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THE RELATION OF MEDIAEVAL AND RENAISSANCE LEGAL-POLITICAL TRADITIONS TO JEAN BODIN'S CONCEPT OF PUBLIC LAW

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ABSTRACT

THE RELATION OF MEDIAEVAL AND RENAISSANCE LEGAL-POLITICAL TRADITIONS TO JEAN BODIN'S CONCEPT OF PUBLIC LAW

Margriet Zwarts

The aim of this thesis is to set Bodin's political theory within the context of earlier legal and political thought, as well as of the political realities of his day. A survey of mediaeval legal theory, a brief outline of French institutions, and an analysis of French Renaissance constitutional theory are given to suggest how Bodin shaped his absolutist doctrine. In this way, Bodin's indebtedness to mediaeval legal theory, in addition to the innovations Bodin made in political philosophy, are analyzed.

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I

In his preface to the first French edition of Les Six Livres de la République, Jean Bodin (ca.1529-1596) lamented that so little work had been done in the study of politics and the systematic analysis of governments. Aristotle and Plato had dealt all too briefly and elliptically with this subject, whereas modern theorists such as Machiavelli "had profaned the sacred mysteries of political philosophy"[1] by their defiance of the precepts of justice and by their ignorance of laws and public rights. The exemplary political philosopher, argued Bodin, should above all begin with a clear understanding of justice and, consequently, of those public laws that guarantee each citizen his due. Only advocates or jurisconsults, then, can fully grasp the true principles of political philosophy. For they alone have anatomized the legal structure of the state and have had practical experience in establishing governments, settling disputes of both rulers and citizens, and adjusting natural or divine law to the needs of men living within a commonwealth.

In rejecting the political theories of his contemporaries, Bodin

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[1] Jean Bodin, The Six Bookes of a Commonweale, facsimile reprint of the Knolles translation of 1606 with apparatus and introduction by Kenneth D. McRae (Cambridge (Mass.): Harvard University Press, 1962), p. A69. Hereafter referred to as Commonweale.

firmly allied himself with an older tradition of political thought: a tradition that fused legal studies to the study of governments. Throughout the Middle Ages, the exegesis of Roman law had stimulated the formulation and expression of political theory. The Justinian code had outlined a network of rights and duties — of legal relationships between subject and ruler — and attempts to lay bare this network had gradually led late mediaeval jurists to a conscious notion of the state and of public or constitutional law.

In particular, civilians and canonists arrived at the idea that all polities maintained certain rights and functions in order to exist and to protect the common welfare. At the same time, they developed concepts of the office of kingship, the inalienability of the basic functions of the Crown, and the inalienable public and private rights of the individual.[2] The assumption that underlay all their inquiries was that human law — be it private or public — reflected the idea of justice, derived its force from eternal law, and, as such, formed the essence of the body politic. For mediaeval jurists, then, the polity was a legal association patterned on the idea of divine or natural justice. An understanding of public law — that which regulates the structure of this legal association by specifying the legal rights and

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[2] Peter N. Riesenberg, _Inalienability of Sovereignty in Medieval Political Thought_ (New York: Columbia University Press, 1956; rpt. ed., New York: AMS, 1970), p. 3.

duties of ruler and subject — should inevitably lead to a better understanding of the nature of the polity as well as the means whereby justice is realised within the polity.

Bodin based his arguments for the use of legal studies in political philosophy on similar grounds: we can only understand the nature of government (or, to use Bodin's Aristotelean classification, its formal, material, efficient, and final causes), if we understand those public laws that establish the network of legal relationships within the state. And, of course, we must also assume that this legal network corresponds to a pattern existing in the mind of God, that public law conforms to the immutable principles of justice.

The analysis of public law during the Middle Ages had, however, remained tied to the exegesis of the Corpus Juris, the only legal system that mediaeval jurists considered to be comprehensive, workable, and universally valid. The illusion that the Justinian code remained relevant in the contemporary world could be sustained as long as the German Empire seemed to be the historical heir to Justinian's Empire. But the rise of independent national states in the late Middle Ages, each with its unique system of customary law, provoked the re-examination of previous legal thought and the eventual rejection of the Corpus Juris as the only source of law. During the Renaissance, publicists and legists in the service of the national states claimed that the Roman law had originated from institutions and customs which no longer obtained in

contemporary society and that, as a result, all attempts to mould the Corpus Juris to fit contemporary institutions would prove anachronistic.

Legal scholarship in Italy and subsequently in France then took refuge in rescuing the Roman law from the so-called barbarisms of its mediaeval interpreters. Fifteenth and sixteenth century legal humanists — those lawyers trained in the new learning and methodology of the Renaissance as well as in traditional juridical theory — soon realised that a comprehensive knowledge of Roman society was needed to understand the provenance and complexity of any particular law; philological studies provided these scholars with the key to the past. However fruitful this philological research may have been for historical scholarship, many legists protested that such antiquarian pursuits stifled the art of jurisprudence. Because their historical research had led to a concept of cultural diversity and because they recognized no universal law code that might serve as the basis for a universal theory of public law and government, the legal humanists took little interest in the application of legal learning to political philosophy.[3] According to Bodin, the major concern of such eminent scholars as Guillaume Budé and Jacques

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[3]Donald Kelley, Foundations of Modern Historical Scholarship: Language, Law, and History in the French Renaissance (New York: Columbia University Press, 1970), pp. 30-35.

Cujas was simply to "begin disputes in schoolboy fashion over words and trivial matters."[4]

Throughout all his major writings, Bodin worked toward one goal: the resurrection of the art of jurisprudence from the dust of the classroom. Yet, his claim to be a neo-Bartolist notwithstanding, Bodin never advocated a simple return to the theories and methods of earlier legal studies. Even though he expropriated many mediaeval concepts, proposed a programme of legal studies that might lay the groundwork of a complete political theory, and assumed, as had mediaeval jurists, that an analysis of political structures rests upon an analysis of public law, Bodin also wanted to exploit the new learning of the legal humanists. Traditional exegesis of the Corpus Juris would serve as only one source, however essential, for his political theory. He would also investigate non-legal sources on the structure of Roman institutions as well as dissect the law codes and institutions of all major commonwealths past and present.

To pull together the results of his research, Bodin further proposed a new methodology: by means of a comparative framework, he would synthesise his information on public law and institutions. Bodin, then, recommended that two major innovations be made in the study of law:

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[4] Commonweale, p. A71.

the scope of legal research should be broadened to include the study of all major commonwealths and a new comparative framework should be introduced. In so doing, Bodin hoped both to justify the enduring relevance of legal studies to political philosophy and to combat those who would bury the art of jurisprudence under a mass of grammatical and philological tomes. Finally, Bodin promised to build a new foundation for a universal political philosophy — a philosophy based on the synthesis of all previous legal thought.

II

Although it will no doubt seem highly over-simplified and contrived to compare the late sixteenth century with the twelfth and thirteenth centuries, there is some justification in including a digression on mediaeval legal-political thought. First, much of the vocabulary, as well as many of the legal maxims, that Bodin took for granted was first coined in the Middle Ages. Second, his changes in methodology notwithstanding, Bodin accepted many of the attitudes of his mediaeval predecessors. This should not be surprising: after all, law is a notoriously conservative discipline and many of the standard texts used in Bodin's time were written in the twelfth and thirteenth centuries. More importantly, a brief glance at earlier jurisprudence will throw into bold relief the innovations that Bodin introduced and the manner in which Bodin manipulated traditional theories to form radically new conclusions. Finally, this survey of mediaeval legal-political thought will help us to analyse the tensions in Bodin's thought; we shall be able to see how Bodin often held simultaneously, and at times contradictorily, opinions rooted in the past and opinions based on contemporary events.

Their theories moulded by Christian theology as well as by the legacy of the Roman law, most mediaeval and Renaissance legists would have agreed that law formed the underlying stratum of the commonwealth.

Law was not merely a social cement, it was also the soul of the body politic. The Vulgate Bible, itself steeped in the Roman legal tradition, portrayed society as a corporation of the faithful regulated and animated by the law.[1] Indeed, the cosmos itself was built upon an immutable, objective, coherent order — the eternal law of God — and the polity could not help but mirror, however dimly, this order. In the Middle Ages, the final, most complex formulation of this notion of law appears in the Summa Theologiae, in which Thomas Aquinas divided law into four categories: eternal, divine, natural, and human law. Since all law emanates from the mind of God, there is no radical break between each category or type of law: all law embodies the justice and equity of God's providence. Thus, if eternal law establishes the eternal paradigm of law, natural law involves those natural inclinations with which God has endowed man to enable him to achieve his proper ends. Similarly, divine law (or the laws of the Scriptures) supplements our knowledge of justice, while human law (or the particular statutes of a ruler arrived at by reason) regulates our daily life within a state. All law is, by its very nature, rational and has as its purpose the fulfillment of human potential.[2]

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[1]Walter Ullmann, Law and Politics in the Middle Ages (Ithaca, New York: Cornell University Press, 1975), p. 42.

[2]Thomas Aquinas, Summa Theologiae in Selected Political Writings, edited with an introduction by A. P. D'Entreves (Oxford: Basil Blackwell, 1965), pp. 113-15, 121.

As such, all law originates with God and must be both equitable and just.

Mediaeval legists also agreed on the correctness of Augustine's revision of the Ciceronian definition of justice. Whereas Cicero had optimistically defined ius as the rendering to each his due (suum cuique tribuendi),[3] Augustine had denied the possibility of realising such an ideal of justice within the polity. For Augustine, true justice is always God's justice — an unknowable and perfect good. In the city of man, justice can only parody divine justice: at best, the ruler can order earthly affairs with relative efficiency so that social harmony be maintained. Earthly justice may try to render to each his due, but only partially succeeds in achieving this goal. It remains an approximation of divine justice; it is a gift from the divine goodness that helps man curb, more or less, his sinfulness within the confines of the polity.[4]

Juridical definitions of the nature of equity tended to be more

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[3]Cicero's definition of justice became the standard definition in Roman law. Cf. Ulpian's definition, "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi" (Digest, 1, 1, 1).

[4]Augustine, The City of God, trans. by G. G. Walsh, D. B. Zema, et al., and edited by Vernon J. Bourke (New York: Doubleday, 1958), pp. 75, 88, 569-70.

ambiguous and uncertain. For Aristotle and, consequently, for Aquinas, equity is the means by which legal justice or statutory laws can be adjusted to a particular case: that is, jurists can correct or change laws in certain exigencies unforeseen by the original lawgiver. Equity, then, is a principle that stands apart from enacted law: a law need not be equitable before it is considered valid or binding. Roman lawyers, however, defined equity as the criterion whereby the correctness of a law could be assessed. For them, an iniquitous law would have been a contradiction of terms. Mediaeval lawyers in turn merged the Aristotelean and Roman definitions of aequitas: equity encompassed both the criterion of legality and the act of shaping general legal precepts to specific circumstances. Legal exceptions might be made if the judge had carefully considered the legislator's intentions and the precepts of equity involved in the ratio legis.[5]

In any case, mediaeval legists agreed that the correctness of human law could be judged with reference to God's law. And, according to later jurists, the link between eternal and human or statutory law could be clearly discerned in natural law. God had ordained certain laws for his creation and mankind, in setting up communities, merely acted according to the dictates of this natural law. The theory that

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5H.F. Jolowicz, Roman Foundations of Modern Law (Oxford: Clarendon Press, 1957), pp. 54-58.

natural law serves as God's instrument to organise mankind into states was not an innovation of Aquinas. Even the Christian fathers found it difficult to escape the influence of Stoic philosophy and, in particular, of the Ciceronian theory that the state originated from a natural desire to preserve the common good. St. Ambrose or Augustine would ultimately condemn the state as the fruit of sin or as a remedy imposed by God to correct human willfulness. They nonetheless hinted that human society was a natural good: man was by nature gregarious and natural reason thus inevitably led our ancestors to seek companionship.[6]

Roman law, unfortunately, provided hopelessly contradictory statements on natural law. While some jurists spoke only of natural law as the instincts common to all animals,[7] others invoked natural law as an immutable principle of equity. For example, Ulpian implied that private law clearly stemmed from those natural laws that man, by means of his natural reason, had fashioned to regulate human affairs. Mediaeval jurists wavered between regarding natural law as instinct and as natural reason,[8] and this antimony in the Corpus Juris remained unresolved

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[6]Gaines Post, Studies in Medieval Legal Thought (Princeton: Princeton University Press, 1964), pp. 499-500.

[7]Cf. Ulpian: "Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis propium, sed omnium animalium, quae in terra, quae in mari nascunter, avium quoque commune est" (Digest, 1, 1, 1).

[8]Post, pp. 508-12.

until the Summa Theologiae. Although he acknowledged that the natural included both the bestial and the rational, Aquinas linked these two characteristics into a composite picture of human nature: man has both a lower nature — that which he shares with all beasts — and a higher nature — that which impels him rationally to seek self-preservation and fulfillment within an organised polity. By means of this higher nature, man can also discover how best to set up and maintain this polity. Natural law, then, not only prompts and even sanctions the foundations of the state;it also gives a model for positive human law. For example, natural law demands the punishment of evildoers, while human law enforces this stricture by specifying certain penalties.[9]

The Roman law had further suggested that natural law was the basis of a law common to all nations, a ius commune or gentium. The Institutes, for example, divided all law into either the ius civile or the ius gentium: concerning the latter, the compilers of the Institutes wrote that "natural reason has established among men a law uniformly conserved by all peoples and called the law of the nations, as though all nations were ruled by these laws."[10] According to Roman

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[9]Aquinas, pp. 115, 123-27.

[10]"quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur" (Institutes, 1, 1, 1).

legists, this law, albeit enacted by specific communities, is immutable because it is wholly consonant with natural precepts. Mediaeval legists, however, tended to blur the distinctions between the *ius naturale* and the *ius gentium*: thus, Accursius (1182-1258) attributed the birth of polities indiscriminately to either law, while Azo (d. *ca.* 1230) traced the joint influence of the *iure gentium et naturale* in private and public law.[11] In the later Middle Ages, Lucas of Penna (1320 – *ca.* 1390) often used the two terms interchangeably: he argued, for example, that the *ius gentium*, as well as the *ius naturale*, rests on universal, natural principles and was created simultaneously with mankind.[12]

More important than this blurring of distinctions were the manifold problems that mediaeval legists encountered in finding and formulating the sources of the *ius gentium*. Roman lawyers had generally used the term *ius gentium* to describe those laws common to the Empire: that is, those laws in the civil code that corresponded with the customs and statutes of non-citizens. Not surprisingly, then, mediaeval lawyers tended to see the Roman law and, in particular, its canonical counterpart as the bulwark of the *ius gentium*. Dreams of *unus populus Christianus*,

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[11] Post, pp. 542-3, 546.

[12] Walter Ullmann, *The Medieval Idea of Law as Represented by Lucas of Penna* (London: Methuen, 1946; rpt. ed., New York: Barnes and Noble, 1969), pp. 46-7.

unified under the laws of the Roman Church and the Roman Empire, supported the prestige of the romano-canonical laws.[13] As late as the fourteenth century, when both the Papacy and the Holy Roman Empire had already lost much of their former powers, Bartolus of Sassoferrato (1314-1357) could call the Roman law the *ius commune* or *gentium* that over-rides, at least *de iure*, all local customs or statutes.[14]

Immutable eternal law, mediated by natural law, was the essence of the body politic. Unless positive human law conform with the standard of justice and equity set by eternal law, the state will founder. Late mediaeval legists concluded, therefore, that all rulers have a moral obligation to ensure the equity and justice of statutory law: the king must, as Aquinas unequivocally stated, "be fired with zeal for justice, seeing himself appointed to administer justice throughout his realm in the name of God."[15] The occasional publicist such as Marsilius of Padua (d. *ca*. 1342), separating positive law from Christian ethics,

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[13] M. H. Keen, *The Laws of War in the Later Middle Ages* (Toronto: University of Toronto Press, 1965), pp. 10-13.

[14] Cecil S. Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought* (Cambridge: Cambridge University Press, 1913), pp. 44-5.

[15] Aquinas, *De Regimine Principum* in *Selected Political Writings*, p. 67.

could argue that a functioning government is an end in itself and, in so arguing, ignore the moral goals toward which a ruler should aspire: Marsilius could regard the law merely as the means by which a "sufficient" life is attained, not as a subsistent moral imperative.[16] But Marsilius did not represent the mainstream of mediaeval legal thought. Until the late sixteenth century, lawyers — and Bodin among them — continued to believe that the law was anterior to the state and, as such, embraced and shaped all facets of social life.

