INFERIOR MAGISTRATES

IN SIXTEENTH-CENTURY POLITICAL AND LEGAL THOUGHT

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PREFACE

The political thought of the sixteenth century has been the subject of numerous perceptive analyses. Protestant and Catholic theories of limited government and the right of resistance, as well as the growing emphasis on royal sovereignty by both secular and religiously oriented writers, are widely known, at least in their broad outlines. A further intrusion into this well-traversed field, however, is justifiable. Many approaches to the political ideas of this century, especially those attempted two or three generations ago, viewed those ideas through the glasses of modern republicanism, focusing attention upon the great issues of popular versus princely sovereignty, constitutionalism versus feudalism, or civil liberties versus the suppression of minorities. Sixteenth-century stances on these issues have tended to be viewed as either "feudal" or "modern," their complex blending of old and new not always being appreciated.

The present study seeks to focus attention on an

aspect of sixteenth-century political thought--the status of magistrates inferior to sovereigns--which has often been treated only in passing in modern works concerned primarily with broader theories of sovereignty and limited government. The Protestant theory of political resistance by inferior magistrates, far from being a mere rationalization for an essentially feudal resistance, as has sometimes been suggested, was rather the locus of one of the Protestants' most notable fusions of "medieval" and "modern," the creation of a theory of government in which king, feudal officials, royal magistrates, and estates were all regarded as public officials with mutual obligations to censure each other in the name of justice and the common weal. This was not yet a modern constitutional theory of government with rationally divided branches and departments and regularized modes of procedure, but the most advanced Protestant political thought did move in this direction from the more informal and uncertain means of limiting royal power in the Middle Ages.

Many Protestant writers, of course, were lawyers, or had at some time studied law. The possibility of juristic influence on Protestant thought was a major object of investigation when this study was begun.

Except for the German Lutherans who worked hand in hand with the lawyers in the 1530's and 1540's to develop their theories of resistance by inferior authorities, specific examples of direct juristic influence are few. Nevertheless, in both Germany and France, jurists of this century developed theories of magisterial office, jurisdiction and imperium which, in their general import, were similar to Protestant theories. Whatever the extent to which Protestant writers were consciously aware of juristic doctrines of magisterial power, their attempt to solve the problem of limiting the king through the action of inferior officials sharing in the sovereign power was not unlike juristic portrayals of magistrates as possessors of jurisdiction which the king could not arbitrarily remove and who had power to restrain him from acting illegally or unjustly. Attempts to analyze Protestant thought on inferior magistrates without reference to contemporary legal thinking must, at any rate, fall short of completeness. Political and legal thought in the sixteenth century crossed paths frequently.

The jurists with whom we are chiefly concerned are those of France and Germany. Many Italian and Spanish jurists wrote concerning inferior magistrates, but French and German juristic thought was more closely related to

the world in which the Protestants moved and thus is of greater concern to this study. The governments of France and the Holy Roman Empire were, of course, widely disparate in nature. While France was becoming increasingly centralized, the empire was tending in the opposite direction. This disparity was reflected in juristic thought on inferior officials, for while French magistrates came to be viewed as integral members of a unified structure of public power, the German princes and cities could never, in spite of juristic attempts to do so, be presented as mere inferior magistrates.

Political thought also reflected the differences between French magistrates and German princes. The theory of resistance by inferior magistrates developed in Germany in the 1530's and was revived there late in the sixteenth century after having passed through the hands of many Calvinist writers. The Lutherans had never employed medieval ideas of community authority standing behind all resistance, for to them the princes and cities were themselves the "community" and received their power from God alone. Popular sovereignty was introduced into the theory of inferior magistrates by Calvinist writers (not by Calvin himself, however) who were more heavily influenced by ancient and medieval

ideas of the authority of the community and by a stronger necessity to find an independent source of magisterial authority than were German writers. The result was that even magistrates appointed by, and dependent upon, the king could now resist him in the name of public authority. When German thinkers revived the theory of the Huguenots and applied it to the empire, they could not (with a few exceptions) apply popular sovereignty to the territories of princes, with significant implications for princely autocracy in Germany. The same basic theory of inferior magistrates was common to both French and German thinkers, but it was also adaptable to the differences in the juristic concepts of inferior authority deriving from the political differences of the two countries.

The study of inferior magistrates in the sixteenth century must deal with concepts such as popular sovereignty and constitutional government, but it is hoped that emphasizing the relationship of political thought to legal thought will focus the discussion on problems that were vital to the sixteenth century and prevent it from introducing problems and concepts of a later age. This approach to the subject of inferior magistrates cannot possibly be exhaustive. Although Protestant theories of resistance and juristic discussions of

magisterial power and jurisdiction are perhaps the most direct avenues to the subject, other routes need to be investigated. Among the possible approaches, I believe two are most urgent. One would require a study of inferior magistrates themselves, analyzing their attitudes toward their own power as expressed by their political behavior, claims to authority, adoption of new, more prestigious, trappings of office, and the like. A more abstract, but no less important, approach for the Renaissance period, would be a thorough analysis of the many treatises of this period dealing with ancient magistrates and their modern counterparts. Facing a changing political world, Renaissance men looked to the past for direction in their thinking concerning the structure of political power. The approach taken in this study will analyze only some of the major ways in which the past helped mold the thought of the sixteenth century.

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CHAPTER I

FOUNDATIONS OF LUTHERAN RESISTANCE: LAW AND THE GOSPEL

The theory of resistance to tyrants by inferior magistrates, developed chiefly by Protestants of the sixteenth century, had roots in juristic and political thought of the Middle Ages. The Reformers and the lawyers sympathetic to their cause combined these older ideas with moral and scriptural imperatives of their own to construct a theory of government which greatly enhanced the status of the inferior magistrate. What in the Middle Ages had been in large part a random collection of laws, charters, opinions and traditions favoring some degree of independence from, and power over, the king on the part of inferior officials became, under the pens of several sixteenth-century thinkers, a more unified, coherent system of restraining monarchical power.

The major credit for the construction of this system has rightly gone to the French Huguenots, whose control of local governments in opposition to Catholic monarchs, plus their religious zeal and Calvinistic propensity for

system-building, gave them special qualifications for the task. In their thought, at least after mid-century, legal justifications for resistance met little opposition from moral and scriptural obligations to obey political authorities. Through a combination of legal and scriptural arguments, the Huguenots developed their fairly complete conception of political resistance taking place in what comes close to being a unified, constitutional government.

What role to assign the Lutherans of Germany in the development of this theory has been a matter of debate. In general, the well-known Lutheran emphasis on passive obedience has made the resistance of the Schmalkaldic League appear as an inconsistent yielding to political circumstance, to the desire to preserve princely independence from the emperor. So lacking was this resistance in theoretical justification, it seems, that Luther himself could never be persuaded to sanction it wholeheartedly. The duty to obey rested more heavily on many Lutheran consciences than any supposed right to resist. Unable or unwilling to unite moral and scriptural injunctions with legal arguments for resistance, the Lutherans seem to have contributed little to the doctrine of resistance by inferior magistrates except the example of their wars against Charles V.

An analysis of the position of inferior authorities in Lutheran thought requires that attention be given to the nature of Lutheran resistance theory itself. Was it a mere circumstantial appeal to positive law, not in accord with divine or natural law?[1] To judge from many Lutheran writings of this period, one would have to answer in the affirmative. These do not, however, represent the totality of Lutheran thought. Not only did

[1] Kurt Wolzendorff, Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht, Untersuchungen zur deutschen Staats- und Rechtsgeschichte, Heft 126 (Breslau, 1916), pp. 21, 183-88, is careful to note that no positive law of the sixteenth century allowed inferior authorities to resist the emperor, but emphasizes that the Lutherans relied much on their knowledge of old Germanic law, and not on natural law. Cf. Hans Baron, "Calvinist Republicanism and its Historical Roots," Church History, VIII (1939), 30-42, who notes the general Renaissance tendency to appeal to facts of history rather than to natural law, and his "Religion and Politics in the German Imperial Cities during the Reformation," English Historical Review, LII (1937), 423-26; Karl Müller, "Luthers Äusserungen über das Recht des bewaffneten Widerstands gegen den Kaiser," Sitzungsberichte der königlich bayerischen Akademie der Wissenschaften, phil.-hist. Klasse, Abt. 8 (1915), 4-84 passim; Fritz Kern, "Luther und das Widerstandsrecht," Zeitschrift der Savignystiftung für Rechtsgeschichte, XXXVII, Kan. Abt. VI, 333-34; Karl Holl, Gesammelte Aufsätze zur Kirchengeschichte, I (Tübingen, 1932), 491-92; Hans Fehr, "Das Widerstandsrecht," Mitteilungen des Institutes für Oesterreichische Geschichts-Forschung, XXXVIII (1920), 20-22 (who emphasizes the natural law elements in other sixteenth-century resistance theory); Georges deLagarde, Recherches sur l'esprit politique de la Réforme (Douai, 1926), 126, 239-45.

Lutheranism develop a dualistic outlook by which political morality and resistance could be separated conveniently from Christian ethics, but also produced the view that legal arguments for resistance were actually in accord with Scripture and natural law.

Basic to nearly all arguments against resistance was St. Paul's admonition, in the thirteenth chapter of his letter to the Romans, that Christians be subject to governing authorities. Since political authority was of divine origin, he said, resisting those in authority amounted to rebellion against God. Obedience was due them not merely from fear of punishment, but "for the sake of conscience."[2] Romans 13 was the moral standard against which legal justifications for resistance had to struggle. To Luther before 1531 this passage meant that divine authorization was not contingent on the authority's behavior. Even wicked rulers must be obeyed until legally and peaceably removed from office.[3] Charles V, of course,

[2] Romans 13:1-5.

[3] Luther, "Antwort, an Churfürst Johansen zu Sachsen" (Mar. 6, 1530), in Friedrich Hortleder, Handlungen und Ausschreiben . . . Von Rechtmässigkeit, Anfang, Fort- und endlichen Ausgang des Teutschen Kriegs Keyser Karls dess fünfften, 2nd ed. (Gotha, Wolfgang Endters, 1645) (hereafter "Hortleder"), II, 5. Cf. Luther's "Meynung in einer Schrifft an Churfürst Friederichen . . . zu Sachsen" (1522), Hortleder, II, 1, and Von weltlicher Obrigkeit (1523), in Luther's Werke, Weimar edition (hereafter WA), XII, 277.

was no ordinary wicked ruler, but the head of the fourth and last great empire prophesied by Daniel. As such, argued John Brentz, a theologian of Nuremberg, the electors, princes and cities had no more right to resist him than their own subjects had to defy their demands.[4] The emperor was looked upon by many Lutherans as the second link in a chain of authority which originated in God and descended through princes and nobles of various grades to fathers and husbands. Several of them expressed the fear that, by what might be called the "domino-theory" of disobedience, resistance to the emperor would elicit a general breakdown of order in the whole society. If fathers did not by their misdeeds lose their authority over their children, the same must be true of the emperor who, like a father, received his authority from God.[5]

[4] "Schreiben an Marggraff George zu Brandenburg" (1529), Hortleder, II, 3.

