and are mostly absolutist in character and Justinianic in date. The second strand is made up of the conceptions of *imperium* and *iurisdictio* which emerge from the discussions of the classical jurists. They are preserved in a few excerpts in the Digest.

1. Sovereignty and the power of the Emperor

The position of the emperor is proclaimed in several texts, not all consistent. On the one hand, he is said not to be bound by statute (*princeps legibus solutus est*)¹⁸; it is well known that this sentence, lifted from *Ulpian*, came originally from the limited context of a commentary on the *lex Iulia et Papia*, and may have meant no more than that that composite law did not apply to the emperor. Be that as it may, in the Digest it signals unrestricted freedom from statutes. The same conception lies behind *Justinian's* assertion that God had sent among men the emperor as a "living statute", to whom statutes themselves were subject¹⁹. Earlier, *Justinian* had proclaimed that the emperor alone had power to make statutes and to interpret them²⁰. In the Code, on the other hand, a constitution of *Theodosius* and *Valentinian* stated that it was worthy of the emperor to profess himself to be bound by statutes²¹.

¹⁸ D. 1, 3, 31.

¹⁹ Nov. 105, 2, 4 (536): "[imperator], cui et ipsas deus leges subiecit, legem animatam eum mittens hominibus".

²⁰ C. 1, 14, 12, 3-5 (529): "explosis itaque huiusmodi ridiculosis ambiguitatibus tam conditor quam interpres legum solus imperator iuste existimabitur".

²¹ C. 1, 14, 4 (429): "digna vox maiestate regnantis legibus alligatum se principem

On sovereignty, virtually the only text which raised the question of constitutional relations between emperor and people stated: "What the *princeps* decides has the force of statute, as the people, by the *lex regia* which was passed regarding his power, confers on him all its own power and authority"²². This can be read as democratic legitimation of the emperor by the people: by *lex* the people parts with its own *imperium* and *potestas* in favour of the emperor. The term *imperium* is being used loosely, since *imperium* in the narrow sense in which the jurists regularly use it was the preserve of the higher magistrates and pro-magistrates, and the people did not itself possess it. It may be thought that this text is no more than *ex post facto* rationalization by *Ulpian* of powers which in his day the emperor undoubtedly did have. But it is also possible that he is referring to the *lex de imperio* passed at the accession of the emperor and which invested him with power²³. Whatever the truth of the matter for Roman times, there is no doubt that in subsequent political discourse this text was of the greatest importance.

2. General theories of *imperium* and *iurisdictio* in Classical Roman law

The Roman jurists provide no general account of the key notions of public law. Although the 2nd and 3rd centuries saw a fashion for writing books about the office of one magistrate or another (*libri de officio*), the most notable example of which is *Ulpian's* ten books *de officio proconsulis*, the surviving material is disappointingly thin. There is no extended discussion of *imperium* or *potestas*, the rudiments of state power. Of the small number of texts on questions of what we would call constitutional law, few come from a *liber de officio*; and many more come from the ordinary run of commentaries on the edict or civil law. The most substantial contribution is made by discussions of the municipal provisions in the edict. That is an observation of some interest. It might be said that the jurists, having in their practice and study of private law no need or opportunity for exposition of the nature and extent of the powers and jurisdiction of state magistracies, determined to exploit the opportunity to do this in connexion with municipal magistrates instead. There was room for the development of similar theory, but there was the added attraction that the material to be expounded had a connexion with the

profiteri".

²² *Ulp.* D. 1, 4, 1 *pr.*; cf. *Gai.* 1, 5. <92>

²³ *P.A. Brunt*, *Lex de imperio Vespasiani*, *Journal of Roman Studies* 67 (1977) 95, at pp. 110-13.

traditional material of private-law debate: the edict.

From a few texts, however, it is possible to piece together a general account of *imperium* and of *iurisdictio*; it was from these same texts, used selectively rather than systematically, that medieval and later jurists constructed their own arguments about sovereignty and power. The questions at issue for them were of constitutional significance; it is difficult to maintain that the stakes were so high in the discussions in the Roman sources.