The notion that the king was the discoverer and protector of the law, and not the maker of laws — a notion rooted in post-classical, feudal usage — also lingered on until the late sixteenth century. Yet, at the same time, there was a gradual shift in legal theories, stimulated by romano-canonical law and the theory of corporate bodies, from the emphasis on the king's relation to the law to an emphasis on the king's relation to his polity. Earlier theories of kingship had stressed the king's responsibility either as a feudal suzerain or as a priestly, sacred officer. As a feudal ruler, the king had to obey customary usage and the mutually-binding contracts he had made with his vassals; as a priest of God, the king had to align his policy with the laws of the Church. A king who strayed from the path of legality could be held

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[16] Alan Gewirth, Marsilius of Padua: The Defender of Peace (New York: Columbia University Press, 1951), pp. 132-3.

accountable before either his vassals or the Pope. The task of earlier legists, then, had been to specify the exact limits of legal action that a king might take and to disentangle the limits of royal jurisdiction from those of the Papacy as well as from those of local lords.[17] Later theories of kingship, however, worked with the assumption that the ruler was the head of a corporate body or the body politic. The needs and desires of this body politic determined the limits of the king's powers; kingship ceased to be regarded as a personal relation between overlord and vassals or as a sacral office. Ernst Kantorowicz has perhaps best described this subtle change in emphasis:

> The corporational problem of the later Middle Ages began to eclipse the preponderance of the legal problem and the "tyranny of the Law" of the preceding period. This does not imply that the king's relation to the Law had become an irrelevant question, but that it was absorbed by, and included in, the far broader problem of the relation to a polity which itself could claim to be the Law and which, by its inherent dynamics, quickly developed its own ethical and semi-religious code — apart from the Church.[18]

In short, the task of legists now was to determine the king's legal position within the polity, to decipher the public laws of the polity that

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[17] Fritz Kern, Kingship and Law in the Middle Ages, translated and edited by S. B. Chrimes (Oxford: Oxford University Press, 1918), pp. 130, 269-78.

[18] Ernst Kantorowicz, The King's Two Bodies: A Study in Mediaeval Political Thought (Princeton: Princeton University Press, 1957), p. 232.

bound the king and that maintained the public welfare, and to specify those private and inviolable rights of the citizenry.

To describe this polity, civilians borrowed from the canonists the term _corpus mysticum_. Originally applied to the Eucharist, this term had radically changed meaning by the time of the papal bull _Unam Sanctam_ (1302) in which Boniface VII explicitly defined the whole community of the faithful, the Roman Church, as the _corpus mysticum Christi_, whose visible head was the Pope, the Vicar of Christ. In the previous century, Aquinas had referred to the Church as a _corpus mysticum ecclesiae_, a "mystical corporation" that was analogous with the clerical _corpus ecclesiae iuridicum_. The Pope, in this schema, functioned as the _primus princeps movens et regulans totam politiam Christianam_, the foremost leader who sets into motion and regulates the entire Christian polity.[19] By the thirteenth century, Vincent of Beauvais (d. 1274 or 1264) had transferred this terminology to the secular world: he called the state a _corpus reipublicae mysticum_. In so doing, Vincent, as well as those legists who followed his lead, made two innovations in mediaeval political thought: the composition of the state could be described as organological and thus based on interdependent units; legists could now treat the state as a legal corporation, as

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[19]Kantorowicz, pp. 194, 201, 203.

a persona or corpus ficta.[20]

The elaboration of the organological structure of the commonwealth continued to be a favourite theme in political and legal writing until the end of the sixteenth century. Lucas of Penna, to cite only one example, likened the prince to the head of the body politic, the senate to the heart, the administration to the eyes, ears, and tongues. The military, of course, represented the arms of the corpus reipublicae

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[20]Kantorowicz, p. 209. The Roman law proved singularly unhelpful in defining the status or nature of legal persons: only two titles in the Digest referred to legal persons and neither of these titles treated the fictive personality of corporations. Furthermore, Roman jurists used no consistent legal term for corporate bodies: they vacillated among universitas, collegium, and societas. Only one passage in the Justinian code (Digest, 3, 4, 1, I) includes the term corpus to indicate corporate personality: this passage defines corporate existence as a concession from the prince and a corporation as that legal entity which owns common property and which has a legal representative. But, on the whole, Roman lawyers had little sense of the fictive personality of corporate bodies: the closest they came to personification of corporations was in Digest, 3, 4, 7, I: "Si quid universitati debetur, singulis non debetur: nec quod debet universitas singuli debent," "what is owed to the corporation is not owed to the individual; nor do individuals owe what the corporation owes." Mediaeval canonists first approached the problem of describing corporate existence in explaining the legal nature of a cathedral chapter; final formulation came in the commentary of the Liber Extra of the canon law, in which Innocent IV defined a corporation as a persona ficta or juristic person, capable of owning property, of suing, and of being sued. See Jolowicz, pp. 128-9, 131; Ullmann, Law and Politics, p. 179; Brian Tierney, Foundations of the Conciliar Theory (Cambridge: Cambridge University Press, 1955), pp. 99 ff; F. Maitland's "Introduction" to Otto von Gierke, Political Theories of the Middle Ages (Cambridge: Cambridge University Press, 1900).

mysticum, while the peasantry served as the feet.[21]

Connected with this corporate theory of the state was the popular metaphor of the king's marriage to his realm, a metaphor first used by Cynus of Pistoia (1270-1336) and built upon the analogy with Christ's marriage to the Church. Lucas of Penna's tag — the prince is the maritus reipublicae — continued to influence French jurists, in particular, until the reign of Henri IV and coloured their theories on the reciprocal duties of the king and his subjects.[22] In 1547, therefore, during the coronation of Henry II, a ring was placed on the new king's finger to symbolize his marriage to his realm; in 1594, this ceremony was expanded to emphasise the inseparable bond created by the coronation rites between the king and his subjects, "pour marque de ceste reciproque conjonction." The French jurist René Choppin clarified the significance of the ring-giving ceremony: "The king is the mystical

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[21]"Princeps obtinet instar capitis, cordis locum senatus habet, a quo bonorum et malorum procedunt initia. Oculorum, aurium et linguae officia sibi vendicant judices provinciarum et praesides. Officiles et milites, qui semper assistunt principis lateribus, branchiis assimilantur. . . . Pedibus vero solo jugitur in haerentibus agricolae coaptantur." Quoted in Ullmann, The Medieval Idea of Law, p. 165.

[22]Kantorowicz, pp. 213-18.

spouse of the respublica."[23]

The new corporate theory of the polity also provoked an increasing consciousness of the reason of state, of the ratio publicae, as well as an understanding of those public laws that best preserved the political structure of a commonwealth. The cornerstone of the new political theory was, as usual, the Roman law, particularly Ulpian's famous definition, "Public law pertains to the status rei Romanae; private law to the utility of the individual; public law involves religion, priests, and magistrates."[24] In other words, Roman legists argued that the Roman Empire enjoyed a certain status and it was the duty of all public persons to protect this status or public welfare: public law, which specifies the rights and duties of public persons, guarantees that none transgress his legal bonds and that the status of the commonwealth be maintained, if not augmented. As early as 1228, one glossator defined public law as that which sustained the state, ut pereat; later legists added that, above all, the public law protects the public or common utility and safety — a good higher than any private

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[23]Kantorowicz, pp. 222-4.

[24]"publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem. . . . publicum ius in sacris, in sacerdotibus, in magistratibus consistit." Digest, 1, 1, 1, 2; Institutes, 1, 1.

good. Furthermore, a public necessity justifies the abrogation of otherwise binding law; here again, legal studies provided the props of mediaeval theory in the maxim, "necessitas legem non habet."[25] Using Aquinas's political thought as the terminus ad quem, we should note his claim that the just prince could expect the greatest blessedness in heaven since he had stifled his personal inclinations to satisfy the needs of the body politic or the utilitas publicum, whatever the cost.[26] After all, the polity or the common weal has its own peculiar needs, to which all individual needs must be subordinated.

The theory of the utilitas publicum merged with the first tentative notions of nationalism. It is the mark of a good citizen, argued the commentator Odofredus (d. 1265), to fight and die for the fatherland, pro patri mori; moreover, a citizen's duty to defend his patria is more important than a vassal's duty to defend his feudal lord.[27] In his continuation of Aquinas's De Regimine Principum, Ptolomaeus of

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[25] Post, pp. 254-6, 258.

[26] Aquinas, pp. 49-53.

[27] Post, p. 444.

Lucca could assert that:

> Amor patriae in radice charitatis fundatur — Love for the fatherland is founded in the root of a charity which puts, not the private things before those common, but the common things before the private. . . . Deservedly the virtue of charity precedes all other virtues because the merit of any virtue depends upon that of charity. Therefore the amor patriae deserves a rank of honor above all other virtues.[28]

For the first time since the time of the Justinian code, then, men spoke of their allegiance to a patria communis — a unified realm composed of both lay and clerical elements — and not of homage to a liege lord.[29]

Furthermore, legists stated that the kingdom, like any corporate body, cannot die. Just as the Roman people maintained their maiestas, despite the so-called lex regia whereby the people purportedly handed their imperium over to Augustus Caesar, so all European peoples maintain their maiestas in perpetuity. The realm is, after all, an abstract, incorporeal thing that signifies the people collectively but that does not correspond with the individuals who make up the realm: as such, it

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[28]Kantorowicz, p. 242.

[29]Kantorowicz, p. 298.

has needs beyond those of the individual citizens. The formulation of this concept that Baldus (1327-1400) offered is worth quoting for the light it sheds on this new juristic interpretation of the state:

> A realm consists not only of the material territory, but also of the peoples of the realm because these peoples collectively are the realm. . . . And the totality or commonweal of the realm does not die, because a commonweal continues to exist even after the kings have been driven away. For the commonwealth cannot die;. . . and for that reason it is said (D. 2, 3, 4) that the "commonweal has no heir" because in itself it lives for ever as says Aristotle: "The world does not die, but the dispositions of the world die and change and are altered and do not perserv-ere in the same quality."[30]

The commonwealth, then, is a fictive person, a corporation embracing all people within certain territorial limits, which must be governed so as to ensure the attainment and continuation of the public utility.

Like all corporations — at least, according to mediaeval legal theories — the commonwealth has the same legal status as a minor or ward. As such, it must be entrusted to a guardian or tutor: the prince.

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[30] Kantorowicz, p. 299.

And, like any guardian, the prince is subject to certain legal restrictions, lest he jeopardise the common interest.[31] For example, he might not alienate the public domain, as this would deplete the revenues of future sovereigns. The metaphor of the king's marriage to his realm supported this theory of inalienability; for, just as a husband may not squander his wife's dowry, so the king might not squander public funds.[32]

Because the people constituted an essential element in the body politic, citizens could claim some legal right to remonstrate against actions of a severe or prodigal king. To formulate and justify this right, legists turned once more to the Roman law, in particular to the legal maxim from private law, quod omnes tangit, ad omnibus comprobetur, what concerns all should be approved by all. In Roman law, this maxim had supported the rights of co-guardians or tutores, co-inheritors, and co-owners of easements or servitudes.[33] Decretists, decretalists, and civilians appropriated the maxim to settle, first, disputes involving

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[31] Ullmann, Law and Politics, p. 58.

[32] Kantorowicz, p. 217.

[33] Post, pp. 169-70.

cathedral chapters, and then all cases involving joint or common rights in a thing. According to contemporary legal theory, all those who share rights in either a corporeal or incorporeal thing should have the legal opportunity to defend their rights and to consent to a court's ruling on the legality of these rights only after a full hearing has been given.[34] In England, by the thirteenth century, we find this maxim cited directly or indirectly in royal letters convoking the community of the realm. English legists explained that, since taxation would touch all those living within the kingdom, communities had the legal right to tractare, to negotiate with the king concerning the terms of any new taxation.[35]

The rights of separate communities to endorse royal action became particularly important in matters of extraordinary taxation. Civilians employed by the monarchy naturally argued in favour of regular, as opposed to extraordinary, taxation and, in so doing, hoped to by-pass the need to solicit communal consent when subsidies had to be raised. Oldradus de Ponte (d. 1335), for example, justified taxation by indicating the permanent financial needs of a commonwealth: administrative costs were a necessitas inhabitu and should therefore be met by a regular, permanent tax.[36] Those forced to bear the burden of

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[34] Post, p. 175.

[35] Post, p. 232.

[36] Kantorowicz, pp. 286-7.

royal taxation were obviously less willing to accept such a permanent need, claiming that levies, whatever their justification, impinged upon private rights. In practice, however, kings had little trouble in imposing their demands, even though they rarely received as much as they had hoped for or had needed. Both French and English kings convoked national assemblies before authorising extraordinary taxation, but, in fact, these assemblies often served simply to advertise the king's will. National assemblies expedited tax collection, since none could escape payment by claiming ignorance of the sovereign will; they did not, however, convene to judge the principle or the need that justified the king's demand for money.[37]

Mediaeval concepts of the powers of the sovereign prince often seem to be contradictory, if not paradoxical: commonly, a legist could both exalt the unlimited dominion of the king and praise the efficacy of certain constitutional limitations. Civilians were fond of endowing kings with the *plenam potestatem et liberam*, a Roman legal right that concerned the powers given to a procurator and that canonists applied to the sweeping powers they claimed for the Pope. Civilians also toyed with such Roman maxims as *princeps legibus solutus est*, the prince is unbound by the law, and *quod principi placuit, legis habuit*

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[37] Joseph Strayer and Charles Taylor, *Studies in Early French Taxation* (Cambridge, Mass.: Harvard University Press, 1939; rpt. ed. Conn.: Greenwood, 1971), pp. 91-2, 168-70.

vigorem, what pleases the prince has the force of law.[38] Yet civilians always hastened to add that the prince was restricted by his obligation to obey the iure naturale et gentium. Furthermore, according to many legists, the prince was little more than a proctor or curator, a temporary official holding a specific and limited mandate: that is, the king held the imperium in trust.[39] In his consilium on the question "Contractus factus per Regem an obliget regem?" Baldus referred to the Emperor as the procurator maximus; he then divided kingship into two aspects, the first of which is personal, while the second is an immaterial office or significato that enpowers the king to govern.[40] In short, the king was both a physical person and an abstraction of the imperium: he was, as Ernst Kantorowicz has suggested, a "corporation sole" — a corporate body created through succession and through time — and thus was subject to all the laws that secured the privileges of any corporation.[41]

Just as the people had been transformed, for juristic purposes, into the abstraction of the commonwealth, so was the king or Emperor

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[38] Tierney, pp. 75.

[39] Riesenberg, p. 95.

[40] Riesenberg, pp. 96-7; Kantorowicz, p. 337.

[41] Kantorowicz, pp. 312-13.

transformed into the abstraction of the Crown or corona. It is by virtue of the Crown that an anointed king possesses his dignitas and maiestas, as well as all of the characteristics that Charles de Graissaille, for example, ascribed to the French king in the Regalium Franciae libri duo (1548): the king is the vicar of Christ in his kingdom, a second sun on earth, similar to a corporeal God; he is delegated by God and can perform miracles.[42] As Professor Ullmann has written, the Crown was "the symbolic expression of the legal bond uniting king and community. . . . The corporeal thing, the diadem (crown), was used to designate the incorporeal legal union."[43] The Crown, like the commonwealth, was invisible, impersonal, and sempiternal. Once kingship was regarded in this fashion, civilians could easily specify the rights and obligations of the monarchy: they claimed that the king or the temporary incumbent of the office of kingship might only act in such a way that the status of the Crown be preserved and that he not endanger the inheritance of his successors. Above all, jurists agreed that certain things both corporeal and incorporeal might not be alienated: whatever regalian rights a king enjoyed were integral to the office of kingship; it was the Crown, not the king, that owned these regalian rights and,

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[42] Julian Franklin, Jean Bodin and the Rise of Absolutist Theory (Cambridge: Cambridge University Press, 1973), pp. 6-7.

[43] Walter Ullmann, Principles of Government and Politics in the Middle Ages (London: Methuen, 1961), p. 179.

consequently, no king might bestow these rights on another individual.[44] Thus, Pierre de Cuignieres (d. 1345), the king's spokesman at the Council of Vincennes (1329), denied that the king had any right to alienate portions of the royal domain, either by means of donations to the clergy or by means of prescription and custom. After all, continued Pierre, the king had sworn in his coronation oath to preserve the status of the Crown.[45] Although treatises written on regalian rights, culled from the _Corpus Juris_, sometimes listed hundreds of items, several rights appear in most lists and were considered to have special significance. Lucas of Penna, for example, specified five fundamental regalian rights: the power to legislate, to interpret the equity of the law, to declare war or peace, to raise subsidies, and to sell land in which he had at least a half interest.[46] Most lawyers would also have considered the royal domain to be inalienable, since it was supposed to be the king's major source of revenue. So firmly entrenched in mediaeval legal thought was this theory of inalienability that Bartolus had to resort to the subtlest of distinctions to justify the autonomy of certain Italian city-states: _de facto_ these cities enjoyed self-rule, wrote Bartolus, yet they were still under the _de jure_ dominion of the Roman Emperor.[47]

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[44] Kantorowicz, p. 347.

[45] Riesenberg, p. 110.

[46] Riesenberg, p. 7.

[47] C. S. Woolf, pp. 122-3.

The analysis of inalienable rights also led civilians to an analysis of magisterial authority. In particular, they examined the monarch's right to delegate portions of his imperium to subordinates without loss of authority or alienation of regalian rights. Roman legists had primarily used the term imperium to describe the aggregate of highest powers — both of jurisdiction and of military command — wielded by consuls, praetors, and dictators. They then distinguished between the merum imperium and the mixtum imperium: the former, according to Ulpian's influential definition, was the "imperium habere gladii potestatem ad animadvertentum facinorosos,"[48] the power of the sword in punishing criminals, or criminal jurisdiction; the latter Ulpian defined as the "imperium cui etiam iurisdictio inest, quod in danda bonorum possessione consistit,"[49] jurisdiction over minor civil cases, such as property disputes, or a lower jurisdiction granted to many magistrates.[50] The question that these definitions had raised was whether the emperor alone possessed the power of the sword and all jurisdiction or whether he could transfer this power to his magistrates. In other words, was the merum et mixtum imperium an inalienable right of the supreme authority?

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[48] Digest, 2, 1, 3.

[49] Digest, 2, 1, 3.