[5] [Brentz?] "Bedencken, dass man Kayserl. Majest. in Sachen des Evangelium belangend, nicht widerstehen möge" (1530), Hortleder, II, 11. Cf. Luther's Antwort to John of Saxony, Hortleder, II, 5, where he fears that there would remain "wol gar keine Obrigkeit noch Gehorsam in der Welt, weil ein jeglicher Unterthan köndte diese Ursach fürwenden seine Obrigkeit thete unrecht wider Gott." Johann Müller, "Anzeig: Warumb sich nicht gebühre, mit der That wider Keyserl. Majest. in Glaubens-Sachen zu Streben" (1531), Hortleder, II, 15, argued that, "solte den Unterthanen zugelassen seyn, dess Keysers ungerechtem Gewalt mit der That zu widerstehen, so müste von Noth wegen meiner Herrn Unterthanen zugelassen werden, dass sie ihren Obrigkeiten, so sie Gewalts beschuldiget werden, widerstehen möchten mit der that. Nun kan sich

In this scheme of things, inferior magistrates indeed had the security of obedience from their subjects, but could in no case resist their superiors.[6]

The combined fears of disobedience to God and the breakdown of social order thus led many Lutherans to take a dim view of their co-religionists who resorted to laws of merely human origin to justify resistance. Luther, whose aversion to lawyers is well-known, criticized them in 1530 for applying the laws of reprisal and defiance to cases involving the emperor, since the saying, "vim vi repellere licet," could not be used against constituted authorities. Moreover, human law itself said that no man could be his own judge.[7] Johann Müller, the Advocate of Nuremberg, admitted in 1531 that the law allowed men to be their own judges in cases of notorious injury to themselves, even if the offending party were the emperor, but this law, he argued, did not extend to injury resulting

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gar in viel Wege begeben, dass eine Obrigkeit nicht allezeit das Recht und gleich treffe. . . . In Summa, es würde kein Policey auff Erdtreich mögen erhalten werden." Then he adds, "Eine grosse warnung soll uns die Bäwrische Empörung geben."

[6] This is illustrated by a Bedencken of Luther, Melanchthon and Jonas of 1532, in Johann Erhard Kapp, Kleine Nachlese (Leipzig, 1727), pp. 206-7, in which the Reformers advised a nobleman to proceed to publish an anti-Lutheran edict issued by Duke George of Saxony, although he should also attach a protest to it, affirming his own Lutheran faith.

[7] "Antwort" to John of Saxony, Hortleder, II, 6.

from the emperor's evil commands contrary to Christian faith.[8] In spite of such objections, however, laws allowing resistance were continually elicited in support of the use of armed force against the emperor, so that in 1552, Matthias Ratzenberger, a physician of John Frederick of Saxony, registered alarm that Christ's (and Luther's) ethic of turning the other cheek was being subverted by the teaching that resistance, whether by private individuals or inferior authorities, was not only allowable, but honorable.[9]

Opponents of resistance were well aware, of course, of the difference between resistance and disobedience,

[8] "Anzeig" (1531), Hortleder, II, 14. Of the Lutheran writings I have seen, this one presents the most cogent legal arguments against any indepedence of the princes and estates from the emperor.

[9] "Warnung, vor den unrechten Wegen, die Sach der Ofenbahrung des Antichrists zu führen," Hortleder, II, 44-45, 58. Ratzenberger believed that the "pure" Luther had been corrupted by misinterpretations and misquoting by proponents of resistance like Melanchthon who had "used" Luther to support their false ideas. Passive obedience had been advocated earlier by a "Bedencken: Dem Keyser . . . nicht zu widerstreben," of a theologian of Brandenburg of 1531, Hortleder, II, 13, written against the jurists of Wittenberg; an anonymous pamphlet of 1531, "Ableynung der Einrede," Hortleder, II, 19-20; and the first edition of Melanchthon's Loci Communes (1521), in Corpus Reformatorum (hereafter CR), XXI, 223. George Spalatin in 1530 held a different position, allowing resistance, but opposing legal justifications for it. See Irmgard Hösz, "George Spalatin auf dem Reichstag zu Augsburg, 1530, und seine Stellungnahme zur Frage des Widerstandsrechts," Archiv für Reformationsgeschichte, XLIV (1953), 83.

and between legitimate and illegitimate resistance. Melanchthon, in 1530, argued that the medieval glosses and commentaries on Roman law, commonly thought to justify resistance, in reality allowed only disobedience. Subjects whose Christian convictions forced them to disobey the emperor were justified in so doing, but had to suffer the consequences of their action.[10] Luther, while strongly opposed to resistance, argued in 1523 that the princes of Germany were to blame for publishing the Edict of Worms in their territories, for they should, in this case, have disobeyed the emperor.[11] Beyond this the princes could not go, except, as he admitted in 1530, when "the empire and the electors" legally and peaceably

[10] "Gutachten an den Kurfürsten [John of Saxony] gegen das Recht des Widerstands" (March, 1530), quoted in Hans von Schubert, Bekenntnisbildung und Religionspolitik, 1529/30 (1524/34) (Gotha, 1910), pp. 233-36. On p. 234 he argues, "Hic concedunt mihi illa iura, ne obediam, sed non concedunt mihi, ut contra imperatorem arma suscipiam volentem cogere." For the laws in question, see below, n. 26. On p. 236 he says, "Permittatur imperatori, ut ipse cum subditis agat pro sua voluntate. Si vult ordinare ecclesias, ordinet. Interea qui volunt confiteri evangelium tanquam privati, confiteantur et patiantur, si opus erit." Passive resistance had its exponents in the Middle Ages as well. Otto von Gierke, Political Theories of the Middle Age, ed. Maitland (Boston, 1900), p. 143, n. 128, cites Hugh of Fleury who insisted that wicked commands be disobeyed but that one offer no resistance to the ensuing punishment.

[11] Von weltlicher Obrigkeit, WA, XI, 246-47.

removed the emperor from office.[12] Armed resistance was justified only when specifically sanctioned by God, as when the princes and people of Judah were commanded to war against their kings, or when carried out against the "Beerwolf" or Anti-Christ of Rome, situations far different from resisting a legally elected and crowned emperor.[13] In most cases, then, neither private persons nor magistrates could offer resistance. Their lot was to disobey, if necessary, and suffer. The one normal outlet for grievances against the emperor was peaceful deposition, as provided by the traditional German constitution. Not even the Christian authority's love for his neighbors and subjects could justify armed resistance to his "natural

[12] "Antwort," Hortleder, II, 6. "Sünde," he argued, "hebt die Obrigkeit unnd Gehorsam nicht auff. Aber die Straff hebt sie auff. Das ist: Wann das Reich und die Churfürsten den Keyser einträchtiglich obsetzen dass er nimmer Keyser were. Sonst weil er ungestrafft und Keyser bleibt, soll ihm auch niemand Gehorsam entziehen, oder widerstreben." In a similar vein Lazarus Spengler, one of the most staunch opponents of resistance, admitted that the proper way to deal with an emperor who mistreats the empire and estates, and acts contrary to his promises and duties, is "dass ihn die Reichstände, denen die Keyserl. Wahl ordinarii zu thun gebührt, auff vorgehende Erforderung und Verhörung wiederumb ordinarii entsetzen, und ein andern wehlen, nicht mit Gewalt handeln sollen. Sonst würden wir gar schönen Gehorsam in Reich unter allenständen behalten." "Eine kurze Defension" (1531), Hortleder, II, 26.

[13] Melanchthon, in a "Rathschlag" issued jointly with Luther and Bugenhagen in 1523, Hortleder, II, 62, argued that the princes and people of Judah were given such a specific command to war against their kings, so

lord," for such behavior might injure the cause of the Gospel far more than the emperor's misdeeds.[14]

Proponents of resistance, faced by such limited concessions to law and strong emphasis on the morality of turning the other cheek, were forced to justify their appeal to law by maintaining the validity of political ethics and distinguishing between the Christian's behavior as a Christian and as a citizen. Melanchthon, in 1530, was aware of this trend of thought, recognizing (though not yet accepting) the argument that the divine command to obey magistrates must be tempered by the laws of individual politiae. Since a tyrant destroyed liberty in all forms and grades, and since the grades of liberty pertained to civil law, then if civil law permitted defense, the latter must be legal "in this form of empire."[15] Such reasoning apparently had its effect on Luther who, during the years 1530 and 1531, gradually came to accept the legality of resistance, at least in secular affairs. In March, 1530, he denied the validity, in the present

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that no comparison could be possible between them and the people of Germany. See also Matthias Ratzenberger, "Warnung," Hortleder, II, 41-45, which cited Luther's distinction between legal resistance against the Pope and illegal violence.

[14] Johann Müller, "Anzeig," Hortleder, II, 15.

[15] "Einige Theologische Sätze . . . von 1530," in Kapp, Kleine Nachlese, pp. 728-29. Within a short time Melanchthon was to adopt views quite similar to this.

circumstances, of laws allowing resistance (see above, n. 7), and again, in February, 1531, he rejected the principle that force could be met with force, but did express uncertainty about the juristic notion that one could resist magistrates in cases of notorious injury (in notorie injusticia violenter resister potestati). Perhaps, if the emperor had indeed bound himself by oath, one could truly render to Caesar what is Caesar's by resisting him in such cases.[16] In March, Luther completely acquiesced in the dualism which allowed the Christian, as a "citizen or member of the body politic" (Bürger oder membrum corporis politici), to resist according to temporal laws, even though, as a theologian and member of Christ and the body of the Church, he could not even advise resistance, let alone participate in it.[17] Human

[16] Luther to Spengler (February 15, 1531), in Wilhelm De Wette, Dr. Martin Luthers Briefe, Sendschreiben und Bedenken, III (Berlin, 1827), 221-22. "Date Caesari, quae sunt Caesaris, et Caesaris sit, sibi resistendum esse in notorie injustis."