(a) *Imperium*

The central concept in Roman public law is *imperium*²⁴. The concept of *iurisdictio* is also important. The following are perhaps the most significant of the various points which the jurists make about these two concepts. First, *imperium*. There were degrees of *imperium*, so that a consul had greater *imperium* than a praetor, <93> and the emperor had *imperium* greater than that of any magistrate. Accordingly, a magistrate had no *imperium* over a magistrate of the same or higher degree but could exercise it only over one of a lower degree²⁵. *Imperium* could be exercised, at least by pro-magistrates, only within their provinces and for the period during which they had charge of them²⁶. *Imperium* could be 'undiluted' (*merum*) and so include *iurisdictio* as well as 'the power of the sword' (*ius gladii* or *potestas*), a capital jurisdiction in criminal matters, or it could be 'mixed' (*mixtum*) and include *iurisdictio* only²⁷.

(b) *Iurisdictio*

Second, *iurisdictio*. Here it is necessary first to deal with the possible objection that it has nothing to do with public law. There is no doubt that the granting of a civil legal remedy (*iudicium dare*) is the original meaning of the word²⁸. But there is equally no doubt that, already among the late classical jurists, the term was applied in relation to criminal and administrative

²⁴ See esp. *Th. Mommsen*, *Römisches Staatsrecht*, vol. 1, Leipzig, 1887, *passim*. <93>

²⁵ *Ulp.* D. 36, 1, 13, 4; D. 4, 8, 3, 3; *Paul* D. 4, 8, 4.

²⁶ D. 1, 18, 3; D. 1, 17, 1 and D. 1, 18, 17.

²⁷ D. 2, 1, 3.

²⁸ *M. Lauria*, *Iurisdictio*, in: *Studi Bonfante II*, Milan, 1920, 481, at p. 492; *M. Kaser*, *Das römische Zivilprozeßrecht*, 1966, at pp. 132 sqq.

matters²⁹. Nor is the reason for this less technical usage far to seek: with the rise of the *cognitio* system of procedure, the difference between a private procedure conducted by an official, and any other kind of procedure conducted by the same official, was far from clear. *Iurisdictio* could therefore be used beyond the narrow realms of private law, to denote the powers of a magistrate in what would now be regarded as public law.

Iurisdictio embraced the general powers which a magistrate had to administer justice³⁰. In the narrow sense, it did not include the power to make certain, mostly interlocutory, orders concerned with the administration of justice, because they properly belonged to *imperium*³¹. A magistrate had *iurisdictio* only over persons who had the appropriate domicile (which itself was a question for him to decide)³². His *iurisdictio* might be subject to territorial and financial limits³³, but could be prorogated by those otherwise not subject to it³⁴. *Iurisdictio* could be exercised only personally, unless statute or convention allowed it to be delegated³⁵. <94> It could be exercised only by a properly appointed magistrate³⁶. If the magistrate had no *iurisdictio*, an order pronounced purportedly in pursuance of it was null and void³⁷.

(c) Conclusions

With an eye to the future role of Roman law, two points can usefully be drawn from these brief outlines. The first is that in these texts we find the jurists adumbrating the concept of an office which must be exercised according to law, and which confers on its holder powers which are defined and delimited by law. Some of the powers are taken to be inherent in the nature of the office; others are expressly conferred by legislation of one sort or another. But the magistrate must act within those powers, and acts which go beyond them are void; for example, a magistrate who purports to act officially outside his own

²⁹ *Lauria* (n. 28) 493-508.

³⁰ In civil litigation it also has the narrower sense of the power to determine the issue to go to trial, and to make various interlocutory orders.

³¹ D. 2, 1, 4 and D. 50, 1, 26.

³² D. 2, 5, 2 *pr.*; D. 5, 1, 2, 6 and 5; C. 8, 1, 2 (260).

³³ D. 2, 1, 20; D. 50, 16, 239, 8.

³⁴ D. 2, 1, 15; D. 5, 1, 2 *pr.*; cf. D. 1, 16, 2 *pr.* and 16.

³⁵ D. 1, 21, 1. <94>

³⁶ D. 1, 14, 3.