[50] Myron Piper Gilmore, Argument from Roman Law in Political Thought: 1200-1600 (Cambridge, Mass.: Harvard University Press; rpt. ed., New York: Russell & Russell, 1967), pp. 20-25.

According to legend, the Emperor Henry VII had consulted Azo and Lothair to settle this question. Lothair, who claimed that the merum imperium rested with the prince alone, won the first round of this debate that was to last for five centuries. But most later jurists, with the notable exceptions of Andrea Alciato and Charles Dumoulin, supported Azo's contention that, although the Emperor holds the imperium per excellentiam, major magistrates hold the merum imperium by right of their office and that, as a result, they may decree laws within their own cities or provinces.[51] The most thorough and consistent discussion of imperium was that of Bartolus, who, typically, moulded Roman legal terms to suit contemporary realities. Bartolus defined jurisdiction in the same manner as the Glossa of Accursius: it is the "potestas de iure publico introducta cum necessitate ius dicendi et aequitas statuendae," the power concerning public law leading, when necessary, to ordaining the law and determining equity. Jurisdiction can be further broken down into two sub-categories: the imperium of higher (nobile) officials and the iurisdictio simplex of lower (servile) officials. The imperium, in turn, is divided into the merum imperium — the jurisdiction of a judge over matters of public interest — and the mixtum imperium — the jurisdiction over civil or private disputes.[52] The ruler of an independent city-state as well as a provincial governor

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[51]Gilmore, pp. 15-20.

[52]Gilmore, pp. 38-41.

can be said to hold the merum imperium, even though he does so de facto, not de jure.[53] Further subdivisions of merum and mixtum imperium allowed Bartolus to construct a "hierarchy of superiorities, wherein each superior had what might be called a property right in his power."[54] In this hierarchy, then, the imperium is dispersed through the varying ranks of magistrates and officials.

Finally, in this brief survey of mediaeval legal and political thought, we must turn to the famous maxim, rex imperator est in regno suo, the king is emperor in his own realm. Early mediaeval legists had been primarily concerned with defending imperial rights against papal encroachments. Since they assumed that the German Emperor was the rightful heir to the Roman Empire, they naturally transferred the terms of the Justinian code, which for them had the force of a living law, to the Holy Roman Empire: the German Emperor, like Augustus Caesar, was the dominus mundi mentioned in the so-called lex Rhodia (Digest 14, 2, 9) of the civil code.[55] Lawyers in the service of the emerging national states could use the vocabulary of the Justinian code to describe their monarchs with less justification; in any case, they had to deny the

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[53] C. S. Woolf, pp. 134-5.

[54] Gilmore, pp. 41-2.

[55] Ullmann, Law and Politics, p. 57.

blatantly imperial tone of the Roman law in order to justify their own claims to self-rule. Hence, the maxim rex imperator est served to assert national claims. The provenance of the maxim is obscure, but by far the most influential formulation occurred in the Per venerabilem (1202) of Innocent III. Here, Innocent clearly recognised the autonomy of the French monarchy, although he did so to vindicate Papal aspirations: "Since the king does not recognise a superior in temporality, he may submit to our jurisdiction without damage to the right of another in it."[56]

Originally coined to support French claims to be an autonomous nation, by the fifteenth century the maxim had taken on a new connotation: since the king is like the emperor, legists argued, he may enjoy the same rights and privileges as the emperor. Thus, in 1418, legists maintained that the king may approve the election of a new Pope, because rex imperator est; in 1427, they defended the king's right to strike coins and to create magistracies on the same grounds.[57] On 5 December 1476, the king's advocate berated Louis de la Trémoille, who had contested the king's right to join the viscounty of Thouans to the royal domain:

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[56] Riesenberg, p. 84; André Bossuat, "The Maxim 'The King is Emperor in his Kingdom': Its Use in the Fifteenth Century before the Parlement of France," in The Recovery of France in the Fifteenth Century, ed. P. S. Lewis (London: MacMillan, 1971), p. 186.

[57] Bossuat, pp. 187-9.

> The king is true emperor in his kingdom and is possessed of the prerogatives of a true emperor and a true Augustus, being always desirous of enlarging his lordship. . . and, in keeping with the title of Most Christian which he holds, and which was attributed to the emperors, even to Octavian, who had ruled the commonwealth peacefully for fourteen years at the time of the nativity of Jesus Christ. . . in the like manner the king is lord throughout the entire kingdom and all inhabitants thereof are his subjects . . . he may therefore join lordship to his domain at his good pleasure in the interest of the commonwealth.[58]

The king, therefore, is like the Emperor in that he holds the imperium to preserve the public welfare. The comparison having been made between king and emperor, legists could easily apply the Justinian code to France and arrogate for the king all those regalian rights hitherto attributed only to the German Emperor.

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[58]Quoted in Bossuat, p. 192.

III.

Although legal theorists of the Middle Ages portrayed the French monarch as if he possessed the power of an Octavian or a Justinian, in practice the king continued to struggle against a host of feudal constraints and out-dated, but firmly entrenched, local institutions. Practice, in this case, lagged far behind theory. For it was not until the seventeenth century that the French monarchy enjoyed the powers attributed to it by mediaeval legists. By Bodin's time, the French monarchy had instituted at least the framework of a centralized bureaucracy that could loyally serve the king in fighting against local self-rule. But the long series of religious and civil wars (1560-94) disrupted the steady growth of monarchical authority; the king proved to be too weak to stop the fragmentation of administrative and juridical power. Furthermore, the Religious Wars provoked a flood of constitutional polemics — written first by the Huguenots and then by the Catholic League — that tried to undermine absolutist claims. It was in this climate of thought that Bodin wrote his two major works: the *Methodus ad facilem historiarum cognitionem* of 1566 and *Les Six Livres de la République* of 1576. Ostensibly written to illuminate the eternal, universal principles of government, both books were also topical replies to current constitutional theory and pleas to put aside religious and local differences for the sake of strengthening national

unity under the Crown.

Although the causes of and events leading up to the French civil wars are complex and often confusing, a few distinctive socio-economic trends can be traced which will help us to understand better both constitutional theory and Bodin's advocacy of a strong centralised government.[1] First, we should note the economic pressures in sixteenth century France that resulted from the Europe-wide inflation and the so-called price revolution. Because revenues from the land had been fixed for decades while expenses had increased drastically, many of the petty nobility were forced to give up their ancestral properties. In their place rose a new nobility, the recently ennobled bourgeoisie, which frequently replaced older forms of land tenure with a system of metayage. After all, short-term leases were far more profitable in this age of inflation than long leases at fixed rents. As a result of new forms of land tenure, the peasants — either driven off their holding by new lords attempting to join small plots into larger, more economically viable holdings or hopelessly encumbered by debts which the income from the land could not support — sought a livelihood in the towns.[2] This

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[1] Cf. J. H. M. Salmon, Society in Crisis: France in the Sixteenth Century (London: Ernest Benn, 1975), pp. 15-16.

[2] Salmon, p. 45.

movement of peasants to the cities and bourgeoisie to the land was, of course, not as yet a gener[illegible]ide-spread movement: it was, however, sufficiently significant to cause major social unrest. And, although the price revolution initially stimulated trade and manufacture, civil strife after 1560 crippled the economic life of many French towns and cities. Finally, the increasingly large tax burden imposed by the chronically indigent monarchy further aggravated the economic plight of both peasants and town-dwellers.[3]

Secondly, the institutional changes made under Francis I and Henri II reflected the social mobility of sixteenth century France. The *nouveaux riches*, the bourgeois notables who had profited from inflation and the price revolution, found new avenues of advancement in the enlarged bureaucracy of the sixteenth century kings. The spread of the practice of venality facilitated the acquisition of offices and, by 1600, the *noblesse de robe courte* could consider itself as powerful as the old *noblesse d'epée* had been during the Hundred Years War. Among the traditional nobility, a system of clientage replaced feudal patronage: in particular, "The Gallican church was transformed into a reservoir of patronage shared among the crown, the great nobles,

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[3]Julian Franklin, "Introduction" in *Constitutionalism and Resistance in the Sixteenth Century* (New York: Pegasus, 1969), p. 16.

and the Pope."[4] Rewards for faithful service could no longer be given in land, but could be given in offices. Thus, the Guises could gather a loyal corp of supporters in their struggle against the monarch that was as large as the corp of feudal vassals gathered by fourteenth century appanagists.

Finally, religious controversy and dissent coloured all facets of political, social, and economic dissatisfaction: at times based on sincere religious zeal, at times based on sheer opportunism, conversion to the reformed faith bound men from all strata of society into a solid opposition to royal policy. Only during the last decade of the sixteenth century were local and religious differences united under the French monarchy; after thirty years of civil strife, the cause of religious purity was sacrificed in order to protect the welfare of the Crown and the state.

Since the end of the Hundred Years War, the monarchy had continually consolidated its authority through the centralisation of governmental administration. Yet, by 1600, this process of centralisation was by no means completed. Despite repeated efforts to rationalise the bureaucracy — to eliminate redundant offices and overlapping jurisdictions — the

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[4]Franklin, Constitutionalism and Resistance, p. 15.

monarch frequently returned to the earlier practice of relying on local administrative units and of creating superfluous offices. And, although France had emerged from the Hundred Years War considerably strengthened and enlarged by the acquisition of Guyenne, Brittany, Normandy, Languedoc, Provence, and Dauphiné, even the most superficial examination of French institutions of the sixteenth century will reveal a chaotic welter of administrative units. Ancient fiefs, appanages, provinces, towns, and guilds defied the monarchy to take away their autonomy and vied for increased special privileges.

First, some ancient fiefs created by mediaeval monarchs, although gradually assimilated with the royal domain through escheat and felicitous marriage contracts, long evaded royal control.[5] Similarly, appanages given to princes of the blood were allowed to retain their autonomy. Both legists and the monarchy recognised that these donations, which included all revenues from and jurisdiction over the territory of the appanage (the king reserved only the right of final appeal and the appointment of clerical benefices), were hazardous to the preservation of the Crown. Nonetheless, Louis XI created an appanage for his brother; François I, for his sons; and Catherine de Medici, for the sons of Henri II.[6]

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[5] Roger Doucet, Les Institutions de la France (Paris: J. Picard, 1948), p. 12.

[6] Doucet, pp. 36-52; Salmon, p.22; Gaston Zeller, Les Institutions de la France (Paris: Presses Universitaires, 1948), pp. 86-89.

Furthermore, those provinces newly added to the realm were allowed to retain many of their ancient privileges and liberties. Guyenne, for example, maintained a relative independence from the Crown through its parlement and admiralty, even though its institutions and legal procedures were rapidly aligned with those of the rest of France.[7] Similarly, the Estates of Normandy kept their right to consent to royal taxation and to negotiate the terms of any subsidy that the king wished to raise in Normandy. Although this right was often no more than formally observed, it continued to symbolise the traditional independence of the province.[8] The seven provincial parlements (in Toulouse, Grenoble, Bordeaux, Dijon, Rouen, Aix, and Rennes), nominally organs of the central government, also sought to protect provincial liberties against monarchical encroachment. Finally, towns and guilds often possessed special charters granting certain liberties, rights, and exemptions — all of which had to be honoured by the monarchy.[9]

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[7]Georges Hubrecht, "Jurisdictions and Competences in Guyenne after its Recovery by France" in _The Recovery of France_, ed. P. S. Lewis, pp. 82-101.

[8]Martin Woolf, _The Fiscal System of Renaissance France_ (New Haven: Yale University Press, 1972), p. 47.

[9]Doucet, p. 35.

The king's jurisdiction extended, at least _de jure_, over this heterogeneous group of administrative units. And, in fact, late fifteenth century monarchs had superimposed a centralised administrative system, a network of royal officials, over all of their realm. How efficiently this bureaucracy functioned has been a matter of debate among historians for decades: some would claim that François I ruled as absolutely as did eighteenth century kings, whereas others argue that the Valois kings could at best only build the facade of absolute rule. It would be safer, perhaps, to argue that the shift from feudal and local administration to a centralised bureaucracy was a lengthy, laborious process that was by no means ended in the sixteenth century — if, indeed, we can claim that it was ended in the eighteenth century.

In any case, however, we can credit the Valois with having created a centralised fiscal system. They may not have been absolute monarchs in the sense that Louis XIV claimed to be, but they nonetheless gained a "tax absolutism." For, however confusing and cumbersome the system of bailiwicks, _generalités_, and _élections_ may seem, the collection of royal taxes occurred with sufficient efficiency to ensure a regular, permanent source of funds. After Charles VII, the French monarchy had _de facto_ won the right to tax subjects without their consent and the fiscal machinery increased in both size and efficiency during the sixteenth century until it covered the entire realm.[10] The French

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[10]Salmon, p. 59; Martin Woolf, pp. 51-2.

kings never claimed the right to tax their subjects arbitrarily, but, in practice, local communities merely exercised the right to determine the manner of payment, never the amount to be paid.

Traditionally, legists had divided taxes into two types: extraordinary and ordinary taxations. The latter included all revenues from the domain, the *cens* paid by peasants and burghers on their property, the *franc-fief* paid by *roturiers* on their ennoblement, and other incidentals. Although some theorists, like Bodin, would argue that the king should support himself by means of ordinary taxation alone, by the sixteenth century ordinary taxation constituted only one-fifth of the royal revenue. The rest came from extraordinary taxation: the *tailles*, the *crues* or additions to the *tailles* to meet certain unusual expenses, *traites* or customs, the *gabelles*, and *aides* or taxes imposed on certain manufactured goods.[11] In addition, the government was often pressed to take other measures, such as the issuing of government bonds, the raising of loans, or the alienation of the royal domain. By the 1540's, the entire tax collection machinery was administered by the king's inner council — the *conseil des affaires et des finances*, headed by the receiver-general and kept apart from the privy council in order to deal exclusively with financial affairs. At the same time, François I created

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[11]Salmon, p. 74; Zeller, pp. 254-71.

the _Epargne_, a central treasury to replace local treasuries that had held tax money to be used within their locality. Extraordinary and ordinary taxation were now joined under the single administration of seventeen, and later twenty-one, _generalités_.[12] Three sovereign courts reserved the right to judge all financial matters: the _chambre des comptes_ (for cases between the court and officials), the _cour des aides_ (for appeals from tax payers), and the _cour des monnaies_ (to control the minting of coins).[13]

The monarchy further augmented its power by relying increasingly on its privy councillors and a professional bureaucracy, composed of the nobility of the gown, wholly loyal to the interests of the Crown. This professional bureaucracy served to replace local administrators and the former haphazard dependence of the king on the good-will of his feudal nobility. The privy council or _conseil des parties_ evolved into the arbiter of daily administrative business, while the _conseil étroit_, composed of the king, the grand officers of the realm, and the princes of the blood, debated high policy. Gradually the chancellor — assisted by a professional corp of notaries and secretaries — emerged as the most prominent official in the state. Finally, the king also made use of secretaries and the _maîtres des requetes_ to perform auxilliary functions

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[12] Salmon, p. 75; Martin Woolf, pp. 81-86.

[13] Salmon, p. 74.

for his council; they took on extraordinary commissions, gathered information, and, after 1553, made regular tours of inspection to correct abuses of power by royal officials.[14]

Moreover, the monarchy of the fifteenth and sixteenth century tried to give France a uniform law code. According to the ordinance of Montils-les-Tours (1454), all customary laws were to be compiled; this work continued into the reign of Henri II and revisions of those coutumiers already published were made until the reign of Henri IV. Originally, legists had planned that each code, once compiled and revised by the local parlements, would be promulgated by the king. During the sixteenth century, lawyers such as Charles Dumoulin hoped to harmonise all the coutumiers into one national law code; this plan, however, never progressed beyond the stage of collecting and collating diverse coutumiers.[15]

Yet, despite the efforts of the Valois kings to centralise and strengthen their administration, the French monarchy could by no means

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[14] Salmon, pp. 66-70; Zeller, pp. 115-17.

[15] Doucet, pp. 60-61.

claim to be absolute. The French king remained half feudal lord and half supreme sovereign. Even the most ardent defenders of the monarchy refused to accept that the king could rule without constitutional restraints, without regard to the rights of his subjects. La Monarchie de France (1515) by Claude de Seyssel, the French cleric and jurist who served both Charles VII and Louis XII and wrote commentaries on the Code, the Digest, and the works of Bartolus,[16] offers the best testimony to the dual nature of the French monarchy. Addressing himself to the young François I, de Seyssel outlined a theory of paternal rule — a rule based on mediaeval notions that the king, however absolute within his own purview, was nevertheless bound to respect the legal rights of his subjects.[17]

According to Seyssel, the French monarchy had attained an authority and glory unparalleled in European history because certain constitutional limitations tempered absolute rule. Most important among these limitations were the fundamental laws of the realm: for example, the Salic law prohibits all women from inheriting the throne and protects the realm from falling into the hands of a foreign prince.[18] Although

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[16]Claude de Seyssel, La Monarchie de France, ed. Jacques Poujol (Paris: Librairie d'Argences, 1961), pp. 12-19.

[17]William Farr Church, Constitutional Thought in Sixteenth Century France (Harvard, 1941; rpt. New York: Octagon, 1969), p. 23

[18]De Seyssel, p. 112.

de Seyssel attempted no explanation of how or why Salic law can restrain the actions of a purportedly absolute ruler, we can assume that he followed the theories of mediaeval legists: that is, the king holds the Crown in trust or in usufruct and, therefore, may not freely dispose of the succession of the Crown. These fundamental laws, although never clearly specified or promulgated in a legally binding constitution, were later frequently cited in the literature on the French monarchy. Thus, the President of the Paris Parlement, de Harley, could condemn royal alienations made by Henri III (1586) by invoking the immutable, inviolable laws of the realm:

> Nous avons deux sortes de loix, les unes sont les loix et ordonnances des rois, les autres sont les ordonnances du royaume, qui sont immuables et inviobles, par lesquelles vous estes monté au throne royal.[19]

In the same way, de Seyssel lauded the fundamental laws of the realm for the role they played in maintaining the continuity of the monarchy and, consequently, in preserving the stability of the state.