[17] Letter of March 18, 1531, De Wette, Luthers Briefe, III, 233. Luther's distinction between man as a Christian and as a citizen was not new at this time. In Von Weltlicher Obrigkeit (1523), he had urged Christians to take up the civil sword among non-Christians by filling such offices as hangman and constable. In office the Christian could at the same time suffer injustice and punish it, resist evil and bear up under it, depending on whether he acted for himself as a Christian, or unselfishly for others as a magistrate. See WA, XI, 252-55.

wisdom and natural law taught men to protect their families and property; piety demanded non-resistance only in clear cases of religious persecution. As Luther became convinced that Charles V had his eye on the properties of Lutherans, it became increasingly clear to him that Christians could lay aside their persona Christiana and defend themselves by their persona politica.[18] This doctrine was shared by many Lutheran writers, among whom the author of Von der Nothwehr Unterricht of 1547 stated in concise fashion, "Und ist wahr, so das Evangelium alle Nothwehr verbotten hette, so were es eine politica doctrina . . . ."[19]

Having freed human laws from scriptural injunctions to obedience, the Lutherans proceeded to elaborate their

[18] These ideas abound in Luther's "Table talks" of the later 1530's. See the Colloquia, oder Tisch-Reden . . . (Leipzig, 1700), pp. 787-89; WA, Tischreden, III, 63, and IV, 236-37, and Erlanger Ausgaben, LXII, 206-7. See also "Etliche Schluss-Reden D. Martini Lutheri in offentlicher Disputation verthädigt, Anno 1539," Hortleder, II, 98-99.

[19] Hortleder, II, 166. Basilius Monnerus, "Von der Defension und Gegenwehr" (1547), Hortleder, II, 186, affirmed that resistance could be carried out "nicht als Christen (dann dieselbigen haben für ihre Person einen andern Befelch) Sondern als Bürger und Einwohner dieser Welt," the laws of which God has ordained for the Christian to use. Monnerus was at this time an adviser at the court of John Frederick of Saxony, and had been a friend of the Reformers of Wittenberg for some time.

legal arguments. Natural law principles of self-defense, given concrete expression in Roman law, were basic to much of their thinking.[20] Even Luther, in 1529, admitted to John of Saxony that defense against an imminent attack by the emperor was permissible, and the princes then planning a league against Charles V likewise appealed to this principle.[21] Melanchthon, whose humanistic impulses gave him a keen interest in natural law, and who began, after 1530, to support the cause of resistance, believed

[20] Monnerus, "Von der Defension," Hortleder, II, 176, 179, cited D. 4, 2, 12 and 4, 2, 46, "Vim vi defendere omnes leges, omniaque iura permittunt;" C. 3, 27, 1, which gave a property owner the right to kill a nocturnal devastator of his fields; D. 9, 2, 5, which allowed one to kill another who made an armed attack upon him; and D. 1, 1, 3, ut vim atque iniuria repulsemus. Coluccio Salutati, in his De tyranno of 1400, cited some of these laws also. See the English translation in E. Emerton, Humanism and Tyranny (Cambridge, Mass., 1925), p. 79. Gerson followed the principle vim vi repellere licet in his Vivat Rex. See P. S. Lewis, "Jean Juvenal des Ursins and the Common Literary Attitude towards Tyranny in Fifteenth Century France," Medium Aevum, XXXIV (1965), 109.

[21] Letter of December, 1529, discussed in Müller, "Luthers Äusserungen," pp. 20-22, and reprinted, pp. 85-89. Cf. a Saxon Bedencken of 1529 quoted in von Schubert, Bekenntnisbildung, p. 185.

that self-defense against notorious injury, and manifest robbery was as much a part of the natural order as marriage and parenthood. If a son could kill his father in self-defense, or if a subject could justly injure his prince while protecting his wife from the prince's attack on her, then certainly subjects could defend themselves against the emperor in political, as well as private, matters.[22] The emperor was to be regarded as any other murderer, and resisted accordingly.[23]

[22] Letter to Heinrich von Einsiedel (c. 1532), in Kapp, Kleine Nachlese, pp. 203-4. Letter to "N. N." (January, 1539), CR, III, 631. Philosophiae moralis epitome (1538), CR, XVI, 105, "Si tyrannus est in magistratu, et atroci iniuria ac notoria subditos affecit, conceditur subditis, praesertim in continenti, defensio, eum in privato periculo, tum in negotio pertinente ad rempublicam." In his Prolegomena in Officia Ciceronis (1530), CR, XVI, 574, he used the frequently cited Roman law by which even a Consul could be killed if caught in the act of adultery. This idea apparently can be traced to Julius Paulus' Sententiarum receptarium, II, 26, par. 1, where he says that by the lex Julia de adulteriis "permittitur patri . . . adulterum cum filia cujuscunque dignitatis domi suae vel generi sui deprehensum sua manu occidere." See CR, XVI, 574, n. 4. Cf. Melanchthon's "Vorrede, vor die Warnunge D. Martini Lutheri an seine liebe Teutschen" (1546), Hortleder, II, 138-39, and his letter to Caspar Marsilio (February 19, 1540), CR, III, 968.

[23] Bugenhagen, Creuziger, Major, and Melanchthon, "Abdruck: Der vidimierten Copey dess Rathschlags, so die Theologi der Universität Wittemberg, gehalten, . . . wegen dess Kriegs wider Keyser Carolum den V" (1546), Hortleder, II, 103. "Solche Gegenwehr," they said, is "nichts anders dann als, so man einem Hauffen Mörder wehren müste, es werde geführet vom Keyser, oder von andern."

Similarly feudal law and the custom of reprisal allowed resistance against political superiors on the basis of self-help. By feudal defiance, a vassal could declare himself free from his oath of homage if, as the jurist Basilius Monnerus argued, obedience to the lord's demands would place the vassal, his father or his "fatherland" in danger. The lord's authority over him ended when he insisted upon his demands rather than upon justice.[24] The practice of reprisal (or issuing letters of marque) was useful to Lutheran apologists, for, in spite of having been increasingly restricted to royal control in the later Middle Ages, it had a tradition of being carried out by inferior authorities. It was an action intended to bring satisfaction for injuries received from subjects of another lord or prince when the latter refused to bring the offenders to justice and

[24] Monnerus, "Von der Defension" (1547), Hortleder, II, 178. He cites, among others, Zasius, In usus feudorum, "ad quid vassalus," Opera (Lyons, 1550), IV, 243, and the Consuetudines feudorum II, 6 and 47. Cf. an anonymous "Juristischer Rathschlag" (n.d.), Hortleder, II, 78-79, which cites the Consuetudines feudorum, II, 22, in support of the vassal's right to attack his lord if unable to obtain justice from him. For discussions of the right of diffidatio in the Middle Ages, see M. H. Keen, The Laws of War in the Late Middle Ages (London, 1965), pp. 67-78, 73, and Du Cange, Glossarum mediae et infimae latinitatis, II (Paris, 1842), 852, "diffidere."

make proper restitution. For the Lutheran jurists, it represented another means of executing the natural right of self-defense, and a useful precedent for their own resistance.[25]

[25] Among the most important of the medieval writers on reprisals, the principal treatment of which seems to be the Liber Sextus, V, 8, and its gloss, were Bartolus, Tractatus de represaliis; John of Legnano, Tractatus de bello, trans. Thomas Erskine Holland (Oxford, 1917), part 5, pp. 155-74 (Latin text), and pp. 307-31; Honore Bonet, Tree of Battles, ed. G. W. Coopland (Cambridge, Mass., 1949), part 4, ch. 79-90, 98, 99, pp. 173-82, 187; Nicholas Upton, De officio militari, II, ch. 13, 14; and Martin of Lodi, De represaliis. A good summary is in Keen, Laws of War, ch. 12, pp. 218-38, which deals with the growth of the movement, in the fourteenth and fifteenth centuries, to limit warfare to that sanctioned by the prince, and thus to repudiate the privately sanctioned reprisal as well as the defiance. Bonet, for example, complained that "jurisdiction and lordship are to-day, through negligence, usurped by all and sundry, . . ." and argued that only a sovereign should grant marques (ch. 82, p. 175). Nicholas of Cusa, De concordantia catholica, III, ch. 31, cited in Keen, p. 237, shared this view also, as did John of Legnano, who, however, limited the right to those who did not recognize a superior, not necessarily to kings alone (Coopland, ed. p. 157). Others, however, still opted for the "just cause" theory of Bartolus, by which any inferior authority, presumably, could take retaliatory action on his own. Guido Papa, (d. 1487), Decisiones (Lyons, 1607), Q. 32, 33, pp. 67-70, quoted (p. 67) from Bartolus' De represaliis. "Et proceditur de iure ad concessionem marchae seu represaliarum absque libelli oblatione, aut alio iuris ordine seu solennitate: sed attenditur simpliciter si causa propter quam conceduntur sit iusta." The extent to which Lutheran jurists may have relied on the doctrine of represalia is uncertain. The only references to it I have found are by Luther and Johann Müller, both of whom opposed it, but who complained that jurists were using it. See Hortleder, II, 5 and II, 14-15. For most of my references on this subject I am indebted to Professor James A. Brundage.

Prerequisite to any resort to self-help, of course, was the absence of a legally constituted authority or the denial of justice through normal channels. Lutheran apologists insisted that the actions of Charles V fulfilled both of these conditions. Precedents for resistance against unjust judges and magistrates were plentiful in Roman and canon law. Melanchthon cited the opinions of Accursius and Bartolus in favor of resistance against judges who refused to grant an appeal, gave commands not proper to their office, or brought injury in any way.[26] Johann Wicks, a jurist of Bremen, referred to both Roman law and its glossators in arguing that any authority acting beyond his jurisdiction could be resisted as a

[26] "Gutachten" to John of Saxony (1530), von Schubert, Bekenntnisbildung, p. 233, n. 1. He cites Accursius in the gloss on D. 50, 17, 167, par. Qui iussu, where it is argued that if a judge orders someone to act against the law, that one can obey the judge and not incur guilt, but if the judge is clearly acting beyond the limits of his office, he is not to be obeyed. The subject's obligation to obey "restringitur ad ea de quibus verisimiliter est actum. In casibus non solum non obedire, sed etiam debent resistere officiales sui." Bartolus is cited in his commentary on C. 10, 1, 5. "Quando officiali iniuste exequenti possit resisti--quod si iudex iniuriat aliquem iuris ordinis omisso, violenter et de facto, potest ei resisti impune." The Gloss. ord. on C. 10, 1, 5 affirms that "etiam Principis officialibus resistitur, si excedant in suo officio," which might imply that the Prince himself is excluded. At this point, however, Melanchthon was still opposed to resistance and to the use of these laws to justify it.

private person. After citing various laws from the Codex and Digest which provided penalties for overly ambitious magistrates, he concluded that "Christian princes, together with the estates under them, are obligated to resist any who intend to force them and their subjects from the true faith by persecution and the sword."[27] Similar conclusions, based on similar laws, issued from the pens of several other Lutheran jurists, all of whom overlooked the fact that none of these

[27] "Rathschlag" (1531), Hortleder, II, 72. Among the Roman laws and their glosses cited are C. 10, 1, 5 and 7; 10, 31, 33; 10, 47, 15; 12, 41, 5; 12, 34, 5; 7, 62, 21; D. 42, 1, 53, parag. ult.; 47, 10, 20; the passage of the Authenticae, Collatio 9, tit. 17, ch. 9, included in C. 9, 5, entitled Hodie novo iure. The first two cited are perhaps the most useful for a doctrine of resistance. C. 10, 1, 7 gives the right of defense to one disturbed by an official of the fisc while their controversy is pending in the courts. C. 10, 1, 5 says "ut etiam si officiales ausi fuerint a tenore datae legis desistere, ipsis privatis resistentibus, a facienda iniuria arceantur." Obviously, there is no notion here of resistance being limited to only inferior magistrates. Wicks also cites Baldus on C. 4, 13; Bartolus on D. 3, 2, 6; Jason Maynus, Cynus de Pistoia and others on C. 2, 18, 1, and on D. 1, 1, 1, the law which stated "ut vim atque iniuria propulsimus," and which provided opportunity for many medieval commentators to explain when they thought force could justly be used against others, including magistrates. The gloss, however, refused to allow that this principle could be used against a magistrate. At best he could be brought to court if a "minor" magistrate, and if he were a "major" magistrate, he was immune to legal action until he left office.