³⁷ D. 2, 2, 1, 2; D. 49, 1, 23, 1; C. 3, 3, 1 (242); C. 3, 4, 1 (440).

province acts to no effect: as *Paul* notes, he is treated as a private individual³⁸. Equally, owing to the hierarchy of magistrates' *imperium*, the acts of magistrates lower in the pyramid can be controlled by those above. As *Ulpian* says, "a praetor has no *imperium* over a praetor nor has a consul over a consul"³⁹, and the solution, where there is an impasse owing to equality of powers, is to seek assistance from the emperor. These considerations about the legitimate exercise of power are manifestations of a rule-of-law rather than an absolutist model of the state and they are developed particularly in connexion with *iurisdictio*⁴⁰. This is perhaps no more than we should expect: while *iurisdictio* itself is not a matter of private law, the concept does provide the very foundation of private-law (and other) procedure in the courts; it therefore falls within the sphere the jurists generally regard as their own.

Second, it is remarkable, considering the central role of the concept *merum imperium* in later political thought, how slight a part it plays in the writings of the jurists. It appears only three times in the Digest. The first sighting is in the well-known text from *Ulpian's* book on the office of *quaestor* which explains that there are two types of *imperium*, *merum* and *mixtum*⁴¹. Unfortunately the context is unclear, since the text is one of only two which survive from that book, and it remains mysterious why it should have been necessary to discuss *imperium* in a work devoted to the *quaestor*, a magistrate who did not possess it. The remaining two appearances of *merum imperium* are in the context of delegation of jurisdiction. Both authors, *Papinian* and *Paul*, say that it is possible to delegate jurisdiction and that that will carry with it such *imperium* as is necessary for the exercise of jurisdiction, <95> but that *merum imperium* cannot be delegated. *Papinian* also draws a distinction between powers which are inherent in a particular office and powers which are attributed by special legal grant: only powers in the first category are delegable; *merum imperium* belongs in the second⁴². These three fragments might be thought a slight base on which to build elaborate theories in later law. But their generality left that same later law encouragingly untrammelled by constricting and unhelpful rules and details.

³⁸ D. 1, 18, 3.

³⁹ D. 36, 1, 13, 4.

⁴⁰ C. 7, 48 collects a number of 3rd to 5th century rescripts raising similar points about judges in *cognitio* exceeding their authority.

⁴¹ D. 2, 1, 3. <95>

⁴² *Pap.* D. 1, 21, 1, 1; *Paul.* D. 1, 18, 5.

3. *The later development of Public Law concepts - Use of the Roman texts and terms*

For several centuries after the rediscovery of the Digest, it was to be these Roman public-law concepts which supplied the basic vocabulary of debate about sovereignty, the powers of emperor and of city, the relations between emperor and magistrate. Their potency lay in an abstraction which permitted ready transfer to modern institutions; little or no hesitation was felt about such transfers. Many texts were put to new uses: for example, the question arose whether the emperor was bound by his predecessors' acts or legislation. *Accursius* held that he was not, since an equal did not have *imperium* over an equal. The Roman jurists had not employed that rule in that way⁴³. The Roman jurists had also been sparing in defining concepts; it was open to their successors, when they took over Roman terms, to reshape them for their own purposes. Thus *Azo* defined *iurisdictio* as "a power publicly introduced with the necessity of stating the law and establishing equity"⁴⁴. The Romans would hardly have put it so broadly.

Roman terms, and the texts in which they appeared, were simply taken over - sometimes of course transformed in meaning - and applied to medieval institutions. At a mundane level, the medieval town could be described as *municipium* and the financial imposts on its citizens as *munera*⁴⁵. Not surprisingly, it was the law of the later empire, known from the *Corpus iuris civilis*, which was taken over, with its decurions and *defensores civitatum*⁴⁶. The titles and offices attested in the various rubrics of the first book of the Digest were laboriously translated to apply to contemporary hierarchies of office⁴⁷. The medieval 'podestà' was compared to the Roman *praeses* or governor: both were temporary officials from outside the locality who, with their assessors, were responsible for the administration of justice. The 'podestà' was regularly assisted by assessors or represented by a judge- <96> delegate, just as the governor had been in the later Roman empire⁴⁸. Nor was the influence of the Roman model of administering justice confined to communities which adopted the 'podestà' constitution: it can also be seen in

⁴³ Gl. on D. 1, 3, 31, citing D. 4, 8, 4 on this point.