De Seyssel neatly divided all types of checks on the sovereign power into three categories: religion, justice, and the 'police'. These checks protected the common weal from the acts of a depraved or tyrannical king and, when a king proved manifestly unfit to rule, provided for

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[19]Quoted in Doucet, p. 66.

a regency to manage the state. As a cleric, de Seyssel ranked religion first among all the restraints on the monarch: religion, he argued, is the most precious possession of the realm and, therefore, no Christian prince should be able to act tyrannically with impunity. Should a prince be iniquitous, the clergy has both the moral duty and the legal right to remonstrate, even though it has no legal power to coerce the king.[20] Legal power is only reserved for the Parlement of Paris, which must see that justice is done in the kingdom. For the Parlement not only dispenses the king's justice, but also guards the civil rights of all citizens against any unjust royal command. Despite his power, the king may never interfere with the private rights of his subjects and so Parlement reviews all royal commands and judges their <u>civilité</u> or <u>incivilité</u>.[21] De Seyssel, then, attached the greatest importance to the French parlements, "car elles sont etablies de si grand nombres de bons et notables personnages que c'est un vrai Sénat Romain, répresentant une majesté secourable aux bons et épouvantable aux mauvais."[22]

While de Seyssel dogmatically asserted that only the Parlement ensured the justice of the laws, other French Renaissance legists disputed

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[20]De Seyssel, p. 116.

[21]De Seyssel, p. 117.

[22]De Seyssel, p. 81.

over the actual rights and powers that the sovereign courts enjoyed. Theoretically the major juridical organ in France, the Parlement of Paris had separated itself from the *curia regis* during the thirteenth century. Its composition fluid, its area of competence never fully specified, Parlement itself claimed supreme power as the sole arbiter of the king, because he had granted it a portion of his sovereignty. In practice, the Parlement of Paris judged all cases touching the king (such as the crimes of treason and counterfeiting) and the peers of the realm; it also received final appeal from the lesser courts of the bailiwicks and *seneschausées*. Finally, parlementarians claimed that they played a fundamental administrative role, since they officially supervised all magistracies.[23] The pretentions of the Parlement are best voiced in a remonstrance (1489) against Louis XI:

> Est lad. Cour le vray siège et throne du . . . dont il est le premier et le chef, *ad instar* du Sénat de Rome, qui estoit constitué de cent hommes, dont l'Empereur estoit l'un et le chef.[24]

The Valois kings, especially François I, repeatedly tried to restrict the area of competence of Parlement to juridical affairs alone. But the Parlement of Paris remained involved in legislation by way of its right to register all royal edicts. All edicts presented for

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[23]Doucet, pp. 178-87; Salmon, pp. 70-72.

[24]Quoted in Doucet, p. 182.

registration, although unchangeable, could be amended by a list of additions; this list of modifications or conditions attached to the original edict would have the same binding force as the king's command. Furthermore, Parlement could remonstrate against the king, if it disagreed with the whole substance of the proposed law.[25] Nonetheless, the king could, in the end, enforce his will either by a lettre de jussion or, as a last measure, by a lit de justice. The ordinance of Moulins (1566) further increased the king's power over his sovereign court in that, henceforth, all edicts, once enregistered, might not be obstructed by parliamentary interference.[26] And, in fact, the king usually could press Parlement to capitulate to his demands: registration of the Concordat of Bologna (1515), to take only one extreme example, took two years, but eventually Parlement had to yield. Finally, the Valois kings usurped a part of Parlement's juridical power by reserving the right of highest appeal for themselves and their own informal court, the conseil des parties.[27]

The gradual decline in parliamentary influence nothwithstanding, de Seyssel maintained vehemently that any king who acted without a parliament would be a tyrant and that, in France, the Parlement of Paris

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[25] Zeller, pp. 155-6.

[26] Doucet, p. 185.

[27] Zeller, p. 113.

was the sole guardian of justice in the realm. The third check that de Seyssel placed beside justice and religion was what he called the 'police':

> c'est a savoir de plusier Ordonnances qui ont été faites par les Rois mêmes, et après confirmées et approuvées de temps en temps, lesquelles tendent à la conservation du royaume en universel et particulier.[28]

These laws have been observed for such a long time that the king may not derogate from them, unless he have the sanction of Parlement and the cour des comptes. Moreover, each of the three estates — the nobility, the peuples gras, and the peuples menu — has its own traditional rights and privileges, which the king may not injure. It is the proper ordering of these estates, argued de Seyssel, that best serves to protect the public welfare. The nobility, in exchange for military service, should receive special exemptions and prerogative; the bourgeoisie, in exchange for administrative and juridical service, should receive the right to follow trade; and the peuples menu, in exchange for manual labour, should receive the right to hold certain lower echelon administrative positions. All three estates, in addition to special privileges, should enjoy full protection by the laws of the kingdom.[29] These three

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[28] De Seyssel, p. 119.

[29] De Seyssel, p. 135.

corporate bodies, each obliged to fulfill a specific function and each granted certain rights, form the corpus mystique of the realm.[30]

The monarch's role, then, is to make sure that each estate performs its duty and receives its rights. According to de Seyssel, this is best done by obeying and maintaining good laws and customs; by annulling out-dated laws; and by making new laws, should the need arise.[31] The king, in de Seyssel's schema of a corporate state, is above all the servant of the law and of the corpus reipublicae mysticum. His role as legislator is subordinated to his role as preserver of the good, old laws. Thus, de Seyssel continued:

> le Roi et Monarque (connaissant qué, par le moyen des lois, ordonnances et louable coutumes de France concernants la Police, le royaume est parvenu à telle gloire, grandeur et puissance qu'on voit, et se conserve et entretient en paix, prospértie et réputaion) lés doit garder et faire observer le plus qu'il peut: attendu mêmement qu'il est astraint, par le serment qu'il fait à son couronnement de ce faire.[32]

The king, in short, ruled over a realm that enjoyed a mixed constitution: the king, obeyed and revered by all, holds all power and authority, although he is limited by good laws and officers of the realm; Parlement, which de Seyssel had compared to the Senate of Rome, moderated the

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[30]De Seyssel, p. 135.

[31]De Seyssel, p. 130.

[32]De Seyssel, p. 154.

dominion of the king. The French state is, therefore, half monarchical and half aristocratic[33].

De Seyssel trusted in the good faith of the king and Parlement to maintain the corporate structure of the state; he allocated no part of the sovereignty to the many representative assemblies that continued to convene throughout the sixteenth century. Such assemblies, however, claimed an almost unlimited area of competence and later French political theorists saw in these assemblies the most powerful check on the actions of a willful or tyrannical monarch. First among these assemblies was what de Seyssel named the assemblée casuelle des Notables,[34] an assembly "de bons et notables personnages de divers Etats" appointed by the monarch. Varying in composition and function according to the king's pleasure, these assemblies were wholly consultative: they in no way determined the substance of new legislation. Thus, in 1506, the towns were asked to send deputies to Tours to support the king's wish to break off the betrothal of his daughter Claude to the future Emperor Charles V; in 1527, François I assembled clerics, parliamentarians, and nobles to ratify the Treaty of Madrid; in 1558, Henri II summoned the towns and prelates to support the continuation of the war against the Hapsburgs

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[33]De Seyssel, pp. 81-82.

[34]De Seyssel, p. 135.

after the defeat of Saint Quentin; in 1561, notables of the Church met at Poissy to debate doctrinal matters and to resolve religious dissent; finally, in 1583, Henri III consulted financial experts at St. Germain to alleviate his financial difficulties.[35]

More significant than the assemblies of notables was the Estates-General, even though its authority existed more in theory than in practice. Myth and insufficient documentary evidence cloud the history of this institution; moreover, the French monarchy never enacted laws to specify either the procedure or the area of competence of the Estates. Sixteenth century theorists, as well as modern historians, often perforce based their analysis of the Estates on guesswork, if not wishful thinking. Only two features appeared consistently in the proceedings of the Estates: the king requested towns and bailiwicks to send deputies chosen from the "good persons" or "notable personnages" of their districts; once at the assembly, these deputies presented _cahiers de doleances_. The manner of election varied from district to district; usually, however, the _bailli_ nominated the deputies for the first and second estate, while the town oligarchy or village notables elected the deputies for the third estate. At a bailiwick assembly, further elections or nominations determined the group of deputies sent to the Estates. The _cahiers_ were generally

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[35] Doucet, pp. 328-35; Zeller, pp. 342-3; Russell Major, _Representative Institutions in Renaissance France_ (Madison: University of Wisconsin Press, 1960), pp. 122-5, 136-7, 144-7.

compiled at the assembly itself, either by all the estates together, by each estate separately, or by an elected committee.[36]

After the relatively self-sufficient rule of François I and Henri II, the later Valois kings tended to rely more heavily on representative assemblies. Why they wished to convene the Estates frequently is unclear, however, since the deputies usually accomplished very little. The Estates of Orléans (December 1560), disrupted by the sudden death of François II, occupied itself in defining its status under the new king; the Estates of Pontoise (August 1561) was largely overshadowed by the assembly of notables held at Poissy; the Estates of Blois (1576) made a serious attempt to reform the state and to resolve France's chronic financial trouble, but ended in an impasse; the second Estates of Blois (October 1588) met to resolve the impending dynastic crisis, but achieved little more than its predecessors.[37] More often than not, the deputies insisted on discussing their local difficulties, and debates on national issues often broke down into individual haggling over the local ramifications of national policy. Thus, a call to increase taxation would result in separate negotiations to lighten local tax loads. Yet, despite its dismal record in moulding national policy, the Estates' pretentions were often unlimited. And, in Protestant or Huguenot theory, the

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[36]Doucet, pp. 314-20; Zeller, pp. 335-40; Russell Major, The Deputies to the Estates General in Renaissance France (Madison: University of Wisconsin Press, 1960), pp. 9-12, 132.

[37] Ibid.

Estates figured as the focus of appeals for popular sovereignty and justifications of a citizen's right to resist an unjust monarch.

During the first half of the sixteenth century, French Protestants had advocated a passivity that verged on quiescence with regard to the affairs of state. Calvin, for example, repeatedly argued that citizens, whatever their religious beliefs, might never rebel against properly constituted authority.[38] The Institutes of the Christian Religion, written in the two years after the incident of the placards (17-18 October 1534) and the renewal of religious persecution, was in part an answer to François I's severe religious policy.[39] For Calvin, natural law had determined that men live together in an organised commonwealth. Natural law, of course, mirrored God's law and, therefore, men must reverence all temporal rule — the manifestation of the Divine will — just as they must reverence spiritual rule. In fact, argued Calvin, the contemplation of temporal rule should lead us to contemplate its source: Divine rule. In addition, man enjoys liberty of conscience, but this liberty is not incompatible with civil servitude; after all, civil society is essential to safeguard both justice and religion, as well as material prosperity, and thus the sovereign may legislate in matters of conscience. Calvin next explained the

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[38]Pierre Mesnard, L'Essor de la philosophie politique au XVIe siècle (Paris: Boivin, 1930), p. 290.

[39]Mesnard, p. 275.

role that the three basic parts of the state — the magistracy, the people, and the law — must play: the magistracy conserves the law and, in so doing, is the representative of God; the people must unquestioningly obey the law and, consequently, the magistrates; finally, the law animates the whole body politic and leads men to the Law of God.[40]

It was not until after the St. Bartholomew Day Massacre (August 1572) that Protestant theorists substantially deviated from the guidelines of civil action set by Calvin. Théodore de Bêze (1519-1605), who had devoted earlier political works to vindicating the Genevan theocracy, now openly supported the Huguenots' right to rebel against the French King. In his pamphlet Du Droit des Magistrats (1574), de Bêze asserted that all magistrates rule by means of the authority that they had received from God. Citizens, therefore, normally owe absolute obedience to their magistrates, unless a command be manifestly iniquitous or irreligious. In general, the citizen can trust the justice of magisterial commands. Yet, if a command appears to be unjust, the citizen must then examine this command and seek redress by legal means.[41] Should the magistracy prove to be recalcitrant, or if a tyrant has illegally seized power, the citizen may then use extra-legal means to enforce justice.

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[40]Mesnard, pp. 279-81.

[41]Mesnard, p. 315; Théodore de Bêze, Right of Magistrates in Constitutionalism and Resistance in the Sixteenth Century, ed. Julian Franklin, op. cit., p. 101.

Above all, wrote de Bêze, we must acknowledge that sovereignty rests with the people: the king can only rule by the grace of popular consent and must therefore serve those who have set him on the throne. Should a tyrant usurp the throne:

> the private citizen should appeal to the legitimate magistrates so that, if possible, the public enemy may be repulsed by public authority and by common consent. But if the magistrates, from connivance or whatever, should fail to do their duty, then each private citizen should exert all his strength to defend the legitimate institutions of his country (to which, after God, each man owes his whole existence) and to resist an individual whose authority is not legitimate because he would usurp, or has usurped, dominion in violation of the law.[42]

If a legitimately constituted monarch should suddenly begin to act in a tyrannical manner, only the magistracy or the Estates can oppose his will. In such a case, argued de Bêze, the people must accept the leadership of their elected representatives. De Bêze further insisted that opposition to a legal monarch has as its aim the correction of abuse, not the overthrow of the king. De Bêze, then, vindicated the citizen's right to rebel, although he did so cautiously, trusting in the magistracy's ability to remedy the king's abuse of his power.

It was François Hotman (1524-1590), in his <u>Francogallia</u> (1573), who first provided the legal and historical justification for popular

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[42]De Bêze, p. 107.

rebellion and for the supremacy of the Estates General. For Hotman, a Protestant Lawyer and publicist, all the civitates of ancient Gaul — whether ruled by a king or by an aristocracy — held annual public councils to deliberate matters concerning the common welfare.[43] The kingdoms were, moreover, usually elective and so the king's power was limited by established law; if the king dared to defy these laws, the people could legally depose him and elect a more tractable king. The councils of those Germanic nations, from which France traces her origins, had been composed of the King, the princes of the blood, and representatives from the people. Hotman further argued that this council had survived in one form or another until the Middle Ages and thus the right of the people to consent to public policy had become firmly entrenched in the laws of the realm:

> it is completely evident that this splendid liberty of holding public councils is part of the common law of the people, and that kings who scheme to supress this sacred liberty are violators of the law of the peoples and enemies of human society and are to be regarded not as kings but tyrants.[44]

The royal majesty pertains only to the king in council, continued Hotman; thus, it is only in conjunction with the council that the

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[43] François Hotman, Francogallia in Constitutionalism and Resistance in the Sixteenth Century, ed. Julian Franklin, op. cit., pp. 53-55.

[44] Ibid., p. 70.

king is said to hold the regalian rights — the right to wage war, to legislate, to confer honours, to divide the royal domain, and to determine public policy. The king is only a temporary leader — a tutor, guardian, or general — while the kingdom exists perpetually.[45] Moreover, the king exists solely for the people, "For a people can exist without a king, by following its own counsel or that of its nobles, whereas a king without a people cannot even be imagined."[46] Like his mediaeval predecessors, Hotman compared the realm to a corporation or a guild, and the king to the corporation's legal representative or procurator. Finally, Hotman claimed that the Estates General, as the historical heir to the Germanic councils, is the only true representative of the people. In so arguing, Hotman ridiculed parliamentary pretentions: the Parlement of Paris, this "counterfeit Senate, into which the kings made sure that no one was coopted who they did not think would be useful for their plans," had merely usurped the rights of the Estates during the fourteenth century and, consequently, had violated the fundamental laws of the realm.[47]

The more subdued Vindiciae contra tyrannos (1579), attributed

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[45] Ibid., pp. 73, 78-9.

[46] Ibid., p. 79.

[47] Ibid., p. 89.

to Philippe du Plessis-Mornay (1549-1623), summed up the constitutional theories of Protestant ideologues and, in so doing, rehearsed much of mediaeval legal doctrine. As had earlier constitutionalists, Mornay advised that citizens only obey their king insofar as his commands are equitous and compatible with the moral teachings of Christ. After all, he argued, the king holds his realm as a fief; if he should commit a felony against God or his people, the realm automatically escheats to its original owner — the people.[48] In any case, the coronation oath — a double contract made between the king and God, and between the king and his people — sets definite limits to the king's power. Should he transgress these limits, the people have the right to rebel because the king has defaulted on his contract. The people should, however, resist the king by means of appeals to the magistracy or the Estates. The reason for this, wrote Mornay, is that the magistracy and elected deputies, although below the king individually, form a corporate body representing the whole realm and, as such, collectively are above the king.[49] In addition:

> as a whole people is permitted to oppose a tyrant, so also are the principle persons of the kingdom, who represent the body of the people, in the same manner that municipal officials may make contracts for the good of the entire corporation. And as the decisions of the majority of a

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[48] Vindiciae contra tyrannos in Constitutionalism and Resistance in the Sixteenth Century, ed. Julian Franklin, op. cit., pp. 142-3.

[49] Ibid., pp. 148-9.