Roman laws specifically allowed resistance against the emperor.[28] Canon law provided sanctions more directly applicable to the emperor, allowing disobedience to his unjust or ungodly demands in addition to resistance to heretics. Actual resistance to an orthodox emperor, however, could not be directly read into canon law, and its chief usefulness lay in its prescriptions for resistance to lesser church officials who acted beyond their jurisdiction or impeded justice.[29] Of particular importance were the provisions for resistance to judges

[28] Monnerus, "Von der Defension" (1547), Hortleder, II, 171-93. On p. 176, he cites D. 50, 17, 132, which reads, "Factum a judice, quod ad officium ejus non pertinet, ratum non est." On p. 178, he refers to the glossa ordinaria on D. 50, 17, 128, which allowed disobedience to the commands of a judge given as if by a private person. See also the "Juristischer Rathschlag," Hortleder, II, 78, which cites D. 1, 2, 20, "Extra territorium ius dicenti impune non paretur. Idem est, et si supra iurisdictionem suam relit ius dicere."

[29] Wicks, "Rathschlag," p. 72, cites canons which allowed disobedience (not resistance) to the emperor, including D. 9, c.1; D. 10, c.2; C. 11, q. 3, c.92-94, Corpus juris canonici, ed. Friedberg (Leipzig, 1874), I, 16, 19-20, 669, and canons requiring resistance to heretics, particularly Gratian's Decretum, C. 23, q. 3, c.2, Friedberg, I, 896-97. Wicks also cited a canon opposing extra-legal exercise of jurisdiction, VI, 2, 2, c.1, ed. Friedberg, II, 995, which declares a bishop's excommunication of someone outside his territory to be of no effect, along with D. 2, 1, 20, which says that a judge acting outside his territory may be disobeyed, and which the decretal quotes to support its position.

who interfered with appeals,[30] for the Lutherans based much of their case on their appeal from the Diet of Speyer of 1529 to a general church council, an appeal which, in their opinion, removed the handling of the Lutheran Reformation from the emperor's jurisdiction and justified their resistance to his efforts to interfere with it.[31]

[30] These provisions were stressed by an anonymous tract, "Etlicher . . . Rechts-Gelehrten zu Wittenberg Sentenz" (1531), Hortleder, II, 69-71, the Latin version of which appears in Müller, "Luther's Äusserungen," pp. 90-92. Müller and Hortleder both believe that Luther was directly influenced by this tract. Taking X, 1, 29, c. 8, "si quando," ed. Friedberg, II, 160, as his focal point, the author explained that this letter of Alexander III, which allowed resistance to judges who enforced their sentence against an appeal, took action outside of court in favor of one party, used unjust (if "proper") procedure, or rendered notoriously unjust sentences, to mean that an emperor who gave commands contrary to God's Word, especially after his sentence against the Lutherans had been appealed, could indeed be resisted. He cites, in addition to the decretal itself, the comments on it by Panormitanus, Felinus, and Innocent IV, and those of Cynus on C. 7, 65, 5 and of Baldus on C. 1, 7, 7. Cf. Johann Wicks, "Rathschlag," Hortleder, II, 72-73, who cited C. 7, 62, 21, a law levying a fine on judges who interfered with appeals, the gloss on which allowed that "subiecti debent resistere praelatis, si quid iniuste agant." Cf. Melanchthon, Theologische Sätze (1530) in Kapp, Kleine Nachlese, pp. 729-30.

[31] Müller, "Luther's Äusserungen," pp. 15-19, discusses the appeal, complaining that it has been too much neglected in studies of Lutheran thought and politics. See, in addition to the Sentenz of the Wittenberg jurists (above, n. 30), the letter of John of Saxony to Luther and Melanchthon (Jan. 27, 1530), in von Schubert, Bekenntnisbildung, pp. 225-26; Bugenhagen's "Bedencken" (1529), Hortleder, II, 65; the "Rathschlag" (1531) of Wicks, pp. 75-78; the "Ausführliches Bedencken" (1532)

In all these legal arguments lay the basic premise that the offending magistrate, by following injurious practices or impeding the course of justice, acted as a private man, not as a magistrate. Since resistance to any public official could thus be carried out according to principles of private law, the Lutherans placed great emphasis on the right of self-defense. They freely admitted that equals could war against equals, and one of their goals was to prove that the erring emperor, as a private man, was merely a peer.[32] Never did they dispute the authority or existence of the emperor's office, but distinguished clearly between that office and its

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of Luther et al., Hortleder, II, 93. For an opposing view, see the "Bedencken" (1531) of a Brandenburg theologian, Hortleder, II, 11-12.

[32] The right to war against an equal was often admitted. "Ein theologisches Bedencken" (Wittenberg, 1531), Hortleder, II, 67, for example, asserted that "sol aber gleiches gegen Gleichen, als ein Fürst wider ein andern Fürsten, Grafen, Stadt, gegen einer andern Oberherr were, oder Gewalt uber ihn hette . . . ." Cf. Luther, Ob Kreigsleute auch in seligem Stande sein können (1526), WA, XIX, 632-33; and WA, Tischreden, I, 326, where he argues that a lord acting contrary to the law makes himself equal to his inferiors.

human incumbent. Such a distinction was no longer a novelty,[33] but the Lutherans resorted to it with frequency and enthusiasm as if they had invented it. Contrary to the view of Johann Müller, who argued that Obrigkeit and Oberherr were united "as body and soul in a living man,"[34] the proponents of resistance maintained that Charles V's actions reduced him, as a person, to the level of a "private prince," or worse yet rendered his authority over the Lutherans no more efficacious than that of the Turk, but they in no way lessened the

[33] Lay writers had developed a division between the persona regis and the corona regni by the mid-twelfth century, and already in the tenth century it had been common for the sedens to be set apart from the papal sedes in ecclesiastical literature. See Michael Wilks, The Problem of Sovereignty in the Later Middle Ages (Cambridge, Eng., 1963), pp. 297-345, 362, 398, n. 2, 493-503, and Gierke, Political Theories, pp. 34, 141, n. 123. The most complete treatment of the entire subject is Ernst Kantorowicz, The King's Two Bodies (Princeton, 1957).

[34] "Anzeig" (1531), Hortleder, II, 15-16. He argued that those learned in the law taught that Obrigkeit and Oberherr are united "wie Leib und Seel zu einem lebendigen Menschen," and if one resisted the Oberherr, he also resisted the Obrigkeit. Just as a judge remained a judge after rendering an unjust verdict, so an authority remained in office, as David did, even though a murderer and marriage-breaker.

authority of the "Emperor."[35] His commands concerning spiritual matters need not be obeyed, for they represented an overstepping of the bounds of his office.[36] Resistance against him in no way implied a rejection of imperial authority, for, as Philip of Hesse insisted, Charles was "nit meher keyser."[37]

[35] "Ein theologisches Bedencken" (1531), Hortleder, II, 68. The emperor, as "ein Geschworner unnd Hauptmann des Papsts unnd derhalben ein Privat Fürst," is equated with the Turks whom one is obligated to resist. These arguments were used by Lutheran princes themselves in their negotiations of 1529 concerning the "exemption" of the emperor from their list of enemies, Margrave George of Brandenburg, for example, wishing to limit the exemption to an emperor who did not suppress God's Word and become thereby equivalent to a Turk. Letters and documents related to these negotiations are cited and discussed in von Schubert, Bekenntnisbildung, pp. 141-44, 184-87. For Philip of Hesse, see his letter to Margrave George, reprinted on pp. 215-18. For similar arguments used to attempt to win the city of Nuremberg to the side of resistance, see Franz Ludwig Soden, Beiträge zur Geschichte des Reformation und der Sitten jener Zeit (Nürnberg, 1855), pp. 346-52, and Johann Joachim Müller, Historie von der Evangelischen Ständte Protestation und Appellation (Jena, 1705), p. 351.

[36] Philip of Hesse to Margrave George of Brandenberg (Dec. 31, 1529), in von Schubert, Bekenntnisbildung, p. 20. "Des Churfürstlichen Sächsischen Heer- und Hoff Predigers erste Antwort, auff das vermeynten Johann Treulingers Buch, wider die sächsische und hessische Noth- und Gegenwehr" (1548), Hortleder, II, 200. The Lutherans did not object to all lay interference in ecclesiastical matters, but insisted, as medieval canonists had done, that such interference not extend to doctrinal issues. See, for the medieval position, Gierke, Political Theories, p. 124, n. 48, and Wilks, Problem of Sovereignty, pp. 78, 82, 235, 325-26.

[37] Philip of Hesse to Margrave George (March 6, 1530), reprinted in von Schubert, Bekenntnisbildung, pp. 214-18,

The distinction between person and office, combined with numerous laws against magistral authority exceeding its limits, facilitated resistance to all political authorities on the basis of a natural right to defend oneself and to secure justice by force of arms. The Lutherans could readily admit that resistance was legal, if not pious. These legal distinctions, however, served yet another purpose. If all authority were from God, and if some authorities denied justice, reviled God's Word and persecuted true faith, might it not be correct to interpret Romans 13 in light of the great difference between the divine authority of the office and the wicked person who held it? Many Lutheran writers came to this conclusion, convinced that Paul had enjoined obedience only to the authority of the office, not to its momentary incumbent.[38] Authority is given, Johann Wicks argued,

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here p. 217. "So der keyser unrecht wieder got handelt, so ist er nit meher keyser, dan er hat den verlassen, von dem im der gewalt herrkumpt, das ist got."