⁴⁴ *Azo*, *Summa super codicem*, ed. Viora, Turin, 1966, on C. 3, 13.

⁴⁵ *Coing* (n. 5) 80.

⁴⁶ *Gaudemet* (n. 17) 31.

⁴⁷ *Stolleis* (n. 14) 66. <96>

⁴⁸ *W. Engelmann*, *Die Wiedergeburt der Rechtskultur in Italien*, Leipzig, 1938, at p. 58.

Sicily and Naples⁴⁹. Furthermore, the powers of individual officials were sometimes supported by argument from Roman law⁵⁰; and the extent of a community's jurisdiction might be supported in the same way⁵¹. Once allowances are made for changed political circumstances, it is clear that Roman institutions were received in later law, some transformed in the process until virtually unrecognizable⁵². It was not a purely Italian phenomenon: for example, the 14th century jurist *Philip of Leiden* regularly employed Roman terms in his 'De cura reipublicae et sorte principantis'⁵³.

Apart from this, however, the Roman texts provided the basis for constitutional doctrine; the development of the idea of the absolute state; the concept of sovereignty; the claim of the emperor to be the sole source, and sole interpreter, of statute. All these owed a debt to the absolutist position of the *princeps* asserted, or sometimes just assumed, in the *Corpus iuris civilis*. But the texts were sufficiently various and sufficiently malleable to be used not just in support of absolutist positions but also for republican ends. The earliest glossators, applying the statement that the emperor was *dominus mundi*, Lord of the World⁵⁴, to the position of the Italian city-states, reached the conclusion that, as a matter of law, those states must be entirely subject to the power of the emperor, and the emperor must be the sole bearer of *imperium*. A literal reading of the *lex regia* from *Ulpian's* text supported that view, since by that statute the people had transferred its sovereignty and invested the emperor with it⁵⁵. But this did not mean power without legal limit, since the medieval lawyers invariably followed, not the view expressed in the Digest that the emperor is not bound by the laws, but the rival assertion in the Code that it is worthy of a ruler to profess himself to be bound by them⁵⁶. From this was derived the premise that there are legal limits on the

⁴⁹ *Engelmann* (n. 48) 61.

⁵⁰ See, e.g., *Coing* (n. 5) 91 on Bart. Cons. 136, deriving the penal powers of the papal *capitaneus patrimonii* from D. 2, 3, 1 *pr.*

⁵¹ E.g. according to *Bartolus*, a *civitas* had the limited jurisdiction of a *defensor civitatis* (C. 1, 55, 1); villages had none: *Coing* (n. 5) 91. Cf. *Stolleis* (n. 14) 66, n. 46.

⁵² *F. Wieacker*, *Privatrechtsgeschichte der Neuzeit*, 2nd ed., 1967, p. 135.

⁵³ *B. Hermesdorf*, *Ius romanum medii aevi V 5 a*, 1968, at pp. 93 sqq.; *R. Feenstra*, Philip of Leyden and his Treatise De cura rei publicae et sorte principantis, in: *idem*, *Le droit savant au moyen âge et sa vulgarisation*, London, 1986.

⁵⁴ D. 14, 2, 9.

⁵⁵ The Latin has *conferat*, 'conferred'; it is notable that the gloss on that word states *et transtulit*.

⁵⁶ C. 1, 14, 4.

exercise of public power⁵⁷. <97>

By the end of the 12th century the republican potential of other texts in the *Corpus* was already being exploited. In his *Lectura super codicem*, treating the people of the city-state as a *universitas*, Azo was able to argue that the individuals who made up a people had transferred the exercise of *iurisdictio* to their ruler, but the *universitas* itself had not; it followed that the people as an *universitas* had never lost this power, and the transfer to the ruler was revocable⁵⁸. Glossing the terms *iurisdictio* and *merum imperium*, Azo also argued that, since the higher magistrates of city-states had the power to establish new laws, they too must be bearers of *merum imperium*⁵⁹. Here the Roman sources were used to legitimate a doctrine of popular sovereignty; and with the 12th century decretist *Huguccio of Pisa* began a similar line of argument about the relations between the pope and the *universitas* of the church. Indeed it is important to bear in mind the contribution made to these questions by the canonists. By singling out religion and priesthoods as two of the three elements of public law, *Ulpian* had given a clear signal to canonists to interest themselves in questions of public law. Just as Azo in his *Quaestiones* had maintained that every ruler had the same power in his territory as the emperor⁶⁰, so too, as early as 1202, had *Innocent III* acknowledged that the king of France, *Philip Augustus*, was an emperor in his own kingdom⁶¹. And, just as the civilians came to interpret their texts in support of civic autonomy, so too did the canonists⁶².