> corporation publicly arrived at are taken as the decisions of the entire body, so the action of the majority of princes and notables is taken to be that of all of them, and what all of them have done is regarded as an act of the people as a whole.[50]

All law stems from the will of the people; the king can only rectify omissions or redundancies in the law and, even in doing this, he must have the consent of the nation. If, however, the king should decide to act unilaterally, private persons have no legal right to initiate a public action. To make this point, Mornay cited the Roman maxim on corporations: "for what is owed by a corporation is not owed to any single individual, and the debts of a corporation are not owed by any single individual."[51] Resistance to the king, then, must be made by the representative organs of the people, never by individuals.

It was in response to such constitutional theorists that Bodin wrote his own political works. Since *ca*. 1559, when he left the university of Toulouse, Bodin had renounced the study of civil law to serve in the auxiliary capacity to various political powers: as an advocate to the Parlement of Paris (*ca*. 1562), as a deputy to the *procureur-general* of Poitier (1567), as a *maître de requete* for the duc d'Alencon (after 1571), and finally as the *procureur du roi* for

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[50] *Ibid*., p. 151.

[51] *Ibid*., p. 154.

Laon (1587-96).[52] Contemporaries and historians have accused Bodin of holding Protestant beliefs,[53] but, whatever his real religious leanings were, by the mid-1570's Bodin firmly asserted that the cause of national unity demanded that all Frenchmen turn to the Crown as their sole material and spiritual protector.

To argue this thesis, Bodin naturally turned to the juridical concepts and vocabulary of his mediaeval predecessors. If du Plessis-Mornay could argue from the private law of contracts to prove that the king was subject to the people's will, Bodin could argue from the private law of corporations to prove that one representative — the king — should assume the responsibilities of the entire polity.

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[52] Commonweale, pp. A5 - A13.

[53] The evidence cited to suggest that Bodin was in truth a Protestant is slight, at best. In August 1548, a Carmelite monk called "Jehan Baudin" was tried for heresy in Paris; from August 1552 until July 1553, the Geneva registers refer to a Jean Bodin who had been given the status of a citizen; and throughout his political career, Bodin was plagued by accusations that his faith rested on opportunism alone. The name "Jean Bodin" was, however, a common one and thus little weight can be given to random documents referring to a Protestant Bodin. Furthermore, on 10 June 1562, Jean Bodin made the public profession of faith required of all advocates to the Parlement; although he was imprisoned in 1569 on the grounds that he adhered to the new faith, Bodin was released after the Edict of Pacification (11 August 1570); finally, the Catholic League twice (in 1587 and in 1590) cleared Bodin of the charge that he favoured Protestants in his legal judgments. The controversial Heptaplomeres (ca. 1590), a discussion among the believers of seven different faiths, has often been used to prove that Bodin, whatever his public statements, supported Protestant aims. What it does indicate, however, is that Bodin remained a religious sceptic until his death. Commonweale, pp. A5 - A13.

Bodin, like his political opponents, regarded legal theory as the basis of political theory and so he also rehearsed much of mediaeval learning to formulate his counterclaims. In so doing, Bodin ignored many of the political realities of Renaissance France: for example, he claimed far greater powers for the king than, in practice, existed. Yet this blindness was due as much to the terminology of the law as it was to Bodin's aspirations on behalf of the French Crown. Thus, because the _Corpus Juris_ portrayed the _princeps_ as an absolute authority and the Senate as a purely consultative body, Bodin could easily — given the maxim _rex imperator est_ — claim that the French king should control the Parlement of Paris. In short, Bodin harnessed mediaeval juridical learning in his attempt to provide the legal basis for the absolute powers of the French king.

IV

The civil and religious wars in France during the late sixteenth century had raised the crucial issue of the limits of lawful resistance to the crown. Yet the traditional source of law, the Justinian code, seemed to offer little practical guidance for a discussion of a French citizen's rights and obligations; legists turned, therefore, to the possibility of constructing a new law code that would be both universal and relevant. Bodin's interest in a reconstructed public law code, then, reflected the urgent demands of French jurists and statesmen during the political crisis of the 1560's for a fresh approach to constitutional law.

Although Bodin's _Les Six Livres de la République_ was perhaps the first successful synthesis of legal and historical studies into a political system, Bodin was not the first lawyer to call for the reconstruction of a universal law code. François Connan (1509-1551), whom Bodin praised in his _Methodus ad facilem historiarum cognitionem_ for his desire to combine the precepts of justice with the practice of law, had during the last fifteen years of his career continuously demanded that jurists turn their attention toward a methodical re-examination of civil law. The guidelines for this re-examination, claimed Connan, should be the principles of justice and the needs of

men in society; any new universal law code should thus blend together those laws common to all societies (the ius gentium) so that each man will receive his due. To organise this ius gentium, the jurist should divide his material into logical units according to recta ratio, after having defined his subject matter rigorously. In his Commentaria iuris civilis, Connan himself tried to follow this method but, as his title suggests, he limited his reconstruction to providing a new basis for the study of Roman law alone.[1]

More important, perhaps, than the work of Connan were the works of François Baudouin and François Hotman. In his De institutione historiae universae (1561), Baudouin outlined a scheme whereby a reformed jurisprudence would become the agent of the reconciliation of the ultramontane Papacy and the Genevan Church. Since the study of the Corpus Juris does not adequately prepare the jurist for practice in the French courts or for the affairs of state, he should supplement his knowledge of the civil law with a careful reading of histories. Only after an intensive course in universal history — in particular, religious, political, and legal history — will the jurist understand the nature of society and the historical development of institutions. He will then be in a position to suggest judicious changes in the constitutional laws of

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[1]Jean Moreau-Reibel, Jenn Bodin et le droit public comparé dans ses rapport avec la philosophie de l'histoire (Paris: J. Vrin, 1933), pp. 20-23.

a commonwealth, if a political crisis should occur.[2]

Hotman's Anti-Tribonian (1567) recommended a more radical course for the reform of jurisprudence. French courts and law schools continue to idolize the Corpus Juris, argued Hotman, and therefore blind themselves to the real roots of the French legal system: Frankish and Gaulish customary law. Legists would be better advised, then, to study feudal law and to consult the Corpus Juris only when customary usage provides no cogent solution to a legal problem.[3] Furthermore, Hotman hoped that his treatise would give the impetus for the compilation of a new law code. "It will be very easy at this time, " wrote Hotman, "when it has pleased God to grant our France a Solon in the person of the great Michel de l'Hôpital, to bring together a number of jurisconsults, statesmen, and some of the more notable advocates and practitioners of the kingdom, and to charge them with bringing together what they can use in the books of Justinian as well as in the books of philosophy and in experience."[4]

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[2]Julian Franklin, Jean Bodin and the Sixteenth Century Revolution in the Methodology of Law and History (New York: Columbia University Press, 1963), pp. 42-5; Donald Kelley, Foundations of Modern Historical Scholarship, op. cit., pp. 127-36.

[3]Franklin, Jean Bodin and the Sixteenth Century Revolution, pp. 46-56; Donald Kelley, François Hotman (Princeton: Princeton University Press, 1973), pp. 192-7; J. G. A. Pocock, The Ancient Constitution and the Feudal Law (Cambridge: Cambridge University Press, 1957), pp.12-23.

[4]Quoted by Kelley, François Hotman, p. 196

Bodin's first step toward the reconstruction of a universal law code or the synthesis of all major legal systems came in his *Juris universi distributio*, a brief treatise first published in 1578 but probably written well before the *Methodus ad facilem historiarum cognitionem*. As did his contemporaries, Bodin denied the universal validity of the *Corpus Juris*: the civil law had been compiled for only one state — Rome. Moreover, the Justinian code reflected a specific stage of historical development of the late Roman Empire and could no longer be considered applicable to the contemporary world. The proper field of study, then, for those who hoped to compile a universal law code should not be the *Corpus Juris*, but the *ius gentium seu commune*: that is, those laws which all peoples past and present have held in common. Bodin offered the following list of laws as the basic components of this *ius gentium*:

> All people have — or at least the better part of all peoples — public law, private law, laws of the prince, magisterial edicts, laws of the majesty, customs, and certain institutions; where there is no law, there are customs and equity: there are also certain laws of rewards and punishments, contracts, obligations, testaments, judgments, decrees, actions of the law, and all those things which conserve the society of men among men.[5]

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[5]"Habent autem omnes populi, aut certe quidem populorum bona pars, ius publicum, ius privatum, leges principum, edicta magistratuum, iura maiestatis, consuetudines, quasdam & instituta, & ubi lex desit, aut ipsa consuetudo, aequitatem: tum etiam paenarum ac praemiorum iura quaedam, conventiones, obligationes, testamenta, iudicia, decreta, legis actiones, & id genus alia, quibus hominum inter homines societas conservatur." Jean Bpdin, *Iuris universi distributio* in *Oeuvres Philosophique de Jean Bodin*, ed. Pierre Mesnard (Paris: Presses Universitaires, 1951), pp. 72-3.

But the immense mass of material on customary law, as well as the disorder of the Corpus Juris and the quantities of glosses, concilia, and law texts based on the Roman law, posed an almost insurmountable difficulty for the compiler of a universal law code. The discovery of a method that would permit the classification of this vast amount of legal material had to precede further study. For this reason, Bodin urged jurists to follow the example of Plato: "Plato dicere solebat, nihil divinius sibi videri quam apte dividere, eo pertinet, ut in recta divisione memborum omnium perpetua sit, & continua quaedam series."[6] Like François Connan, then, Bodin stressed the need to re-organise jurisprudence by dividing and subdividing legal material into easily manageable topics or arguments.

As Kenneth McRae has persuasively argued, the source of both Connan's and Bodin's method was probably the Institutiones dialecticae of Peter Ramus. Basing his design for a new logic on a somewhat sketchy understanding of Plato, Ramus had assumed that the material world is no more than a copy of the hierarchy of ideas existing in the mind of God. The logician need not strive to shape a composite model of the universe through a lengthy and laborious inductive process; he need only uncover the basis of the generalised concepts of the mind — and then organise

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[6]Jean Bodin, Iuris universi distributio, p. 71.

his sense data accordingly into neat, symmetrical patterns. These patterns, if they are deduced from inviolable and eternal ideas, will correspond to the eternal paradigm. Reason, therefore, involves a two-fold process: finding or *inventio* and disposing or *collactio*. The new logic that Ramus proposed to organise sense perception seems extremely easy, if not simplistic: the subject is first succinctly defined and then divided and subdivided, moving from general to more specific aspects, until all possible topics or arguments have been exhausted. The division of the subject could be done in several ways, but by far the simplest was to divide the subject into two contrary aspects; each aspect could in turn be defined and then further subdivided, *ad infinitem*.[7]

The similarity of Ramus's logic to the method outlined in Bodin's *Iuris universi distributio* is obvious. Bodin began with a brief, general definition of jurisprudence that he found in the *Digest* of the *Corpus Juris*: jurisprudence is the art of rendering to each his due so that the harmony of society is preserved. He next divided the art of jurisprudence into four categories, according to the four Aristotelean causes: the formal cause consists of *ius*; the material cause

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[7]Kenneth D. McRae, "Ramist Tendencies in the Thought of Jean Bodin," *Journal of the History of Ideas*, XIV (1953), 309-11; *cf.* Neal W. Gilbert, *Renaissance Concepts of Method* (New York: Columbia University Press, 1960), pp. 142-4.

consists of leges actiones and the judicii officium; and the final cause consists of aequitas. Each cause or category is in turn defined and anatomised: ius, for example, is defined as the divine light of goodness and wisdom that holds society together; this definition then leads to the bifurcation of ius into ius naturale and ius humanum, the definition of the latter term leads to the ius gentium and the ius civile, and so on. Bodin continued this process of subdivision until all major aspects of the art of jurisprudence were ranged under what he considered its four major causes. He by no means deviated from the standard textbook definitions of legal terms — all his terms conform, more or less, to those provided in the Corpus Juris — and yet he provided a wholly new arrangement of legal material.

In the Methodus ad facilem historiarum cognitionem (1566), Bodin left the realm of pure legal science for the study of history, "for in history the best part of universal law lies hidden; and what is of great weight and importance for the best appraisal of legislation — the customs of the peoples, and the beginnings, growth, conditions, changes, and decline of all states — are obtained from it."[8] Bodin complained, in his dedication to Jean Tessier, that most writers on the civil law had merely encumbered an already unwieldy body of law with the bulk of their endless

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[8] Jean Bodin, Method for the Easy Comprehension of History, trans. Beatrice Reynolds (New York: Columbia University Press, 1945; rpt., New York: Octagon, 1966), p. 8. Hereafter referred to as Method.

disputations. They had done so, moreover, because they had misunderstood the true aim of legal studies. Any art, including the art of jurisprudence, should seek out universal truths; law studies should, therefore, seek out the eternal principles of good government. Instead of confining themselves to a close examination of Justinian's code, jurists "should have read Plato, who thought there was one way to establish law and govern a state: wise men should bring together and compare the legal framework of all states, or the most famous states, and from them compile the best kind."[9] In short, by comparing the public laws of major commonwealths, Bodin expected to find the foundations of a _ius gentium seu commune_, which could then be used as a guide to just government. For this reason, claimed Bodin, he had previously drawn up his _Iuris universi distributio_, a table for the arrangement and classification of laws so that the law student might easily trace the "main types and divisions of types down to the lowest, yet in such a way that all members fit together."[10] Bodin would now also yoke historical studies to his legal studies to fashion a practical philosophy of politics.

Bodin further criticised the method of exegesis practised by both mediaeval and contemporary legists. While the glossators and

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[9] _Method_, p. 2.

[10] _Method_, pp. 2-3.

post-glossators had obscured the meaning of the Corpus Juris with their ignorance, contemporary legists believed that their sole task was in the counting of syllables. There are, according to Bodin, four major types of legists: theorists who lose themselves in a maze of exegetical details; practitioners who flagrantly defy the principles of justice; scholars who combine their knowledge of theory with the practice of law;and lastly jurisconsults who add a knowledge of the arts and philosophy to the theory and practice of law. It is only the jurisconsults who, because they comprehend the nature of equity and justice, can grapple with the complexities of legal studies: they can assemble their knowledge of both history and law as well as "circumscribe the entire division of learning within its limits, classify into types, divide into parts, point out with words, amd illustrate with examples."[11] Statesmen should, therefore, turn to these men for the compilation of a new universal law code; for only the true jurisconsult can unite a juridical analysis of public law with the historical interpretation of institutions and societies.

In the fifth chapter of his Methodus, Bodin himself undertook to frame a tentative comparative analysis of political organisations. For this purpose, Bodin began, as he had in his Iuris universi distributio, with a series of definitions. In order to avoid confusion,

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[11] Method, p.

argued Bodin, a study of those laws necessary for the preservation of social harmony must be preceded by clear, succinct explanations of the three basic components of society: the citizenry, the magistracy, and the supreme authority. In particular, these explanations must be universally valid. Aristotle, for example, had erred grievously when he had defined a citizen as any individual who might share in the administration of justice, hold public office, or act in a deliberative capacity, because this definition described a citizen of Periclean Athens only. Bodin thus offered to replace the muddled and often irrelevant definitions of Aristotle and other political theorists with those he had discovered through the cogency of reasoning. First, a citizen in all commonwealths is a free subject bound to obey his sovereign lord. The magistrate holds a part of public authority and has the power of _coercitio_, although his commands are merely ordinances, never laws. Finally, the supreme authority holds the _summa rerum_ or the _summum imperium_, the basic rights of which are the right to create and define the offices of the magistracy, the right to proclaim and annul law, the right to declare war and peace, the right to receive highest appeal, and the power over life and death.[12] Bodin, then, transformed what mediaeval legists had called the regalian rights of the Crown into the essential marks of sovereignty. He did not, however, as yet consider the law-making power of the king as the foremost characteristic of the

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[12] _Method_, p. 166.

imperium and so agreed tacitly with mediaeval and Roman legists that jurisdiction and administration, not legislation, was the pre-eminent sovereign right.

Bodin's descriptions of the basic components of society stemmed, of course, from traditional juridical concepts of public rights and obligations. An examination of the state can therefore be reduced to an examination of the legal status of the members of a commonwealth — of the public laws regulating this status — and to an unravelling of the web of legal relationships among magistrates, citizens, and the supreme authority. In particular, Bodin focused his analysis on the supreme authoruty, "the determining condition of the Republic."[13] For it is the number of men who hold the sovereign rights, the location of sovereignty, that determines the form of government: a monarchy is simply the rule of one man, an aristocracy is the rule of a minority of citizens, and a democracy is the rule of a majority of citizens. Moreover, when the legist has grasped the nature of the sovereign authority, he will then better comprehend the obedience that both magistrates and citizens owe to their rulers and the rights that are secured in exchange for this obedience.

It is particularly urgent, wrote Bodin, to distinguish sharply between the public rights of the magistracy and those of the sovereign

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[13]Method, p. 156.

authority, for the misinterpretation of these rights has hitherto clouded the analysis of public and constitutional law. Bodin claimed that, although the five rights he had attributed to the sovereign authority were generally undisputed, jurisconsults had often been led astray in their analyses by what appeared to be the sweeping powers delegated to magistrates. To clarify the rights of magistrates, then, Bodin re-examined the critical problem of the right to the merum imperium, a recurrent problem in legal debates past and present. Bodin, however, cut through the tangles of past legal debates by re-asserting the Roman definition of the term merum imperium: following Bartolus — and consequently Ulpian — Bodin claimed that this legal term referred solely to the power of the sword. Furthermore, cautioned Bodin, the legist should not dwell exclusively on any specific power or area of jurisdiction held by a prince or magistrate if he wishes to understand the nature of public power; the legist should also examine the means whereby all magisterial and sovereign rights are held and exercised. To do so, the legist should make a basic distinction between the leges actione or the statutory process (Cujas duly ridiculed Bodin's misunderstanding of the term legis actione) and the iudicii officium, a distinction that Bodin had made earlier in his Iuris universi distributio. The legist must further distinguish between the law and equity; that is, he must understand that equity is a principle that stands apart from enacted laws that may be used to correct the law in particular cases, but that is not a criterion to ascertain the legality or validity of the law. Whatever functions a magistrate performs by law in carrying out the statutory process may never be delegated; but whatever functions

a magistrate performs by right of office — by the _iudicii officium_ — in applying the principle of equity to a special case may be entrusted to others.