[38] See especially Andreas Osiander (?), "Ein theologischer Rathschlag von Nürnberg: Dass nicht alle, sondern nur die ordentliche Gewalt von Gott" (1531), Hortleder, II, 83-85. Osiander's authorship is suggested by Georg Ludewig, Die Politik Nürnbergs im Zeitalter der Reformation (Göttingen, 1893), p. 133. Cf. Bugenhagen, "Bedencken" (1529), Hortleder, II, 64, and the "Gründtlicher Bericht . . . wie ferne man den Ober-Herren Gehorsam schuldig" (1552), Hortleder, II, 209-211. Evading scriptural commands to obey authorities by distinguishing between the man and the office was practiced in the eleventh century by Manegold of Lautenbach,

only for improvement; if the magistrate fails to improve conditions, those who do improve them by resisting him have greater authority than he.[39] Implied in this interpretation was a more sacred view of political authority than that which conceded divine sanction to any form of government, no matter how tyrannous. According to this view, political authority was too sacred to be entrusted to men of unclean hands; men of God must resist its debasement by those who misused it and, consequently, had

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Ad Gebehardum, XLIII, cited in R. W. and A. J. Carlyle, A History of Medieval Political Theory, 3rd impr. (London, 1950), III, 161, n. 4.

[39] "Rathschlag" (1531), Hortleder, II, 71. This idea, of course, was common in the Middle Ages, and Wicks refers to the Scriptural basis for it, II Cor. 10:8, where Paul says that God gave him power "in aedificationem, et non in destructionem vestram." Wicks concludes, p. 71, "So fern aber die Obrigkeit nicht bessert, so hat der mehr Obrigkeit, der mit widerstreben bessert, dann die Ubelthäter." Wicks acknowledged his debt to Wessel Gansfort, the fifteenth century Brother of the Common Life, whose De dignitate et potestate ecclesiastica asserted that subjects might disobey the unjust and unreasonable mandates and decrees of their prelates. For passages which make Gansfort appear to be a direct link between the conciliar movement and the resistance ideas of the sixteenth century, see the English translation of his treatise (Concerning Ecclesiastical Dignity and Power) in Edward Waite Miller, Wessel Gansfort, Life and Writings (New York, 1917), II, 163-66, 175-77. Wicks asserts that resistance by inferior authorities is proved by Gansfort, but this is only by inference, since Gansfort's paragraph on civil government did not mention inferior authorities, and he seemed to consider the inferior clergy as "authorities" primarily by virtue of their learning which often exceeded that of their superiors.

no right to it.[40] At this point, the law of God intertwined with the laws of men. Both laws required obedience only to legitimate authorities, allowing resistance to those who overstepped the bounds of their office. The distinction between the office and its holder blurred somewhat the dualistic separation between political and spiritual morality. It allowed Christians (or Christian magistrates) to fulfill both religious and legal responsibilities by opposing wicked or unjust governors.

Not all Lutheran apologists, then succumbed completely to the dualistic position implied by Luther's initial hesitating acceptance of secular morality and resistance. The realm of politics might indeed fall far short of the ideals of the spiritual realm, but, nevertheless, human laws could support the cause of the Gospel, as one theologian thought,[41] and the Gospel, in turn, might reinforce

[40] Wilks, Problem of Sovereignty, pp. 493-99, shows how raising the status, or sacredness, of the papal office in the Middle Ages in reality limited papal sovereignty. Augustinus Triumphus believed the Pope to be the vicar of God. But since God could not sin, the Pope, by teaching or commanding anything sinful or contrary to his office, must be considered to be acting beyond his jurisdiction and as a private man. He had in effect removed himself from office and no obedience was due him.

[41] "Ein theologisches Bedencken" (1531), Hortleder, II, 67.

those laws through its effects on men's consciences.[42] More than a grudging acceptance of the political sphere was implied when Luther and several other theologians argued that "the Gospel is a doctrine of the spiritual and eternal laws of the heart, and it does not spurn the external temporal government, but rather establishes it and esteems it highly; so it follows that the Gospel allows all natural and equitable protection and defense, whether it is ordained by natural law or through the temporal government."[43] Luther went so far as to assert, in 1539, that Christ had forbidden only private vindication; resistance against anyone who sought the property of his subjects was sanctioned, not only by the

[42] Luther, Jonas, Melanchthon, Spalatin, and some jurists of Wittenberg, "Bedencken: . . . Underricht von der Gegenwehr" (1531), Hortleder, II, 83. " . . . unnd wir allezeit gelehrt haben, dass man Weltliche Rechte soll lassen gehen, gelten, unnd halten, was sie vermögen, weil das Evangelium nicht wider die Weltlichen Rechte lehret. . . . Auch weil es jetzt allenthalben so gefährlich stehet, dass täglich mögen auch andere Sachen fürfallen, da man sich stracks wehren müsste, nicht allein auss Weltlichen Rechten, sondern auss Pflicht und Noth dess Gewissens." A final apology is made for their former opposition to resistance, for, they argued, they had not known "dass solches der Obrigkeit Rechte selbst geben," which, of course, had to be obeyed.

[43] Luther et al., "Aussführliches Bedencken" (1532), Hortleder, II, 92. More briefly put, the "Evangelium non tollit politica, seu leges politicas."

jurisconsults, but also by "pure Christian doctrine."[44] Melanchthon argued on several occasions that, since the natural law which allows resistance is implanted in man by God, it "is truly divine law."[45] Luther, of course,

[44] Paul Drews, ed., Disputationen Dr. M. Luthers (Göttingen, 1895), p. 570. "Christus privatem vindictam prohibet. Caesar et alii similes quaerant possessiones nostras. Volunt esse domini. Hac de re consulant iurisperitis, sed tamen propter doctrinam christianum puram esse resistendum." From this remark, one must judge that Luther's opinion now did not merely reflect the disappearance of his "spiritual resistance," as he "looked upon the whole problem of the right to resistance solely with the political and juristic eyes of the Saxon statemen," as is argued by Baron, "German Imperial Cities," pp. 423-24, n. 2. Rather, at this point, Luther is substituting "spiritual approval" for "spiritual resistance."

[45] Letter to von Einsiedel, in Kapp, Kleine Nachlese, p. 204. Similar statements are found in Melanchthon's letter to Caspar Marsilio (February 19, 1540), CR, III, 968-69; his preface to the 1546 edition of Luther's Warnung, Hortleder, II, 138; his preface to Luther's Erklärung of 1547, Hortleder, II, 149; his letter to "N. N." (January, 1539), CR, III, 63. Cf. "Von der Nothwehr Unterricht" (1547), Hortleder, II, 162; and Monnerus, "Von der Defension (1547), Hortleder, II, 177, 179.

still hesitated to sanction resistance to religious persecution as such, but it became more common during the Schmalkaldic Wars for Lutheran writers to justify their resistance by the very fact that their religion was being suppressed.[46]

The full circle had nearly been turned; the Gospel, instead of forbidding all resistance, or even only reluctantly allowing it, seems to have encouraged it to some degree. Divine commands to resist evil could reinforce temporal and natural laws which allowed disobedience or resistance to tyrannical authorities, unjust judges and would-be murderers and robbers. Scripture and law were now free to cooperate in defending the Reformation against antagonistic rulers.

In the process of developing their theory of resistance, however, the Lutherans created a problem. The natural and human laws to which they appealed allowed resistance at many levels of society. In

[46] See, for example, the "Bendencken von dem Krieg" of "Christian Alemann" (Monnerus?) with a preface by Christoph Conrad (Basel, 1557), Hortleder, II, 214-18.

presenting analogies to resistance against an emperor, they often seemed to be sanctioning resistance by private individuals, not only against inferior authorities, but against the emperor himself. With memories of the Peasants' War of 1524-25, Lutheran pastors and jurists hastened to modify their insurrectionary tone.

CHAPTER II

THE LUTHERAN UNTERE OBRIGKEIT

Lutheran attempts to formulate a theory of resistance by inferior authorities were, in part, a reaction to the radicalism displayed by the German peasants and expressed in some of their own writings. They appealed to the German constitution, which in their view allowed political action against the emperor by the "estates"--the electors, princes and cities--but which forbade rebellion by ordinary subjects. Their arguments, however, portrayed these "estates," or at least some of them, as virtually autonomous powers whose right to resist seems to be founded as much on their independent status as princes as on their elevated, though not supreme, position within a unified Holy Roman Empire. The fact that in many respects the federated empire of the post-1648 period was foreshadowed in Lutheran writings of the 1530's renders somewhat tenuous the portrayal of Lutheran resistance as the activity of inferior authorities within a single, corporate

government. Yet, as we shall see, the Lutherans retained many elements of the medieval view of the empire as a unified monarchy, whose king could be resisted by men who were decidedly, if only slightly, his inferiors.

A major problem facing the Lutherans was to restrict armed defense against the emperor to inferior authorities, removing it from private persons who, by common consent, had a natural right to defend themselves against injury. This problem was not solved completely, for when war threatened in 1546, Bugenhagen issued a call to "the churches, youth, women and girls" to join the conflict against the murdering bands of the emperor.[1] Such radical calls to resistance were not uncommon during the time of imminent or actual warfare in the late 1540's,[2] but justifications for them had been suggested in preceding years. Johann Wicks, in 1531, had urged the peasants to help the princes and estates declare the law and combat false doctrine, and Luther and his

[1] Letter of Bugenhagen to various pastors, in Kapp, Kleine Nachlese, 764-65.

[2] See, for example, George Major, "Ewiger, Göttlicher, Allmächtiger Majestat, Declaration. Wider Keyser Carl" (1546), Hortleder, II, 133.

colleagues had argued in 1532 that every Christian (ein jeder Christ) should protect and defend true worship just as the prince protected his subjects.[3]

In one of his "table-talks," Luther forbade resistance to religious persecution which was directed at the Christian as a "member of Christ," but confessed that, if attacked wantonly on the street, "as a member of the Prince and the Authority," he must resist, for he was obliged to help the prince clear the land of outlawry.[4] The strange implication here that some form of lese majesty could be committed against a private person received further support in a disputation of 1539 where Luther again allowed the Christian to resist as a "member of the authority" which was being flouted.[5] His

[3] "Rathschlag," Hortleder, II, p. 72, Luther, Jonas, Bugenhagen, Amsdorff, Melanchthon, "Aussführliches Bedencken," Hortleder, II, 92.