4. Bartolus

With *Bartolus*, such arguments were further refined. He elaborated a complex hierarchical scheme of powers based on the Roman term *iurisdictio*⁶³. It was taken as a genus which was divided into two species, *imperium* and *iurisdictio* in the narrow sense, which he called *iurisdictio simplex*. *Imperium* itself was

⁵⁷ *Coing* (n. 5) p. 92. <97>

⁵⁸ Azo, *Lectura*, reprint of ed. Pavia, 1506, Turin, 1966, 1, 14, 11.

⁵⁹ Azo, *Summa*, reprint of ed. Pavia, 1506, Turin, 1966, gl. on C. 3, 13. There is here the basis of a hierarchy of powers such as was later developed in detail by *Bartolus* (see below); cf. also gl. *mixtum* on D. 2, 1, 3.

⁶⁰ Azo, *Quaestiones*, ed. Landsberg, Freiburg, 1888, at pp. 86-7.

⁶¹ Decretal 4, 17, 13, *Per venerabilem*.

⁶² *S. Mochi Onory*, *Fonti canonistiche dell'idea moderna dello stato*, Milan, 1951.

⁶³ See, e.g., *In primam Digesti Veteris partem commentaria*, in: *Opera omnia*, Basel, 1588, vol. 1, on D. 1, 21. <98>

further divided into *merum imperium* and *imperium mixtum*. For each of these three concepts *Bartolus* constructed a hierarchy in six degrees (*maximum, maius, magnum, parvum, minus, minimum*), so arriving at eighteen degrees of power in all. For example, the *maximum merum imperium* was held only by *princeps*, senate and praetorian prefect, while the *minimum* was simply the right to impose a small fine, and was much more widely held. Many editions of the Digest include this scheme represented in the pictorial form of the tree of jurisdictions⁶⁴. The motivation for developing this <98> scheme was the attempt to bring the Roman texts into line with the realities of contemporary society. *Merum imperium* was not in reality exercised solely by the emperor; the cities could claim also to have wielded it for a very long time. This was tantamount to a claim that the cities were governed by free peoples, who wielded their own *imperium*. Each, in *Bartolus*' famous phrase, could be said to be a *princeps* to itself (*civitas sibi princeps*)⁶⁵. By this means *Bartolus* extended the notion of the ruler who recognized no superior to the *civitas* itself⁶⁶. None the less, the *merum imperium* which cities possessed was manifestly not the same as that of the emperor. The hierarchy of degrees of *imperium* was the solution to the problem.

Bartolus' scheme went far beyond anything the Roman jurists had ever imagined. The central role given to *iurisdictio* shows the persistence of Roman influence. It is of course true that the Bartolist conception of the word is remote from the Romans' own. The words *ius dicere*, which had been used by the Roman jurists to denote the granting of a remedy in civil litigation, in *Bartolus* come to mean simply the exercise of the magistrate's authority. But the very construction of *Bartolus*' hierarchy depended on understanding the powers of magistrates as defined and limited, a message clearly conveyed by the Roman texts. Equally, the Roman texts strongly supported the understanding of *iurisdictio* as a power within territorial limits; this may explain some of the appeal of the concept, since the Bartolist scheme was designed precisely to accommodate the powers of cities and regions⁶⁷. In

⁶⁴ *M.P. Gilmore*, *Argument from Roman law in Political Thought 1200-1600*, Cambridge, Mass., 1941, pp. 36-44.

⁶⁵ *Q. Skinner*, *The Foundations of Modern Political Thought*, vol. 1, 1978, at pp. 9-12.