Using Bartolus's definition of the _servile_ and _nobile_ functions of a magistrate, Bodin argued that only those powers granted by the right of office agree with the fundamental role that the magistracy plays in any commonwealth. It is these powers that are truly _nobile_, in that they require the magistrate to understand the principles of equity and justice. The rights of the magistracy, then, are not limited to the _merum imperium_ alone; for certain magistrates, they also involved the power to enforce special judgments beyond and even contrary to the law, if the principles of equity should demand extraordinary legislation. In short, _nobile_ magistrates held the right to act and to judge according to conscience. That this right has been granted to magistrates can be demonstrated, argued Bodin, by a brief glance at historical examples. Bodin concluded, then, that, although the five basic attributes of sovereignty were inalienable, in certain cases the magistrate could, by right of his office, be granted the right to correct the law.[14]

Having distinguished the rights of the magistracy from those of

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[14] _Method_, pp. 173-5.

the sovereign authority, at least to his satisfaction, Bodin could now proceed to a simple classification of the types of government: a three-fold division of all governments into monarchies, aristocracies, and democracies. Moreover, because he wished to avoid the application of ethical norms to political theory, Bodin refused to classify tyranny, oligarchy, and ochlocracy as distinct types of political organisations; after all, he argued, the vices or the virtues of the ruling body never affect the fundamental constitution of a commonwealth. Nor would Bodin acknowledge the possibility of a mixed constitution, despite the popularity of de Seyssel's analysis of the French government. Sovereignty, or the ownership of the sovereign rights, is always indivisible and thus no government can exist if, for example, the executive power is separated from the legislative power. For this reason, Bodin maintained that, contrary to contemporary opinion, neither Rome nor Venice had had mixed constitutions: both had undoubtedly always been pure popular states. Contarini, in his eulogy of the mixed government of Venice, had himself confessed that appeal from the magistrates lay with the people and had thus unwittingly revealed that Venice was in practice a democracy. And Roman historians had repeatedly suggested that the property of all citizens, fortunes, liberty, life, death, justice, laws, wars, peace treaties, and the entire welfare of the state depended on the will of the people.[15]

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[15] _Method_, pp. 185, 188.

Armed with this three-fold classification of governments and with clear, brief definitions of the legal rights and obligations of the citizenry, magistracy, and the supreme authority, Bodin now thought himself prepared to analyse the structure of all major commonwealths past and present. But the search for the basis of a universal law code did not end with the simple exposition of the structure of political organisations. Bodin further argued that some notion of historical development must be added to our understanding of constitutions and public law. With this aim in mind, he outlined the pattern of change that all commonwealths had undergone; in so doing, he substituted a dynamic pattern of historical development for the static historiography of mediaeval theorists.

The origins of human society, Bodin claimed, can be found in the laws of nature. In the state of nature, each individual had enjoyed absolute liberty and sovereignty over himself, even though this liberty became somewhat constrained after the formation of the first natural association — the family. When the number and size of families had increased and the bonds of kinship had been extended, men further bound themselves within a second type of association — the fraternity or fellowship. These associations, although not derived from the force of natural law, were wholly consonant with natural reason: while men still lived in a state of nature, enlightened self-interest and brotherly love prompted individuals to seek voluntarily the benefits of a community. The associations that resulted from the later combination of fellowships

and fraternities were regulated without positive law and were thus a half-way house in the evolution from a pure state of nature to an organised poltical society. According to Bodin, covetousness led to violence and necessitated a legal association or a state only after the formation of communities. Two types of monarchical government then emerged: either force and conquest created tyrannies or individuals willingly gave up their liberties in exchange for the protection of an equitable overlord. Goaded by envy and greed, however, the multitude soon tired of its subjugation, drove the monarch from the commonwealth, and finally established governments of the optimates or the people. The course of history, therefore, involves the inevitable degeneration from monarchical rule to the rule of the many. By means of this schema of historical development, the student of history as well as the legist can trace the evolution of all major commonwealths.[16]

Only after he had anatomised the structure and evolution of most European political organisations did Bodin propose that monarchy be considered the best form of government. History has repeatedly shown, claimed Bodin, that any form of popular rule, be it of the majority or of the minority, leads inexorably to civil unrest and the abrogation of legal rights. Only monarchies have been able to unify the diverse elements of a society — all individuals, religious sects, corporations, communities, provinces, and estates — into a purposive whole and have

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[16] Method, pp. 212-17.

thus ensured the attainment of the public good. Therefore, we should analyse monarchical governments, especially the means by which the constitution of a monarchy guarantees the fundamental civil liberties of all subjects as well as protects social harmony. This analysis will in turn serve as the basis for a reconstructed law code.

Bodin's plan to use the constitution of a monarchy as the basis of a perfect, universal law code comes of course as no surprise. It is a commonplace to label Bodin as the ardent defender of the unfettered sovereignty of the French monarchy and, consequently, as the first radical ideologue of absolutism. Indeed, the notion that rulership should be the absolute sway of one man so dazzled Bodin that he lost sight of all other forms of government. In the Methodus, Bodin built his theory of public law upon what he thought the rights and power of the French king should be: sovereign power in all commonwealths should therefore be supreme, absolute, perpetual, and indivisible. Bodin in fact succeeded only in describing the workings of a monarchy. He simply assumed that sovereignty ought to be the absolute and indivisible dominion of one man over his subjects and so failed to understand the corporate sovereignty of the ruling body in an aristocracy or a democracy. He further implied that, because we must distinguish between those who rule and those who are ruled — between those who stand above the law and those who must obey the law — it is impossible for the subjects of a commonwealth to hold simultaneously the sovereign rights. In other words, the subjects and the rulers in a polity cannot form one corporate

whole. According to the logic of Bodin's argument, democracy is little more than a euphemism for what is really anarchy. Only in a monarchy, in which sovereignty is wielded by one man, is the proper relationship of ruler to subject, as well as the indivisibility of sovereign power, maintained. Monarchy is therefore the only perfect form of government. In any case, argued Bodin, natural and divine law provide the model for the perfect state: just as God alone rules the universe and a father alone rules his household, so should one man alone rule the polity.

Bodin, then, hoped to vindicate the rights of an absolute monarch because, for him, only a king can successfully unite society into a legal framework or association that can protect both private and public interests. The king, who can balance distributive and commutative justice and who should most perfectly understand the precepts of equity, provides the principle of harmony within this legal association and moulds all components of society into one body politic.[17] Bodin's application of the principles of monarchical rule to all types of government, albeit ill-founded, merely reinforced his argument for the necessity of an absolute monarchy: given the premises of his arguments, aristocracies and democracies will appear to be hopelessly insecure and unstable. For example, in sharply separating the legal rights of the

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[17] *Method*, pp. 268-72, 286-89.

citizenry from the rights of the ruler, Bodin formulated what Otto von Gierke would have called a theory of dual-State personality: that is, the body politic is in fact composed of two distinct corporations — the corporation sole of the monarchy and the corporation of the people as a whole.[18] Although this theory can explain the workings of a monarchy, in which the ruler establishes a common control and centralised power that stands above and detached from those who are ruled, it is not clear in the Methodus how the citizens of a democracy can at the same time be both subjects and rulers. Furthermore, if it is only possible, as Bodin asserted, to have one indivisible ruling body in a polity, it is difficult to imagine the government of a democracy or an aristocracy, in which sovereignty is shared among a group of people. Had Bodin showed how democratic or aristocratic governments form a corporate or legal entity, he could have by-passed this problem. Bodin, howver, ignored the constitutional theory of contemporary legists, which portrayed French representative organs as the legal and public guardian of the entire polity. He preferred to grant the ownership of the sovereign rights to one natural person — the king; and we perforce return to the notion that a monarchy is the only pure, and indeed the only possible, form of government.

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[18]Otto von Gierke, Natural Law and the Theory of Society: 1500-1800, trans. Ernest Barker (Cambridge: Cambridge University Press, 1958), p. 53.

The absolute and indivisible sovereignty of one ruler does not, however, entail the total subjugation of the people. Bodin above all wanted to secure the civil liberties — in particular, the right to enjoy private property — of each individual subject to the Crown. He tried to formulate, therefore, a moderate political programme that would guard against the threat of tyranny and that would also refute those who saw every royal prerogative and all centralised government as a violation of individual liberty and who would thus limit royal power by a hedge of constitutional checks. In short, Bodin hoped to find the middle ground between tyranny and anarchy.

In seeking a moderate public law code that would simultaneously harness the powers of the king and strengthen centralised government, Bodin in part reiterated the constitutional theories of his contemporaries. French civilians had relied upon the language of the _Corpus Juris_, particularly on the Roman definition of the _princeps_ and the late mediaeval juridical maxim _rex in suo regno est imperator sui regni_, to assert both the status of the king and the rationale of centralised government. Yet they had also found in the Roman law the justification for the rights of feudal institutions that effectively limited the power of the king. The commonwealth was, after all, one _corpus mysticum_ composed of interdependent units of government: only the harmonious agreement of all these units could protect the public welfare or the common good. As we have seen, legists thus ransacked both private and public Roman law to bolster this theory: for example, the maxim _quod_

omnia tangit became the mainstay for theories of parliamentary consent. The use of the Roman law to support concepts of constitutional restraints was later supplemented and often corrected by the use of customary law. For example, de Seyssel had argued that, although the French king nominally possessed the plenitudo potestatis, whenever a law or custom is allowed to exist, the king has in effect renounced his power and may not revoke these laws or customs.[19]

Bodin based his own discussion of the constitution on a distinction between two types of monarchs: the tyrant and the royal monarch. Whereas tyranny, which Bodin considered to be a primitive form of kingship, is unjust, unlawful, and unrestrained rule by one man, Christian princes (who are all royal monarchs) depend on the orderly, lawful succession of the Crown for their right to rule. Moreover, all Christian princes act within the law. Although he conceded that it might be necessary to place the supreme authority above the constraining force of the law so that princes could legislate freely, Bodin preferred to argue that the Christian prince irrevocably binds himself to obey the laws of his realm by means of his coronation oath. The Christian prince is thus legally responsible to govern justly and for the public welfare. Furthermore, the prince can and should bind both himself and his subjects whenever he promulgates a new law:

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[19] Julian Franklin, Jean Bodin and the Rise of Absolutist Theory, op. cit., pp. 6-21.

> Indeed, it is a fine sentiment that the man who decrees law ought to be above the laws;. . . but once the measure has been passed and approved by the common consent of everyone, why should not the prince be held by the laws he has made? . . . If it is just that a man shall be held by whatever he decrees for another, how much more just is it that the prince or the people shall be held by their own laws?[20]

In short, when a law has been enacted with the consent of the community, the king and the community are equally bound to respect this law. Bodin further implied here that, in practice, it is only the sanction of the community that momentarily elevates the sovereign prince above the law so that he can proclaim new legislation. Once the law has been proclaimed, however, the king returns to his normal status and is restricted by his own law.

The fundamental laws of a commonwealth also should protect the citizen against the arbitrary sway of the sovereign will. Bodin noted that in France the monarchy may not abrogate the Salic law and the Agrarian law: the king may therefore not tamper with the lawful succession of the Crown or with the public domain. In addition:

> of all the laws of the realm. . . none is more sacred than that which denies to the decrees of the prince any force unless they are in keeping with equity as well as truth. From this it comes about that many are cast out by the magistrates, and the grace granted [by the prince] is no help to the wicked. Often the voice of the magistrates is heard, "The prince can do nothing contrary to the laws."[21]

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[20] Method, p. 203.

[21] Method, p. 254.

The magistracy, then, is the judge of the equity of the monarch's legislation and Bodin complained that, in his day, it no longer fulfilled its noble task: "Yet when custom grows obsolete we turn gradually away from precedent. Oh, that we might imitate the virtue of our elders! They prefer the loss of both state and reputation rather than office."[22] In the Methodus, however, Bodin confined his analysis of constitutional limitations and public law to an encomium of the sagacity of the French constitution. He offered no explanation of how the magistracy might lawfully enforce its will against the sovereign will, whether resistance might ever be considered lawful, and whether constitutional limitations or limited rights to resistance are compatible with the sovereign rights of an absolute monarch.

[22] Method, p. 254.

V

It was not until he wrote Les Six Livres de la République, first published ten years after the Methodus, that Bodin fully clarified his concept of public power and grappled with the problems posed by constitutional law, particularly the crucial contemporary issue of the subject's or magistrate's right to resistance. Without changing the basic premises or methods of his arguments, Bodin now advanced a complete political theory: he broadened the scope of his analysis to discuss exhaustively all types of governments, gave concise definitions of all his major terms, and culled histories and contemporary political treatises for a host of examples to illustrate his theses. Indded, so many historical digressions clutter his text that his aim — to provide a juridical analysis of public power and a framework for a reconstructed universal public law — often seems hopelessly obscured and critics have frequently accused Bodin of having lost sight of his political theory in a morass of encyclopaedic erudition. Yet the République does exhibit a definite structure, similar to that proposed in the Iuris universi distributio and followed in the Methodus. A brief description of this structure will perhaps be useful to indicate the basis of Bodin's concept of public power.

As did the chapter on government in the Methodus, the République begins with a collection of juridical definitions. Bodin gathered most

of the classical definitions of the state, sovereignty, and the citizenry, rejected these definitions on the grounds that they all lacked precision, and then presented new definitions that were, according to him, both exact and universally applicable. To prove the accuracy of these definitions, Bodin investigated diverse law codes ranging from the Roman XII Tables to recent French coutumiers: they all, he claimed, assumed that citizens and rulers possess certain basic public rights and it is in these rights that we must seek the essence of a citizen or the supreme authority. In the second book of the République, Bodin moved deductively from his basic definitions to the classification and then the analysis of the three types of government. He next turned to an examination of those public institutions common to all three types of government: the senate, the college of magistrates, officers, and commissions. Bodin described each of these governmental organs according to its relationship to the sovereign authority: that is, he sharply distinguished the sovereign rights from all other public rights. Momentarily side-tracked, Bodin here tacked on a brief discussion of the jurisdiction of private corporations and fellowships. By means of juridical analysis, then, Bodin specified in his third book of the République the rights and duties of each governmental organ and the means whereby the sovereign authority delegates power. By the end of the third book, Bodin had presented in skeleton form the structure of the state; he had dissected each of the three components of the state — the sovereign authority, the magistracy, and the citizenry — and had indicated the legal relationships among them. Once he had anatomised the structure of the state, Bodin could examine the nature and sources of political change. Only

then could he offer practical advice and a concrete political programme that would stipulate how social justice is best maintained. Accordingly, Bodin devoted the last three books of the _République_ to the human and natural sources of change and to the formulation of a programme that would guard against the ravages of rapid political change. Lastly, Bodin concluded with a panegyric on monarchy, specifically the hereditary monarchy of France. In short, the first three books of the _République_ present the _ius gentium seu commune_ outlined in the _Iuris universi distributio_, while the last three books provide a guide for good government based upon this _ius gentium_. Bodin's argument, then, progresses from simple juridical definitions to a description of the legal network of relationships created by public law and, finally, to a policy of governing that could protect this legal network from violent change.

Bodin shaped his entire political system around a single juridical definition of the state or commonwealth: it is the aggregate of families united to protect private and public property, the "lawfull gouernment of many families, and of that which vnto them in common belongeth, with a puissant soueraignitie."[1] Immediately, then, Bodin

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[1] _Commonweale_, p. 1.

contrasted his own definition based on the precepts of justice and law with those pragmatic definitions that had stressed the common good. For Bodin, the state is lawful government, not a political organisation directed by the dictates of expediency and social utility. In arguing thus, Bodin supported the mediaeval notion of the ideal commonwealth — a commonwealth that, while serving the utilitas publicum, embodied an absolute idea of the law and, consequently, served to lead the citizenry to moral virtue.

Bodin further stated that this lawful government assembles all families under one supreme authority. Bodin here seemingly digressed from the explication of his definition of the state to discuss the family. Yet this digression is basic to his anatomy of power, for the family is both the essential component and the model of the state. The paterfamilias holds together the common possessions of his community through right government and, in return, receives the absolute obedience of his family. Similarly, the sovereign prince provides a single locus of rule, albeit public rule, that protects men living in the commonwealth. Even the paterfamilias, who reigns supreme in his own household, owes absolute obedience to his sovereign. A citizen, then, is a "free subject holding of the soueraignitie of another man"[2]:

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[2] Commonweale, p. 47.