[4] Colloquia oder Tisch-Reden, p. 787. If attacked on the street, he said, he could defend himself, "so wolt ich mich von wegen des Fürsten Amts, als ein Unterthan und Diener, ihrer gewehret und Widerstand gethan haben, denn sie greiffen mich nicht an ums Evangelii willen, als einen Prediger und Glied Christi, sondern als des Fürsten und der Obrigkeit Glied, da sol ich dem Fürsten helffen sein Land rein halten," even by killing the attacker if necessary.

[5] "Etliche Schluss-Reden D. Martini Lutheri in offentlicher Disputation verthädigt, Anno 1539," Hortleder, II, pp. 97-98. The Christian might resist "gleich wie die Obrigkeit, welcher Gliede du bist . . . ."

meaning was clearer in a "table-talk" of 1539 in which he associated the subject's right of resistance with his membership in the body of the empire of which the emperor was the head, thus preventing too close an identification between sovereign and subjects.[6] The close relationship of the subject to the governing authority, however, was still manifest in Luther's assertion that "when the magistrate is unavailable, the common person is magistrate" (deficiente magistratu, plebs est magistratus) and can act accordingly to maintain the law.[7]

In spite of such elements of radicalism, Lutheran thinkers usually qualified their exhortation to resistance. Very common was the notion that each individual should resist "according to his estate," a distinction still serviceable to Huguenots some years later. A pamphlet of 1547 argued that heads of households must

[6] WA, Tischreden (Feb. 7, 1539), IV, 236. "Caesar est caput in politico regno et corpore, cuius corporis quilibet privatus homo est pars et membrum, cui ut politico iura concedunt defensionem, immo praecipiunt; si non defenderit se, tunc est homicida sui corporis."

[7] Ibid., p. 237. The same principle occurs in Melanchthon's Prolegomena in Officia Ciceronis (1530), CR, XVI, 573, where he states that "vim iniustam repellere licet vi ordinata, scilicet officio magistratus, cum eius auxilio uti potest, aut manu propria, si desit magistratus, ut si quis incidat in latrones."

protect their wives and children, while the prince defended himself and his subjects. All lords were to protect their families, churches, schools, and lands, although the defense of a temporal government and its subjects belonged to public officials, as did the regular punishment of murderers.[8] An anonymous pamphlet of 1552 likewise claimed the right of every subject to resist "according to his calling" (ein jeder nach seinem Beruff). The royal council was to resist with counter advice, the preachers with sermons, the confessors with refusal of absolution and of sacraments, subjects with pleas and supplications, and churches with prayers, but only the subject who bore the sword given him by God to punish evil and protect the good could resist forcefully.[9]

[8] Justus Menius [Melanchthon?], "Von der Nothwehr Unterricht," Hortleder, II, 162, "Und diesen Schutz sol ein jeder nach seinem Stande thun. Ein Haussvater für sich, sein Weib und Kind: Ein Fürst für sich und seine Unterthan, so jemand hohes oder niedriges Standes offentliche Grausamkeit an ihnen üben wil." Bugenhagen, in his letter of 1546 (see above, n. 1) also mentioned the role of the Haus-Vetter in protecting churches, children, honor and morality.

[9] "Grundtlicher Bericht" (1552), Hortleder, II, 212. This is no doubt what Martin Bucer had meant when, in his Dialogi (Augsburg, 1535), no. 9, p. Zv^{V}, he said that private subjects, when their authorities did nothing to improve their conditions, might only call upon God, "und yeder nach seinem beruff die oberen im Herzen ires Ampts zu ermanen."

perhaps this is what Monnerus had meant in 1547 when he proposed that "everyone, but especially the authorities" (ein jeder, und sonderlich die Obrigkeit) could resist.[10]

The status of each man in his vocation, especially that of "the authorities," in Lutheran thought no doubt owed much to the Lutheran (and medieval) idea of the sacredness of secular vocations. Luther had early considered political office to be a special type of vocation, since secular government, although dealing with temporal affairs, was nevertheless of the "spiritual estate."[11] Christians, therefore, were to accept worldly office as a calling favored by God, to be esteemed as highly as marriage, husbandry or any other divine calling.[12] No man, thought Martin Bucer, could interfere in another's vocation, for that person was responsible only to God. Hence, no emperor could hinder those of his inferiors who were called to bear the sword.[13]

[10] "Von der Defension," Hortleder, II, 176. "Hie ist ein jeder, und sonderlich die Obrigkeit, schuldig darein zu sehen, zu wehren, und die armen unschuldigen Leuten zu schützen."

[11] The separation of these two estates was the "first wall" he attacked in his An den christlichen Adel deutscher Nation (1520), WA, VI, 407-11.

[12] Von weltlicher Obrigkeit (1523), WA, XI, 257-58.

[13] Dialogi, no. 9, p. Viii^{v}.

The distinction between the Christian as a private man and as a bearer of the sword was, then, fundamental to Lutheran thought. Several of Luther's early works, contrary to some of his later comments, specifically forbade private men to resist, and this remained his basic position. In 1522, he warned that "Herr Omnes" would harm the innocent more than the guilty by his indiscriminate rebellion. The masses should merely attempt to arouse the authorities to action, while acknowledging their sins and the justness of God's chastisement. Their only arms were prayer and verbal attacks against the papal regime.[14] Private men could not resist, said another theologian, though "lower, but nevertheless ordained, authorities" must oppose a higher authority who misused his office, even to the extent of divesting him of his sword.[15] Scriptural commands to

[14] Eine treue Vermahnung zu allen Christen (1522), WA, VIII, 676-87. These alternatives given to private individuals became standard in subsequent writings that limited resistance to inferior magistrates.

[15] [Osiander ?], "Ein Theologischer Rathschlag" (1531), Hortleder, II, 85. Martin Bucer, in his "Responsiones ad Quaestiones a Georgio Morello et Petro Lathomo Valdensium provincialium ad legatis, de Religione rebusque ecclesiasticae propositos" (October, 1530), in Thesaurus Baumianus, Thesaurus epistolicus reformatorum Alsaticorum (Strasbourg, 1905), III, 351[v], "Porro gladium nemo ipse sumere debet. Magistratibus quicunque sunt ii, inquit Paulus [the apostle] a Deo ordinati sunt, et iis gladium Deus contulit. Alii ferre omnia (potius) debent quam sibi sumere gladium."

suffer were thought not to apply to the magistrate, for he "suffers enough violence and injustice when other authorities disturb his peace and make war upon him."[16] Although some Lutheran writers sanctioned elements of popular resistance, they came to consider inferior authorities as the only legitimate instruments for resisting Charles V.[17]

Lutherans who wished to avoid the radical implications of natural law appealed not only to Luther's conception of vocation, but also to the constitution of the Holy Roman Empire. Traditionally, German emperors had been deposed only by public authorities, particularly the electors,[18] a fact well known by

[16] Veit Dieterich (or, Hortleder suspects, Melanchthon), "Meynung, von der UnterObrigkeit Gegenwehr in GlaubensSachen" (1545?), Hortleder, II, 142.

[17] The "Aussführliches Bedencken" of 1532 (see above, n. 3), which mentioned defense of true religion by "ein jeder Christ," decidedly favored resistance by "princes and all authorities." Hortleder, II, 92-94. See also "Ein ander theologischer Rathschlag" (1529, incorrectly dated as 1531 by Hortleder, for which see Baron, "German Imperial Cities," p. 421, n. 3), Hortleder, II, 86-87, which interprets Lupold of Bebenberg's reference to the "people" who could depose kings (De jure regni et imperii, ch. 17) as "principes et optimates terrae;" and the "Erste Antwort" of the court-pastor of Electoral Saxony (1548), Hortleder, II, 194, 197.

[18] Carlyle, Medieval Political Theory, V, 118-19, VI, 182-83.

sixteenth-century writers. In 1523, Zwingli allowed resistance by the princes who had elected their king, basing his argument on the assumption that whoever had the power of electing the ruler, whether this be a few princes or the people as a whole (die gmein hand), should be able as well to remove him from office. In hereditary realms, Zwingli could find no grounds for resistance at all, unless the entire body politic, or the "greater, more pious part" of it, took joint action, which he seems to have thought unlikely to happen. His greatest confidence lay in resistance by those who elected their rulers, and his thought was obviously geared to the Swiss cantons and the Holy Roman Empire.[19]

In contrast with Zwingli's rather abstract formulations, most Lutheran apologists quite explicitly

[19] "Auslegung des 42. Artikels," from the Auslegen und Gründe der Schlussreden (July 14, 1523), CR, LXXXIX, 343-46. See also his Christianae fidei . . . Expositio, in Huldrici Zuinglii Opera, ed. Schuler, Schultheiss (Zurich, 1841), IV, pt. 2, p. 59. For a summary of Zwingli's views on resistance, but one which tends to emphasize the radical elements of his thought, see Alfred Farner, Die Lehre von Kirche und Staat bei Zwingli (Tübingen, 1930), pp. 63-67. Baron, "German Imperial Cities," pp. 425-26, denies, however, that Zwingli had any important influence on the theory of resistance by inferior magistrates.

discussed the current relationship of their emperor with the Lutheran princes.[20] Philip of Hesse wrote to Margrave George of Brandenberg that they, "as Christian authorities," could legally resist an emperor bound by a contract to "do right,"[21] and obligated to the estates as much as they were to him. The estates, moreover, had sworn their oath not only to him, but also to "the empire" (sondern Im und dem reich zugleich), implying that they could remain loyal even while resisting the emperor. The latter's failure to meet his sworn duties made him a common person, because his position was not hereditary but elected.[22] The Lutherans adamantly

[20] While Zwingli seemed to limit resistance to the electing princes in an electoral monarchy, the Lutherans included under the heading "Untere Obrigkeit" not only the seven electors, but all the estates, including other "princes" and cities. They used the word "Fürsten" rather loosely, referring, apparently, to even the petty nobility (Landesherren) who were members of the imperial diet. The cities were the free imperial cities which were commonly, though not without opposition, "selbs Fürsten gleich geacht," as in Ulrich Tengler's Laienspiegel of 1509, cited in Otto von Gierke, Das deutsche Genossenschaftsrecht (Berlin, 1881) (hereafter DGR), III, 664.

[21] Letter of December 21, 1529, in von Schubert, Bekenntnisbildung, pp. 200-201.