⁶⁶ *Bartolus* (n. 63) on D. 4, 4, 3.

⁶⁷ *Bartolus* (n. 63) on D. 2, 1, 1, n. 15. For further discussion, see *D. Willoweit*, *Rechtsgrundlagen der Territorialgewalt*, 1975, e.g. on *Baldus*, at pp. 26 sqq. There is a parallel development in the canonists in relation to the territorial limits of the authority of bishop and priest: *Mochi Onory* (n. 62) 261.

details too this scheme owed much to Roman law and to two texts in particular: *Ulpian's* distinction between *imperium merum* and *mixtum*, and *Papinian's* distinction between powers inherent in an office and powers specially attributed to its holder. Applying *Papinian's* distinction, *Bartolus* found the lowest two degrees of power in his hierarchy to be delegable⁶⁸, and the remaining four non-delegable.

Although Roman in inspiration, this was in no sense a historical picture of Roman practice. In Roman terms *iurisdictio* was not the archetype of power itself, but a concept subordinate to *imperium*. As *Cujas* pointed out, for the Romans there was no such thing as *iurisdictio simplex*: since there could be no *iurisdictio* without some degree of *imperium*, it followed that *imperium mixtum* and *iurisdictio simplex* were the same thing⁶⁹. But such objections miss the point. In his use of these <99> concepts *Bartolus* can be seen shaping the malleable conceptions of Roman public law to serve new ends. The essence was to explain and to justify a plurality of jurisdictions such as a feudally organized society presented. The model of delegated and territorial powers put forward in the Roman sources turned out to be remarkably apt for this⁷⁰. *Bartolus'* complex scheme married Roman concept and social fact in a way scarcely to be repeated⁷¹.

The whole medieval debate on public powers is therefore informed by the spirit of Rome. This does not, of course, mean that there is close adherence to the doctrine of Roman law. What it does mean is that Roman terms are used to describe modern institutions; Roman terms are defined or redefined to answer modern demands; Roman texts are applied, distinguished or combined to produce arguments to meet modern needs. In short, the whole debate about the state and the powers of the sovereign is carried on in Roman terms. That is the extent of the influence of Roman public law.

⁶⁸ To some extent the hierarchy of powers and the indelegability of the higher powers had already been worked out in the Gloss: gl. *mixtum* on D. 2, 1, 3.

⁶⁹ *J. Cujas*, *Observationes et emendationes* 21, 30; the objection is in fact anticipated in gl. *mixtum* on D. 2, 1, 3. <99>

⁷⁰ Cf. *Willoweit* (n. 67) 32.

⁷¹ Others simplified his scheme without challenging its essence: *Baldus* found three rather than six degrees of *imperium* to suffice; *Jason de Mayno* settled for four of *imperium merum* and three of the others: *Gilmore* (n. 64) 43. For comprehensive discussion of *Baldus*, see *Canning* (n. 16).

5. Jean Bodin

To jump from *Bartolus* to *Bodin*, though undisturbing alphabetically, may seem unwarranted. Excuses have been pleaded already. This is a jump from the medieval to the modern concept of authority. And *Bodin* offers an opportunity to assess the continuing influence of Roman law at a time when it had already faced the critical challenge of humanism. *Bodin's* views about the merits of the medieval Commentators were scathing, and he professed the view that the first accomplishment of the jurisprudence of his day had been to purge medieval errors and restore the "pristine dignity" of Roman law⁷². He also expressed doubts about the value of continuing to study Roman law, asserting that there were *Papinians* and *Labeos* enough, if only they would break with the authority of Roman law and create a system of their own⁷³. The question arises how far in his own work *Bodin* did break free.

Not far, it seems, in his early work of 1566, the *Methodus ad facilem historiarum cognitionem*. There *Bodin* divided the authority of a magistrate into two parts, one granted to him by law and the other held by virtue of his magistracy; the latter power alone was delegable⁷⁴. This division was based on *Papinian's* distinction <100> between powers inherent in an office and powers specially attributed. *Bodin* held that from society to society the answer to the questions whether magistrates had *merum imperium* and what the content of that *imperium* was might differ⁷⁵. For *Bodin*, as for *Bartolus*, there were degrees of *merum imperium*.