That is, he is free from the bondage of servitude, free to enjoy the liberties and privileges granted by public law, although he is bound by the power and majesty of the sovereign prince to whom he has pledged his obedience. Sovereignty is the "most high, absolute, and perpetuall power ouer the citisens and subiects in a Commonweale,"[3] the marks or rights of which Bodin now specified and ranked as the power to make law without the consent of the people, the power to declare war or peace, the power to create magistracies, the power to receive final appeal, and the power over life and death. Like his mediaeval predecessors, then, Bodin understood that the sovereign was an abstraction of supreme authority — a perpetual imperium which was temporarily granted to specific individuals. Bodin differed from earlier theorists, however, in that he recognised that the legislative power — the power to make the law as well as to mould public policy — was the highest sovereign right. According to Bodin's schema, the state mirrors the eternal paradigm of justice that exists in the mind of God; but it is the king who actively shapes this likeness by means of his legislative powers. He does not, as mediaeval legists assumed, merely supervise the correct application of a pre-existent law code or, at best, uncover the law that lies latent in a political organisation.

As in the Methodus, Bodin's definition of the legal rights and obligations of the sovereign authority describes the workings of a

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[3] Commonweale, p. 84.

monarchy alone, in spite of his claim to have anatomised all types of public power. For example, Bodin argued in the République that, because all sovereign rights are subsumed in the power to make the law and because only one indivisible body can serve as the legislative organ in the state, the sovereign power or the ownership of all sovereign rights must also be indivisible. A monarch can never delegate any of these rights to a subject without thereby losing his sovereignty:

> It is also by the common opinion of lawyers manifest, that those royall rights cannot by the soueraigne be yeelded vp, distracted, or any otherwise alienated; or by any tract of time be prescribed against. . . . And if it chance a soueraigne prince to communicat them with his subject, he shall make him of his seruant, his companion in the empire: in which doing he shall loose his soueraignitie, and be no more a soueraigne: for he onely is a soueraigne, which hath none his superiour or companion with himselfe in the same kingdome.[4]

The error in reasoning here is obvious and is similar to that which Bodin had made in his earlier work: if sovereignty cannot be shared without a loss of sovereignty, how then do we explain the shared rule in a democracy or aristocracy? In a later passage of the République, Bodin again claimed that, since sovereignty is indivisible, a mixed constitution in which the various estates of the realm perform different governmental functions is a logical absurdity. For, if

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[4]Commonweale, p. 155.

sovereign authority were shared, the jurisdiction of the various estates would overlap and civil chaos would ensue. If, for example, the nobility legislated, the people controlled the fisc, and the king held the power over life and death, each estate could effectively block the exercise of the others' rights: the king, say, could threaten death to all those who obeyed the laws promulgated by the nobility. Moreover,

> if soueraignitie be of it selfe a thing indivisible, (as wee haue before showed) how can it then at one and the same time be diuided betwixt one prince, the nobilities, and the people in common? The first marke of soueraigne maiestie is, to be of power to giue laws, and to command ouer them vnto the subiects, and who should those subiects bee that should yeelde their obedience vnto that law, if they should also haue the power to make the lawes? who should he be that could giue the law? being himselfe constrained to receiue it of them vnto he him selfe gaue it? So that of necessitie we must conclude, that as no one in particular hath the power to make the law in such a state, that then the state must needs be a state popular.[5]

Bodin ridiculed the logical absurdity of arguing that sovereignty could be divided, but stopped short of lapsing into a logical absurdity of his own. Yet he implied that in a democracy, where all are both subjects and rulers, none have the power to make the law because all are equally subject to the law — even though all have the power to proclaim and abrogate the law because all are equally sovereign. In the République, then, Bodin retained his rigid distinction between the legal rights of subjects and rulers; as a result, he was compelled to represent democracy

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[5]Commonweale, p. 185.

as little more than anarchy.

Bodin tried to avoid this conclusion by further distinguishing between the legal obligations of the individual in particular and those of the corporate body that absorbs all individuals in a democratic state. Law can be made and maintained, therefore, because each individual swears to the generality, to the governing body of the state, that he will obey the law. Yet Bodin did not believe that such an oath would be legally binding:

> But it is one thing to bind all together, and to bind euerie one in particular: for so al the citisens particularly swore to the obseruation of the lawes, but not all together; for that euery one of them in particular was bound vnto the power of them all in generall. But an oath could not be giuen by them all: for why, the people is a certaine universall bodie, in power and nature diuided from euery man in particular. Then againe to say truly, an oath cannot be made but by the lesser to the greater, but in a popular estate nothing can be greater than the whole body of the people themselues.[6]

It seems then that, although each individual in particular can bind himself to the generality, the generality in turn cannot bind itself to any higher body and is thus not obligated to respect any oath it has made to obey the law. Bodin, like his mediaeval predecessors, understood that the people forms a corporation — and so are subject

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[6] Commonweale, p. 99.

to all the laws that regulate any corporate body — yet he failed to explain how each individual, in his capacity as a member of the ruling body, may be compelled to obey the law. Furthermore, he failed to explain how the corporation itself could be forced to keep its oathes and promises. In short, according to Bodin, the citizens in a democracy are in no way bound by the laws they themselves have made.

Bodin agreed that the means whereby a state is actually governed can be mixed — for example, the sovereign power can temporarily delegate authority to a subordinate or customary law can establish limited rights of self-government — but no mixed constitution can be said to exist. Either the people, the nobility, or the prince holds the sovereign rights. Yet the argument Bodin used to reject the theory of a mixed constitution — that sovereignty, if divided, leads to anarchy — also refutes his own claim that the system of legal relationships that obtains in a monarchy can also be found in the political organisation of a democracy or an aristocracy.

It is therefore not surprising that Bodin's examination of a subject's right to resistance rests upon an examination of public law in a monarchy alone. He began his discussion with the assumption that, in a monarchy, the king is the sole supreme arbiter: no subject can sit in judgment of the king's actions and, consequently, the sovereign will may not be legitimately resisted. In any other type of state, resistance is lawful because no one individual holds supreme power;

co-partners in sovereignty can prohibit the illicit mandates of their peers. But in a monarchy the prince is responsible to none save God. Although Bodin allowed that subjects might depose a tyrant who holds his office unlawfully, he further warned against calling any severe or unpopular prince a tyrant. And, only another sovereign prince, motivated by good will and an understanding of justice, may lawfully deliver a commonwealth from the yoke of such an unpopular king.[7]

Bodin did, however, grant a limited right of resistance to those magistrates directly subject to the sovereign will. In the _Methodus_, Bodin had indicated the powers of the magistracy in his discussion of the _merum imperium_ and his distinction between the _leges actiones_ and the _iudicii officium_. To this discussion, Bodin added in the _République_ an analysis of royal orders. There are, he maintained, two types of royal commands: the mandate and the _lettre de justice_. When issuing the latter, the prince expressly urges his magistrate to act according to conscience and equity: in other words, he grants his magistrate the right to exercise the _merum imperium_ and whatever other rights are necessary in order to resolve a particular case. But mandates, unless they specify that the magistrate examine the equity of the prince's demands, bind the magistrate to act

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[7] _Commonweale_, p. 210.

according to the sovereign will, even if, in so doing, he manifestly would defy the law of nations. If a mandate flagrantly ignores natural or divine law, the magistrate can then remonstrate as often as three times; thereafter, he must execute the prince's demands. Bodin further suggested that magistrates never have the right to resign when they are faced with the execution of what appears to be an unjust law. At best, the magistrate can threaten to resign or can form a common front with other like-minded magistrates in the hope that the prince will revoke his mandate. Bodin sanguinely assumed that, if opposition to new legislation were well-founded, the prince would doubtlessly capitulate to the demands of his magistrates.[8] Finally, magistrates have the right to examine any mandate that concerns the fisc or the public welfare: that is, mandates concerning grants of privileges, dispensations, exemptions, and immunities.[9] But, since he had written the Methodus, Bodin's position on the magistrate's right to resist his king had hardened. He no longer longed for the past during which the magistracy performed the noble task of correcting or reprimanding the king; he adamantly asserted that the magistracy has no real legal right to resist the sovereign authority, however moderate and just its claims:

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[8] Commonweale, pp. 310, 313, 318.

[9] Commonweale, p. 320.

"let vs vpon this conclude it to be much better in all obedience to stoupe vnto the soueraigne maiestie, than in refusing of his soueraigne commaunds to giue example and occasion of rebellion vnto the subiects."[10] In true Politique fashion, Bodin believed that it was ultimately better to suffer the iniquities of despotism than to provoke civil strife.

Similarly, the estates, parliament, or any senatorial college subject to the prince has the right to advise or to remonstrate against, but never the right to coerce, the sovereign will. In arguing thus, Bodin severed his connexions with all earlier theories on constitutional law: although he agreed with French legists that the Roman senate was similar to the Parlement of Paris, he further argued that neither the Senate nor the Parlement possessed the right to demand popular ratification of all royal decrees. The senate, which Bodin called the second principle organ of government, exists only by the grace of the king's will: the prince alone has the right to convene and dismiss it at his pleasure. To allow the senate or parliament any real power to command or the legal right to resist the prince would derogate from the sovereign rights. The role of the senate, then, is merely consultative and a monarch will only ask for its consent to important legislation as a matter of procedure: the senate serves to publicise the prince's will,

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[10] Commonweale, p. 324.

to ensure that none can claim ignorance of the law, and thereby to facilitate enforcement of new legislation. The senate may determine the details, but never the substance or nature, of legislation. Moreover, the views of his advisory body can sensitise the prince to the needs of his people:

> But that publication or approbation of lawes in the assembly of the Estates or parliament, is with vs of great power and importance for the keeping of the lawes; nor that the Soueraigne prince is bound to any such approbation, or cannot of himselfe make a law without the authoritie of the States or the people: yet it is a courteous part to it by the good liking of the Senat, as saith _Theodosius_, which _Baldus_ enterpreted not to be a thing so much of necessitie, as of courtesie.[11]

It is no more than a courtesy, then, to permit all those who share rights in a commonwealth to appear whenever the common welfare is adjudicated. Yet the king, who may be party to the decision, remains the supreme judge. Thus, Bodin recognised the validity of the Roman legal maxim _quod omnes tangit_; yet, what in mediaeval legal theory provided the justification for a real legal right, in Bodin became the

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[11] _Commonweale_, p. 103.

justification for a courtesy conceded by the prince.[12]

Bodin also outlined the limited rights of corporations or fraternities to jurisdiction over their members. But, even though he encouraged the spread of corporations and guilds, Bodin maintained that all corporations (both public and private) exist only with the permission

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[12]Bodin himself participated in the Estates of Blois (1576) as the deputy from Vermandois for the third estate and played a significant role in the deliberations on the powers of the Estates General. Responding to the demands of Huguenots and Politiques, Henri III hoped to use the Estates to finance his crusade against religious dissent and to alleviate a financial burden amounting to almost 100 million livres. But it was not until January of 1577 that Henri III actually proposed viable measures to raise new funds: he proposed a graduated tax, levied on all hearths, to replace the _tailles_. Bodin opposed this proposal on the grounds that the tax _egalée_ could easily be transformed into an additional tax rather than a substitute for the _tailles_. The _cahier_ of the third estate presented Bodin's argument clearly and briefly: "The third estate represents to Your Majesty that the _tailles_ are not due to you from ordinary right, and have only been accorded to you in the past for reasons of necessity. . . . The said _tailles_ and any other impositions should not be levied without the advice and consent of the said estates, as was established at the estates held in the time of Louis Hutin [Louis X] and Philippe de Valois [Philippe IV]." Although Bodin, in this case, wished to refuse the revenues that would allow the king to continue the civil wars and, consequently, to bind the king to the decision of the estates, in general Bodin rejected all of the Estates' efforts to limit the sovereignty of the king. For example, the Estates of Blois challenged the composition of the king's council, claiming that the people had the right to appoint those counsellors who determined public policy; the Estates further proposed that all its recommendations be enacted as fundamental law. These two measures Bodin opposed vehemently, arguing that such measures would pervert the constitution and turn France into an aristocracy. So strong was Bodin's opposition that he persuaded the third estate to veto these measures and the Estates General were dismissed after having failed to resolve the tasks set to it by Henri III. Martin Woolf, _op. cit._, pp. 159, 161-165; Salmon, _op. cit._, pp. 220-221.

of the king.[13] Corporations, colleges, fellowships, and communities may be consonant with natural law since natural reason and innate gregariousness induced men to seek associations. But in civil society, the prince reserves the right to regulate all corporate life. Before law books were written, the first monarch had founded and promoted guilds to foster amity and to strengthen their own jurisdiction; thereafter, all corporations remained subject to the prince. Bodin thus defined a corporation as the "lawfull communitie or consociation vnder a soueraigne power,"[14] which a monarch deploys to police or discipline his subjects, to regulate trade and production, and to support religion. A corporation may legislate for its members only insofar as its constitution does not derogate from the sovereign's rights. If a community or corporation should contravene the sovereign will, the king can then attack the thing held in common by the corporate body or he can revoke the corporation's charter. Although many jurists had demanded the prohibition of all corporations on the grounds that such assemblies inevitably breed sedition, Bodin

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[13]In practice, the sixteenth century French monarchy had inadvertently brought most guilds within the royal purview. There were, according to law, two types of guilds: the _métiers jurées_, which were licensed by the king; and _métiers libres_, which were under local or municipal jurisdiction. In search of the revenues that would result from increased licensing of guilds, the monarchy naturally encouraged the transformation of _métiers libres_ to _métiers jurées_; and, in 1581, a royal edict enforced the licensing of all guilds hitherto free of the royal authority. Salmon, pp. 53, 227-7; Woolf, p. 175.

[14]_Commonweale_, p. 365.

preferred to emphasise their beneficial role, if properly controlled, within an orderly commonwealth.[15] The wise prince, then, placates his subjects with the illusion of self-rule by allowing all communities to control their own members, while he reserves all real power for himself.

The sovereign prince is, according to Bodin, the sole principle of unity in a commonwealth: he permits all to participate in the government, but is by no means bound by the voice of his people or by the law. Bodin further insisted that the prince is ultimately free of all restraints, even of those he promised to acquiesce in according to his coronation oath. Contracts or promises made between the prince and his people are only mutually binding while the equity of the contract obtains. And since the prince alone can adequately judge the equity of his own contracts, he alone may unilaterally abrogate whatever he has promised to his subjects. Laws and contracts should not be confused, argued Bodin:

> for that the law dependeth of the will and pleasure of him that hath the soueraignitie, who may bind his subiects, but cannot bind himselfe: but the contract betwixt the prince and his subiects is mutual, which reciprocally bindeth both parties, so that the one partie may not start therefrom, to the preiudice, or without the consent of the other. In which

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[15] Commonweale, pp. 361, 364, 379, 384.

> case the prince hath nothing aboue the subiect, but that the equitie of the law which he hath sworne to keepe, ceasing, he is no more bound to the keeping thereof, by his oath or promise, as we haue before said: which the subiect cannot do among themselues, if they bee not by the prince releeued.[16]

Bodin tried in this passage to ensure that monarchs would act justly, yet he feared the ramifications of making a monarch obligated to obey the law. Unlike the Methodus, the République affirmed that only the prince who stands above the law can effectively enforce his will and smother civil disobedience. The compromise to which Bodin resorted is that the king, although above the law, is nevertheless bound by contracts because the binding force of the latter derives from natural law. Also according to natural law is the proviso that a contract looses its binding force if the terms are no longer equitable. But, as Bodin himself admitted, a contract is mutually binding and cannot be dissolved without the consent of both contracting parties — and, in fact, constitutionalists such as du Plessis-Mornay had used this argument to describe the role that the Estates-General ought to play in France. Bodin, however, believed that the prince had the right to dissolve his contracts unilaterally. It is not clear how Bodin planned to bar subjects from themselves annulling any contract made between them and their prince or from insisting that their consent be sought before the prince act contrary to the terms of the contract.

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[16] Commonweale, p. 93.

Even if he would not recognise the need for parliamentary consent to annul a mutually binding contract, Bodin did conceive of two basic restrictions that bound the sovereign power: the fundamental laws of the realm or the leges imperii and natural or divine law. He had moved far beyond his constitutional stance of the Methodus and now advocated sovereign rights that placed the king far above the constraining force of the law or of any secondary governmental organ. Yet he still clung to certain aspects of traditional constitutional theory. He thus reprimanded those critics of the 1577 Geneva edition of the République who had accused him of favouring despotism:

> Nevertheless I am amazed that there are people who think that I concede somewhat more to the power of one man than befits a worthy citizen of a Commonweal. For specifically in Book I chapter 8 of my République, and frequently elsewhere, I have been the very first, even in the most perilous times, to refute unhesitatingly the opinions of those who write of enlarging the rights of the treasury and the royal prerogative, on the grounds that these men grant to kings an unlimited power, superior to divine and natural law. But what can be more in the interest of the people than what I have had the courage to write: that not even to kings is it lawful to levy taxes without the fullest consent of the citizens? Or of what importance is my other statement: that princes are more stringently bound by divine and natural law than those subject to their rule? Or that princes are bound by their covenants exactly as other citizens are? Yet nearly all the masters of legal science have taught the contrary.[17]

Bodin may, however, have restricted the powers of the sovereign prince without having given the subjects any legal recourse should the prince

[17] Commonweale, p. A71.

decide to defy these restrictions. Since the only arbiter of natural or divine law is God, if the prince violates natural law, his people have no special right to judge and, consequently, to resist the prince's will. A subject who has been dispossessed by his sovereign must console himself with the thought that ultimately the prince will be held accountable for his misdeeds before the tribunal of God. Yet a violation of the fundamental laws of the realm at least partially allows the people to challenge a monarch: that is, any new legislation that might abrogate the _leges imperii_ should have the full consent of the people.