[22] Letter of October 21, 1530, in Christoph von Rommel, Urkunden-Band zur Geschichte Philipp's des Grossmüthigen (Giessen, 1830), p. 43. F. W. Hassenkamp, Hessische Kirchengeschichte seit dem Zeitalter der Reformation, 2nd ed. (Frankfurt, 1864), I, 206-7, also discusses Philip's political views and those of the jurists of Hesse in 1530. Otto Winckelmann, Der schmalkaldische Bund und der nürnberger Religionsfriede

insisted on the conditional nature of Charles V's power in the German constitution. As Luther put it, Charles had acted "not only against God and divine law, but also against his own imperial law, oath, duty, seal and letter."[23] His power was given or "loaned" to him conditionally by the empire.[24] He must use this power for the good of the empire, thought Bucer, for he had promised to rule so as to produce that good. According to Digna Vox (C. 1, 17, 4), the emperor should realize that his power was subject to the laws.[25] Monnerus argued that power submitted to the law was greater than that which claimed to be autonomous. Even though written laws might not bind a prince who has no superior, he should nevertheless submit to them voluntarily. He is bound absolutely, however, by all natural and written

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(Strasbourg, 1892), pp. 38-39, suggests that this letter served fully to convince Luther of the prince's right to resist, after the jurists (i.e. the "Sententz," Hortleder, II, 69-71, and the "Juristischer Rathschlag," Hortleder, II, 78-82) had partly convinced him.

[23] Warnung an seine lieben Deutschen (1531), WA, XXX, Abt. 3, p. 291.

[24] "Ein theologisches Bedencken" (1531), Hortleder, II, p. 68. Johann Wicks, "Rathschlag" (1531), Hortleder, II, p. 74, used the term "verliehenen Gewalts." See also Monnerus, "Von der Defension" (1547), Hortleder, II, p. 172, "ihrer Dignitaten, Hoheiten und Aemptern, so ihnen vom Romischen Reich gegeben sind. . . ."

[25] Dialogi, no. 9, p. Yiv^{v}. Cf. "Juristischer Rathschlag" (n.d.), Hortleder, II, 81.

laws to honor contracts made with his subjects or others. As Baldus had said, the prince was a "rational animal," who could not claim exemption from the laws of nature implanted in the minds of all men. He could indeed be disobeyed if he broke his agreement, cum frangenti fidem licitum sit, fidem frangere (according to the gloss on X 1, 6, 16), just as the feudal lord's breach of faith freed the vassal from his oath of fealty.[26]

The Lutherans accused Charles V specifically of breaking his promises to refrain from attacks on the estates, whether led by himself or by foreigners; to condemn no member of the empire without a hearing; to rule in accord with the profit and happiness of the subjects; to preserve each prince and subject in his traditional privileges, rights and freedoms; and to introduce no changes or new statutes into the empire without the approval of the estates. Beyond those obligations stemming from his oath of capitulation was now the "Eternal Peace" (Landfrieden), a plan for establishing tranquility and order in the empire under the

[26] "Von der Defension," Hortleder, II, 181-82. Monnerus displayed a fairly thorough acquaintance with the medieval debates on whether the prince is legibus solutus, as well as the legal sources which bound the emperor to his contracts.

control of the Imperial Cameral Tribunal erected in 1495, and which, as Monnerus pointed out, Maximilian and Charles had at various times agreed to uphold.[27] Given all these conditions modifying the relation of the estates to the emperor, Monnerus saw no comparison between David, who would not lay a hand on King Saul, and the German princes, who lived under a constitution which allowed them to resist forcefully the unjust power of their superior.[28]

Even as the example of David, so the injunctions of Paul and Peter to obey authorities could be nullified by the German form of government. Paul had told the civil authorities not to resist Roman authority, but Philip of Hesse countered that in Paul's day there had been no hereditary princes but only "simple prefects" who could be removed from office at will by the Romans. These prefects, unlike the princes of Germany, had had

[27] Ibid., pp. 182, 186. See also Philip of Hesse's letter to Margrave George of Brandenburg (December 21, 1529), and Duke John of Saxony's letter to Luther (January 27, 1530), in von Schubert, Bekenntnisbildung, pp. 201, 225; "Ein theologischer Rathschlag" (1531), Hortleder, II, 85; George Major, "Declaration wider Keyser Carl" (1546), Hortleder, II, 132; and the "Warhafftiger Bericht und summarische Aussführung," of John Frederick of Saxony and Philip of Hesse (1546?), Hortleder, II, 284.

[28] "Von der Defension," Hortleder, II, 186. Cf. "Ein theologisches Bedencken" (1531), Hortleder, II, 69.

authority only in secular affairs, and were without subjects of their own. Hence the apostolic commands could not apply to the German princes.[29] Another tract admitted that the emperors had in Christ's time been principes mundi (D. 14, 2, 9) but were now bound to the electors and princes by oath.[30] The author of a "Theologischer Rathschlag" of 1529 compared the German princes to the judges in ancient Israel whom God appointed to protect his people against tyranny, with the qualification that, in the sixteenth century, the "Christian princes and estates are already in office and need no new summons or special command for it, as they had to have."[31] Martin Bucer believed that, though the ancient Hebrew and Roman monarchies had allowed inferior bodies no self-government, the estates of his "Holy Empire of the German Nation" could indeed make their own statutes and ordinances.[32] Luther compared the "time of the

[29] This appears in Philip's letters to Margrave George, in von Schubert, Bekenntnisbildung, pp. 201, 217, and to Luther, in Rommel, Urkunden-Band, p. 43. and in a set of instructions he issued in 1529, in Rommel, pp. 28-29.

[30] "Juristischer Rathschlag" (n.d.), Hortleder, II, 81.

[31] Hortleder, II, 87.

[32] Dialogi, no. 9, p. Xiii^{v}.

martyrs," when Diocletian ruled alone, with his own day, when the emperor must rule with the seven electors.[33] The Renaissance tendency to look backward for precedents and illustrations did not blind these men to obvious differences between ancient governments, to whom obedience was always necessary, and their own constitution. The Lutheran tendency to separate scriptural from political morality, which, as we have seen, was not strong enough to prevent a unification of the two in matters of natural law, was strengthened by this disparity between ancient autocracies and the modern, limited government of the empire.

The Lutheran view of the imperial constitution emphasized, then, the power of the princes as well as the conditional nature of the emperor's authority. The princes, in fact, were often portrayed as near equals of the emperor rather than as his subjects. The constitution which the Lutherans described took on aspects of being a confederation of independent states rather than a union of superior and inferior authorities. Events of medieval history had already initiated the tendency for the princes to pull away from imperial authority, and

[33] WA, Tischreden, IV, 388, dated May 9, 1539.

writers of the sixteenth and seventeenth centuries, partially influenced by the reception of Roman law into Germany, provided increasingly cogent arguments for the independence finally acknowledged in 1648 by the Peace of Westphalia. Lutheran writings of the 1530's and 1540's did not present such comprehensive arguments as did jurists a generation or two later, but they did contribute to the theory of princely independence. In particular, they maintained that the princes were not merely subjects of the emperor, that their subjects stood immediately beneath them rather than beneath the emperor, and that their jurisdiction and power of the sword came not from the emperor but directly from God. Their independent right to the power of the sword (ius gladii) made them appear as virtually autonomous powers.

Luther, who in 1530 denied that Duke John of Saxony had any more right to protect his subjects against the emperor than the Bürgermeister of Torgau to defend his townsmen against the Elector of Saxony,[34] in 1531 still spoke of princes as private persons before the emperor, but also admitted that they were subject only "to a certain extent according to the regulation of the laws." Princes and cities, he maintained, shared many regalian

[34] De Wette, Dr. Martin Luthers Briefe, III, 561.

rights with the emperor; thus they could not be completely his subjects.[35] Whereas some Lutheran writers argued that the apostle Paul's command to obey authorities was not affected by changes in the constitution of the empire, or that the princes were still purely subjects since the empire had not changed at all,[36] a Lutheran jurist argued that although the peoples of the four great ancient empires had been subject to their kings, the electors, princes and estates of the sixteenth century "could not be considered subjects of the emperor."[37] The opponents of resistance demanded consistency; if the subjects of princes had no right of rebellion, even though they may have owned hereditary land, then the hereditary princes

[35] WA, Tischreden, II, p. 404. This is given as "the last of August," 1536, in the Leipzig, 1700, edition of Colloquia, p. 788, where the rights of escort or protection (Geleite) and mining (Bergwerke) are included also.

[36] "Ableynung der Einrede" (1531), Hortleder, II, 12, 23-24. Theologian of Brandenburg, "Bedencken" (1531), Hortleder, II, 13. [John Brentz?], "Bedencken" (1530), Hortleder, II, 10. [Lazarus Spengler?], "Eine Kurze Defension" (1531), Hortleder, II, 25. For a similar opinion in 1547, see Oskar Waldeck, "Die Publizistik des schmalkaldischen Kriegs," Archiv für Reformationsgeschichte, VII (1910), 51.

[37] "Juristischer Rathschlag," Hortleder, II, 81. This and the sources cited in the next several paragraphs indicate that Gierke, DGR, III, 692, was wrong in saying that the Lutheran resistance pamphlets never doubted that the Landesherrn were officials and subjects of the emperor.

had no claim to any such right against the emperor.[38] Supporters of resistance saw little similarity between subjects of the princes and the princes themselves.[39] The latter, it was argued, were bound to their subjects by obligations of greater moment than any they may have owed to the emperor. Princes, therefore, were primarily rulers; they were subjects only secondarily. The author of this argument cited Lupold of Bebenberg's opinion "that western kings, by a custom observed from a time to which the memory is not contrary up to the present day, are able legally to exercise imperial power in their realms with respect to their subjects," apparently intending to replace Lupolds' "kings" with his own German

[38] "Ableynung der Einrede (1531), Hortleder, II, 18, 23. This tract asserts as a general principle that the princes could claim no rights against the emperor which they denied to their subjects against themselves. See also Luther's Gutachten of December 24, 1529, to Elector John of Saxony, quoted by Müller, "Luthers Äusserungen," p. 87.

[39] The court preacher of Electoral Saxony, "Erste Antwort" (1548), Hortleder, II, 197, argued that the subjects, as eigen Leute, could not rebel, nor could the analogy of a city governed by its burgomaster and council --so descriptive of the imperial government--be applied to the governments of the princes. Cf. the "Juristischer Rathschlag," Hortleder, II, 81-82, which made the single exception of vassals of a prince, whose right to resist their lord still remained.