Ten years later, in his 'Les six livres de la republique' of 1576, *Bodin's* concern was essentially to identify the nature of sovereignty, and he did this by looking not only at the French or Roman position but at a great variety of other states besides. This universality was new. Can it be said that here at last we reach the end of the influence of Roman law? The answer to this question must again be 'no'. While *Bodin's* approach was neither uncritically nor exclusively centred on Rome, the questions he asked could hardly be considered in isolation from all that had gone before. His very concern to identify the marks of sovereignty might even be seen as a reformulation of an

⁷² J. Franklin, *Jean Bodin and the Sixteenth Century Revolution in the Methodology of Law and History*, 1963, at p. 65, citing *Bodin's* *Methodus* in: P. Mesnard, ed., *Oeuvres philosophiques* 107, at p. 108A.

⁷³ Franklin (n. 72) 107B.

⁷⁴ Gilmore (n. 64) 103. <100>

⁷⁵ Gilmore (n. 64) 101-4.

old question: which 'political' powers were unique to the king or sovereign and which were also to be found in lesser authorities? In essence *Bodin* put this question in another way: which powers could the sovereign cede to other authorities without ceasing to be sovereign?

When *Bodin* came to discuss the marks of sovereignty, the first one he identified was the power of the sovereign "to give law to all in general and to each in particular". This power carried with it the power to repeal, to correct, and to interpret the laws as appropriate⁷⁶. Lurking barely concealed behind this mark of sovereignty is *Justinian's* claim as emperor to be the sole source and sole interpreter of law⁷⁷. Roman conceptions also surface in connexion with those holders of power who are not sovereign. A magistrate who exceeds his jurisdiction is to be regarded as a private individual⁷⁸. The same applies to a governor or regent, but not to the sovereign himself, since the people has transferred all power and authority to him⁷⁹. Here, in one and the same chapter, we find the absolutist doctrine of the *lex regia* combined with republican doctrine about the restraints on the use of *imperium*. Roman law had left its mark.

IV. Conclusions

In the late medieval period the influence of Roman public law on contemporary public law had been almost total: Romanization of modern terminology had been carried on as a matter of course, and the term *iurisdictio* had been taken over from <101> Roman law to organize the varying degrees of power possessed by emperor, cities and territories. In the 16th century the direct influence of Roman law became more subdued but, even when the focus of attention shifted with *Bodin* to sovereignty, there was no clean break with the Roman heritage. The Roman texts on *iurisdictio* and the *lex regia* continued to inspire a debate about sovereignty and territorial power which persisted through the earlier years of the 17th century⁸⁰. During the 16th and 17th centuries, new positive public laws played a part of increasing importance and the space left for Roman law as the source of law of last resort

⁷⁶ *J. Bodin*, *Six livres de la république*, Paris, 1583; repr. Aalen, 1961, I.10, at pp. 221-3.

⁷⁷ C. 1, 14, 12, 3-5 (529).

⁷⁸ *Bodin* (n.76) III.5, p. 445; III.6, p. 464.

⁷⁹ *Bodin* (n. 76) I.8, p. 127. <101>

⁸⁰ *Stolleis* (n. 14) 62.

steadily shrank.

Yet, rooted in the discipline of public law which now went on to develop independently, were concepts and structures of Roman creation⁸¹. Firmly entrenched too was the methodology of Roman legal argument, although that was the legacy essentially of private law. And there persisted concepts so well established that their Roman origin was no longer observed: the claim of the sovereign to a monopoly on the passing and the interpretation of legislation; the concept of the public office exercisable only within defined limits and powers. There is an element of paradox here. On the one hand, the Roman sources provided a model of the most unrestrained absolutism, apt for the elaboration of theories of sovereignty and unfettered power. But on the other hand, less prominent but unmistakably present in the Roman sources was a theory of control of powers worked out by the jurists in relation to magistrates. These two very different models do much to account for the continuing appeal of Roman law under the most various regimes. The Digest contained a selection of absolutist and republican texts to suit all tastes.

⁸¹ *Stolleis* (n. 14) 63.