Earlier in the _République_, Bodin had distinguished between _ius_ or right and _lex_ or the law: _ius_ concerns that which is not commanded but is good and equitable, whereas the law is always the command of the sovereign will. Even though the king can never be bound by the law, he must respect _ius_ or, more specifically, the precepts of natural law. For Bodin, the major right guaranteed to the citizens by natural law is the free enjoyment of private property. Eastern despots such as the Grand Turk or the king of the Russians might be lords of both the persons and the goods of their subjects, but in the civilised west, argued Bodin, subjects in a royal monarchy possess their own liberty and property. Many European monarchs will nonetheless profess to hold the property of their people, even though this is nothing more than empty boasting. For even land held in fief can be used and disposed of at will:

> Now if one say that there is no Monarque in Europe which pretendeth not all the goods and lands of his subiects to belong vnto him in right of direct soueraignitie, neither any man which confesseth not to hold his goods of his soueraigne prince: yet I say that that sufficeth not that any man should therefore of right be called the lord of all, or a lordly Monarche: seeing that euery subiect hath the true propertie of his owne things, and may thereof dispose at his pleasure: although the prince for pompe and show challenge vnto himselfe the soueraignitie thereof.[18]

The king, then, robs his subjects if he confiscates their goods without a just cause or equitable compensation. In developing this argument, Bodin inveighed against those who wished for the equal re-distribution of property; this action could only lead to wide-scale confiscations and would thus disrupt the entire legal apparatus of the state.[19] The wise prince should scrupulously guard the property rights of his subjects rather than re-distribute wealth according to his own personal notions of social munificence. Only in the case of a national crisis — when, for example, a peace treaty stipulates the payment of reparations — may the king ignore natural law and confiscate private property. Bodin concluded in the same way that most mediaeval canonists and civilians had, despite their avowal that private property had not existed in the state of nature:

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[18] Commonweale, pp. 200-201.

[19] Commonweale, pp. 569-71.

since the fall from grace, man has possessed his own goods and, as a result, the state must ensure that property rights are honoured. In addition:

> For that which the common people commonly saith, <u>All to be the princes</u>, is to be vnderstood concerning power and soueraignitie, the propertie and possession of euerie mans thing yet reserued to himselfe. For so saith <u>Seneca</u>, <u>Ad reges potestas omnium pertinet, ad singulos proprietas</u>, . . . And for this cause our kings by the lawes and decrees of Court, are bound to void their hands of such lands as are fallen vnto them by way of confiscation.[20]

Bodin suggested here that the civil law commanding the prince to return any confiscated land merely reinforces the natural laws concerning private property and that the king is thus bound to obey this law. Bodin never indicated, however, what the legal consequences of the king's disobedience would be.

Also derived from the natural laws concerning property rights are those restrictions placed upon the king's right to raise subsidies. Bodin insisted that, in accordance with natural law, the king solicit parliamentary consent in this one fundamental case:

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[20]<u>Commonweale</u>, pp. 110-111.

> For that it is not in the power of any prince in the world, at his pleasure to rayse taxes vpon the people, no more than to take another mans goods from him; as Philip Commines wisely showed in the parliament holden at Tours, as we read in his Commentaries: yet neuerthelesse if the necessitie of the Commonweale be such as cannot stay for the calling of a parliament, in that case the prince ought not to expect the assembie of the states, neither the consent of the people.[21]

In arguing thus, Bodin granted parliament or the Estates-General the right to guage the public welfare, to judge whether a public need did in fact warrant extraordinary taxation, as well as the right of resistance, if the prince should by-pass normal procedure or impose unnecessary taxation. The inconsistency in Bodin's reasoning is obvious: natural law may prohibit taxation, but it does not confer the legal right to proceed against a prince who levies unpopular, or even unnecessary, taxes. Nor does natural law specify that the Estates-General ratify the imposition of taxes. At the risk of being illogical, however, Bodin firmly opposed the prince's unlimited power over the property of his subjects. In fact, warned Bodin, the prince would be better advised to stay within the limits of the revenue of the royal domain or, in the case of dire need, to raise forced loans that could later be repaid.

Bodin's arguments for the binding force of the *leges imperii*

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[21] *Commonweale*, p. 97.

are perhaps more clear-sighted and persuasive than those he used to indicate the binding force of natural law. These leges imperii, which were the Salic law and the inalienability of the royal domain in France, were "annexed" to the Crown; the monarch who flouts these laws risks jeopardising the future estate of his successors:

> But touching the lawes which concern the state of the realm, and the establishing thereof; forasmuch as they are annexed & vnited to the crowne, the prince cannot derogat from them, such as the law Salique: & albeit that he do so, the successor may alwaies disanull that which hath been done vnto the preiudice of the lawes royall, vpon which the soueraigne maiestie is stayed & grounded.[22]

In short, some aspects of the sovereign power extend only as long as the lifespan of the prince; any attempt to bind a successor or to alter the normal line of succession is a legal impossibility. This does not, however, give the Estates or the people the right to remonstrate against a monarch who ignores the leges imperii; only the successor to the Crown, whose rights have been prejudiced, can redress the crimes of a former prince. Similarly, the public domain, which should provide the upkeep of the royal household, may not be alienated because this could cause the

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[22] Commonweale, p. 95.

future bankruptcy of the state; any lawful successor may thus reclaim those sources of revenue that either his predecessor alienated or have been alienated through prescription. Bodin, therefore, rejected Bartolus's claim that the Italian city-states had prescribed their right to the *imperium*:

> But those were not true alienations, nor exemptions from subiection; but rather simple graunts and gifts, with certaine priueleges to gouern their estate, vnder the obeisance of the empire. It was also not in the power of the emperours, neither of any prince whatsoeuer, to alienat any thing of the publike demaine, and much lesse of the rights of the soueraign maiestie, but that it was always in the power of the successour to lay hands thereon againe, as it is lawfull for the lord to lay hold vppon his fugitiue slaue.[23]

Only during a national crisis may the king sell crown lands and then parliamentary consent serves as a warranty for the validity of the sale: because the approval of the entire body politic is needed to ensure that no future prince re-assert his rights, the sale will have no legal force, if parliment refuse its consent.[24] The prince, wrote Bodin, only holds crown lands

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[23] Commonweale, p. 129.

[24] It seems to have been common practice to demand the approval of a parliamentary body in the ratification of treaties, particularly those treaties that specified the surrendering of territory. Ocassionally, the terms of the treaty clearly demanded that parliamentary consent be given; those who consented were to serve as the guarantors of the treaty. Russell Major, Representative Institutions in Renaissance France, op. cit., pp. 121, 132.

in usufruct or as a husband holds his wife's dowry: he may enjoy the fruits of crown land while he holds office, but may never abuse his rights or prejudice the rights of his legal heirs.

In the République, then, Bodin attributed far greater legal power and freedom to the sovereign will than he had in the Methodus; Bodin now insisted that the king stood above the law, unencumbered even by the promises he had made to his subjects. Nonetheless, in both the Methodus and the République, Bodin carefully limited what he conceived to be the authority of the prince so that subjects, although without legal recourse to a higher court of appeal, could never be ruthlessly exploited. Although Bodin no longer advocated the magistracy's right to correct the sovereign will, his later work stressed the binding force of the leges imperii. In his discussion of these fundamental laws of the realm, Bodin solved the apparent paradox of his theory of a legally limited, yet absolute, king by arguing that no sovereignty extended beyond the life of the owner of the sovereign rights. No prince, therefore, could prejudice the estate or rights of his successor. This is, of course, to argue that only the successor to the throne, who holds a power equal to that of his predecessor, can and may sit in judgment of a king who has acted unlawfully. The constitutional limitations placed upon the sovereign will are never enforceable by the people themselves and thus do not derogate from the supreme power vested in the monarchy.

While defending the subject's right to enjoy private property,

however, Bodin never solved the fundamental inconsistency of his thought: he refused to grant the king any legal rights over the property of his subjects and thus allowed a parliamentary body to judge whether a public need justified the imposition of taxes; by implication, therefore, Bodin conceded that the sovereign will was less than supreme in this one important instance. Rather than have the king defy property rights — despite the inconsistency of his position — Bodin permitted parliaments to evaluate and even resist the king's actions.

VI

Needless to say, it is difficult — if not impossible — to separate Bodin's juridical thought from his politics. As both a legist and an active participant in contemporary political events, Bodin was obviously well versed in the traditional juridical literature on kingship and the state, as well as the administrative structure of his France. But he was also aware of the rapid political changes occurring in the sixteenth century and of the direction that contemporary theorists had taken in their attempts to give a fresh basis for the French government. Bodin hoped to harness legal studies to political philosophy, but this hope is inextricably interwoven with his hopes to illuminate the legal basis of the rights of the French monarchy. His philosophy of law — his insistence that all law is the product of the prince's will — clearly arose from what he considered these rights to be. Thus, Bodin intended to vindicate the claims of the French crown against the counter-claims of parliamentarians and constitutionalists such as François Hotman or Philippe du Plessis-Mornay. Moreover, Bodin couched his reply to these publicists in the terms of mediaeval legal theory. He, like earlier legists, believed that a complete political philosophy should rest upon the foundations of a universal law code, a _ius gentium_ or _commune_: And, he tried to formulate political theory according to the legal learning of the previous four centuries.

Like his mediaeval predecessors, Bodin found it impossible to sever political philosophy from juridical thought. He based his analysis of the state on an analysis of public law, particularly on those laws that defined the legal rights and duties of the members of a commonwealth. The state, according to Bodin, is above all a legal association that only can be understood or anatomised if the web of legal relationships that maintain the state is untangled. For this purpose, Bodin neatly divided the state into three component parts — the citizenry, the magistracy, and the supreme authority — and proceeded to analyse each with regard to its legal rights and obligations. For the essence of each component can be found in the legal boundaries placed upon its powers. To support this analysis, Bodin exploited his research on a multitude of law codes past and present: his political philosophy not only depends on an analysis of the Corpus Juris; it also rests upon the distillation of all major legal systems into one universally valid system of public law, a system that clearly specifies the hierarchy of legal rights within the state. Thus, whereas mediaeval legists tended to call the Roman law the *ius commune*, Bodin compiled a full comparative schema of diverse law codes.

Perhaps the greatest innovation that Bodin made in political philosophy can be found in his emphasis on social and political change. For him, the state constantly evolves in dynamic response to celestial, climatic, geographical, and political forces. The legist, however, should not only examine the determinants of change; he should also understand those universals or absolutes that withstand change and that,

indeed, constitute the substratum of social life and condition all forms of social or political evolution. These universals, claimed Bodin, are the principles of natural law. Certain natural imperatives, both instinctive and rational, drive men to form communities and to establish particular legal associations.

It is in his understanding of natural law that Bodin demonstrates his indebtedness to mediaeval legal theory. For him, as for mediaeval legists, natural law theory forms the cornerstone of his political thought. First, Bodin argued that natural law determines the role that sovereign and citizens play in the polity: the natural association of family, which constitutes the basis of all communal life, provides the model for the structure of a commonwealth; that is, the king, like the father, should have absolute command, while the citizenry, like the wards of the father, owe absolute obedience to the sovereign will. Furthermore, Bodin followed his mediaeval predecessors in believing that natural law mediates divine law and so directs man toward brotherhood and communal life. Natural law, in mediating God's law, endows human society with a moral content. In other words, because natural law reflects divine law, it *ipso facto* sets the guidelines for those moral virtues that God has ordained as the proper end of human existence.

According to Bodin, the state, because it derives from natural

imperatives, must also strive toward inculcating all citizens with these moral virtues. Human association is not merely an expediency that man has exploited in order to protect and augment material prosperity; it is also the means whereby human moral excellence is attained. To argue in this fashion means to believe that society itself must conform to certain moral norms — that the law, for example, must be both expedient and morally correct. In short, the ruler should attempt to realise certain principles of justice as well as to sustain the material well-being of his subjects. Natural law, then, provides the moral imperative underlying the political structure of any polity. Bodin insisted that a commonwealth is much more that a band of thieves: the state is lawful government — a government patterned on universal principles of what is right. For Bodin, the many innovations of his thought notwithstanding, the traditional categories of legal thought — justice and equity — still form the underlying assumptions in his theory.

Furthermore, Bodin quite naturally followed mediaeval legal theory in assuming that the state was a corporation composed of all subjects and that the prince was, to use a mediaeval metaphor, the tutor or guardian of this corporation. Bodin also assumed that this corporation had as its end, as its raison d'etre, the propagation of the utilitas publicam. Yet, unlike those political philosophers who followed him, Bodin considered the moral as well as the material utility of the polity: that is, a "sufficient" life entails both spiritual and material security. The king, then, has the moral duty to regulate the

spiritual well-being of his subjects. In short, although his contract with his subjects may not be legally binding, the prince's contract with God involves a real, if not tangible, obligation.

Bodin also borrowed from his mediaeval predecessors the notion that the king holds in usufruct certain regalian rights that are inalienable and that supply the king with the necessary authority to rule effectively. Yet, these regalian rights are, in Bodin's thought, merged into one, all-embracing notion of sovereignty. Mediaeval legists had already formulated the abstract notion of the Crown — a perpetual, indivisible, and supreme incorporeal entity — to represent the locus of rule in the polity. What Bodin added to this notion was his understanding that all the regalian rights could be united into one abstraction (similar to the abstraction of the Crown) that would represent the entire body of rights needed to rule. This abstraction Bodin called sovereignty. And paramount among the sovereign rights was, according to Bodin, the right to legislate. For without the power to make the law, the prince could never claim to rule. Thus, the right to legislate included within itself all other rights: no derogation of the legislative power could be tolerated without jeopardising the common good.

Bodin differed from earlier legists in that he argued that law is primarily statutory law. In effect, natural law or the emanations of divine reason play an ancillary role in the legislative process, even though the king should, as much as possible, strive to follow the precepts

of equity. The prince may and should act according to natural reason, but is by no means constrained to do so. Although Bodin invoked the principles of natural law to reinforce his arguments for certain constitutional limitations to the royal power, he simultaneously argued that the prince remains, at least in this world, the final arbiter of natural law. Thus, whereas late mediaeval jurists had regarded natural law as the sole foundation of the law, Bodin consistently stressed the role played by the sovereign will in legislation. Even customs only acquire legal force insofar as it pleases the prince to tolerate these customs. Bodin, then, severed his philosophy of law from the religious framework of those mediaeval theorists who saw divine reason made manifest in human law and who, consequently, called the prince a discoverer, not a maker, of the law.

Bodin also manipulated natural law theory to arrive at conclusions quite different from those of earlier theorists. Although late mediaeval theorists such as Aquinas were willing to concede that the state is a natural good and not merely the fruit of sin, few would have claimed that property was a natural good. According to Aquinas, for example, property replaced communal ownership after the fall had created strife among mankind. Bodin, however, used natural law to demonstrate that private property existed even in a state of nature. Since the family is natural, claimed Bodin, all that is necessary for its survival is also natural. Private property, which is essential to the material security of the family, is thus a natural phenomenon: in fact, the desire to own property becomes, in Bodin's thought, a natural imperative and any governmental

attempt to deny a citizen his right to hold property becomes an abrogation of natural law.

Later theories of individualism — or what Professor MacPherson has called "possessive individualism" — served to undermine Christian theories of natural law. Seventeenth century political philosophers no longer attempted to deduce the political rights and obligations of the citizenry from moral values or from natural imperatives that ultimately stemmed from the will of God. Instead, they used quasi-scientific models that purportedly outlined the universal, eternal structure of the state. While Bodin's thought, in some sense, adumbrated these later theories, he never completely divorced his thought from traditional juridical concepts of the moral worth of human society. He understood that, for example, property and the right to dispose of property freely was a major determinant of the social structure. Yet the argument that he used to prove that a citizen might claim total ownership over his goods came from the traditional understanding of natural law. In addition, Bodin simultaneously believed that all human society must be directed to larger communal goals. The state is, for Bodin, a corporation. It is not an aggregate of individuals, each pursuing his own interests and only barely restrained under the command of a supreme ruler. Society is a unified community, with a common interest and holding common goods, represented by the prince or guardian.

Bodin, then, thought that he had corrected the errors committed

by political philosophers such as Machiavelli: he alone had used his exhaustive legal training to uncover the legal basis of the state and to construct a universally applicable theory of public law. Indeed, Bodin was the last major philosopher to build his theory upon an analysis of public law codes. Yet Bodin never devoted his work to annotating the Corpus Juris, as his mediaeval predecessors had done; he attempted to synthesise all previous legal thought and all major public law codes into a complete, self-sufficient political philosophy. In so doing, he retained the mediaeval belief in the moral worth and the purposive nature of political organisations — in fact, Bodin's belief that justice and equity inform the polity is central to his understanding of the state. This belief is, of course, a limitation imposed by the framework of mediaeval legal thought within which Bodin worked.

Bodin nonetheless broke with earlier legal theories in his contention that the king alone shapes the state. For Bodin, kingship is more than a collection of legal regalian rights; kingship — or any type of rule — involves the abstraction which Bodin called sovereignty. In particular, sovereignty embraces the legislative powers of the ruling body; for without the power to make the law, argued Bodin, no government can effectively control its subjects. In other words, Bodin expounded a legal-political theory that would support the absolutist claims of the French Renaissance monarchy. He hoped to vindicate the Crown's claim to regulate all aspects of political life. As the first ideologue of absolutism, Bodin rid political theory of the constitutional

implications of mediaeval legal thought; at the same time, he refuted the theories of those contemporaries who aspired to limit the sovereign power. Bodin's theory, then, although grounded in mediaeval legal traditions, looked forward to the ideology set forth by seventeenth century statesmen.

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