"princes."[40] So far were the princes from being mere subjects of the emperor, or even mere inferior authorities, that they might almost be considered "emperors in their own realms."[41]

Not only were the princes not mere subjects of the emperor, but their own subjects, far from owing direct allegiance to the emperor, stood directly beneath them. Consequently, the duty of protecting these subjects fell directly upon the princes. Convinced of this, Philip of Hesse denied that the emperor had any right to lay a

[40] "Ein ander theologischer Rathschlag" (1529), Hortleder, II, 86, 87. Lupold is quoted from chs. 5 and 15 of De jure regni et imperii. The author does allow, however, the emperor's "mediate jurisdiction" in cases of appeal, negligence and denegation of justice. Another early statement of royal powers for German inferior authorities was made in 1408 (by Conrad of Soest?), affirming that "every nobleman, however modest his standing, is king in his own territory; every city exercises royal power within its own walls." See H. S. Offler, "Aspects of Government in the Late Medieval Empire," in Hale, Highfield, and Smalley, Europe in the Late Middle Ages (Evanston, Ill., 1965), p. 220. Later, in 1577, Le Tocsin (Reims, 1579), p. 240, referred to the German princes as "petits roys."

[41] Bucer had one of the participants in his ninth Dialogue, p. Zi^{v}, assert that the princes "seind in iren landen Kaiser," but Bucer here opposed this, for the statement was used to claim certain powers for the princes not shared by other inferior authorities such as cities, which Bucer would not admit. It was becoming increasingly common, however, to attribute to inferior authorities in the empire powers equal to those of the emperor. See Gierke, DGR, III, 693, and below, ch. 9, pp. 304-9.

hand on the people of Hesse.[42] This protection, argued Bugenhagen, was owed in return for the services rendered by the subjects.[43] Lutheran writers more commonly, however, considered this obligation to have been placed on princes by God and by natural law, not by the subjects beneath them.[44] Bucer founded this duty on the scriptural injunction to love one's neighbor as much as oneself, which allowed Christians to defend others, if not themselves, by arms.[45] Johann Wicks also began from the moral duty to protect one's neighbor from injustice as taught by St. Ambrose, canon law, and the principle given in the glossa ordinaria that a lord must protect his serfs.[46] Luther derived the princes' duty of protection

[42] Letter to Luther (October, 1530), in Rommel, Urkunden-Band, p. 43.

[43] "Bedencken" (1529), Hortleder, II, 65.

[44] Luther had said this already in Ob Kriegsleute, WA, XIX, 648, but limited such protection to defense against only equals or inferiors. See also "Ein ander theologischer Rathschlag" (1529), Hortleder, II, 88, and Philip of Hesse's letter to Margrave George (December 21, 1529), in von Schubert, Bekenntnisbildung, p. 200.

[45] Enarrationes perpetuae, in sacra quatuor evangelia (Strasbourg, 1530), p. 56.

[46] "Rathschlag" (1531), Hortleder, II, 74. He cited Ambrose, Officiorum, I, 27; Gratian's Decretum C. 23, q.3, c.5, ed. Friedberg, I, 897; VI 5, 11, c.6, ed. Friedberg, II, 1095; Bartolus on D. 4, 2, 9, paragraph sed licet, and D. 1, 18, 6; and the gloss on D. 50, 17, 51.

from the duty of each man to defend his wife, children and servants.[47] This duty, then, which nature and his own conscience forced upon the prince, in no way implied that his subjects had installed him as their protector. Popular sovereignty found little place in Lutheran thought.[48]

Added to this responsibility was that to care for the church and ecclesiastical discipline, and to "implant God's Word" in their territories. This was not emphasized in the literature of the late 1520's and early 1530's, due perhaps to the belief that one could resist only for political, not religious, reasons. In the 1540's, however, protection of the church was often mentioned in conjunction with protection of subjects,[49]

[47] WA, Tischreden, III, p. 631, dated April 3, 1538.

[48] Melanchthon's statement in Judicium . . . principi electori factum, CR, III, 126, which attributes to the people the function of bestowing the imperium upon their princes is rare, if not unique, in these Lutheran writings. Luther, WA, Tischreden, I, 326, did say that "Unsere Fürsten sind dem Reich mit Eiden verpflichtet, . . ." but the Reich he probably had in mind was a populus in the Roman law sense, that is, "a juridical entity distinct from the members who composed it." See Wilks, Problem of Sovereignty, pp. 196-99, esp. 198, for a discussion of the German princes of the fourteenth century acting as the populus but owing no responsibility to the people. Cf. below, n. 61.

[49] Protection of the church was emphasized by the "Erste Antwort" of the Saxon court preacher (1548), Hortleder, II, 200, which allowed resistance against

reflecting a growing acceptance of both the right to resist for religious reasons and the princes' role as heads of their churches. The right to control their churches emerged in this period as the "highest regalia" of princes and cities.[50]

It could be argued, of course, that regalian rights, as well as other elements of princely authority, came to the princes as concessions of the emperor.[51] Supporters of the princes replied that all public authority came directly from God. This was proved, thought Bugenhagen, by the fact that inferior officials of the empire remained in their office after their lord, by his murderous and Turkish actions against God's Word, had vacated

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religious persecution only against foreign powers; Veit Dieterich, "Meynung von der UnterObrigkeit Gegenwehr in GlaubensSachen" (1545?), Hortleder, II, 141-42; and Major's "Declaration wider Keyser Carl" (1546), Hortleder, II, 131-32.

[50] Johannes Heckel, "Höchstes Regal," Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Kan. Abt., XIII (1924), 518-20, discusses documents of 1543, 1545 (of Bucer) and 1548 which, he says, are the earliest occurrences of this idea. Bucer, of course, had made this right a part of merum imperium by 1535, and in his Philosophiae moralis epitome (1538), CR, XVI, 102-08, 117-18, Melanchthon allowed the authorities to defend innocent subjects in either civil or religious matters and instructed them to maintain "externam disciplinam."

[51] See, for example, Johann Müller, "Anzeig" (1531), Hortleder, II, 15. For an application of this principle to the city of Nuremberg, see the "Bedencken" (1530) of a theologian of that city (Brentz?), Hortleder, II, 10.

his own office.[52] A theologian of Nuremberg applied Romans 13 not only to kings and princes, but also to cities, communities and all others with a right and duty to protect the pious. They, "not less than" the emperors, were ordained by God. To argue that their power came not from God, but "mostly" from the emperor, "as if he were a dispenser of power," was contrary to Scripture, for it implied that the emperor's power was his own rather than ordained of God. The emperor, in fact, received his power "from the government" (Regierung) or the empire through his election and installation, and this power could be recalled by those "Wechter" who gave it. That God gave the sword to both the cities and the emperor meant that "the power of the cities is the same as that of the emperor" (ist der Städte Gewalt gleich

[52] "Bedencken" (1529), Hortleder, II, 65. The magistrate's continuity in office after the death of the king was observed also by the Milanese jurist, Andreas Alciati, in his commentary on D. 13, 6, 5. See Myron P. Gilmore, Argument from Roman Law in Political Thought, 1200-1600 (Cambridge, Mass., 1941), p. 50. The "Juristischer Rathschlag," Hortleder, II, 81, showed an awareness of the problem for princely independence created by the medieval conception of the dominum directum, possessed by the emperor, and the dominum utile, which he allowed to be held by his inferiors. It sidestepped the problem, however, by asserting that dominium utile is "preferred" ("so haben gleichwol die Fürsten dominum utile: id quod directo, regulariter praefertur.") This followed the Gloss. ord. on C. 8, 42, 3, "Qui habet utilem videtur praeferri."

dem Gewalt dess Keysers). An inferior power is not only equal to his superior, but in some cases is more eminent ("nicht allein dem höhen Gewalt gleich, sondern auch in etlichen Fällen höher und fürnehmer ist"),[53] and must not be considered a private person. Paul had not meant that one power should be made the subject of another, but that all without power should be obedient to all who had it.[54]

God's direct grant of power to all magistrates was proved, according to a tract of 1552, by Christ's words to Pilate, "You would have no power over me unless it had been given you from above." Pilate's authority had come directly from God, even though the emperor had been the formal means (Werck Zeug) through which he was appointed to office. Only God had the power of the sword in himself, so that no man could be the source of another's authority. Pilate, then, became the type of all inferior officials of the Roman Empire.[55]

[53] Another theologian agreed that the emperor's inferiors became his equals and could resist him if he failed to use his sword properly. "Ein ander Theologischer Rathschlag" (1529), Hortleder, II, 86.

[54] Osiander (?), "Ein Theologischer Rathschlag" (1531), Hortleder, II, 84.

[55] "Gründtlicher Bericht" (1552), Hortleder, II, 209, 213. The author assumed that the emperor would have to possess this authority in his own person in

The major difference, then, between the princes and their subjects, and a major element of Lutheran resistance theory, was that the princes had the right of the sword directly from God. In view of the significance of the right of the sword, and the frequency of its mention by Lutheran apologists, it is surprising that only one Lutheran writer, a theologian, essayed a full explanation of it. Martin Bucer, aware that, in legal usage, the right of the sword (ius gladii) was equivalent to the merum imperium of Roman law, included in the magistrate's right of the sword those powers attributed by the legists to merum imperium. These included the right to judge capital cases (über das blüt zurichten), to punish malefactors by a certain "full power" (ein vollem gewalt), and to grant statutes and ordinances.[56] Moreover, anyone "with power and, as they say, merum imperium," had divine directive to protect those committed to his trust, so that any contrary command of a superior was not to be heeded, even if the inferior had received his sword from that superior. This right to resist force with

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order to transmit it. Contemporary jurists were, as we shall see below, quite perplexed over this question of who really "possessed" the ius gladii. Most jurists admitted that at least the emperor possessed it, and could therefore delegate it, and to this extent our author was in conflict with predominating legal theory.

[56] Dialogi, no. 6, pp. Fi^{v}, Fii.

force was not, he urged, for private men, but only for those whose sword was from God.[57]

As the jurists distinguished among levels of merum imperium, Bucer ranked the inferior authorities of Germany according to their relative power in judging capital cases and making statutes and ordinances. Only those with the power to make general laws without the consent of a higher authority were responsible for maintaining true religion.[58] Any control of preachers and churches must belong to those who had merum imperium, those to whom the "governing of human life is committed," with no interference by higher authorities. The estates of the Holy Roman Empire, the princes, graves, cities and many nobles, all recognized themselves as subjects of the emperor, but had no need to consult him in making statutes and judging capital cases in their own territories. They were protected by imperial law requiring

[57] Enarrationes, pp. 57-58, in the commentary on St. Matthew's Gospel, esp. p. 57, "Iam quicunque potestate, meroque, quod aiunt, imperio pollet, eius fuerit, pro virili sua parte, tueri contra vim suae fidei commissos, idque cum exigat Deus, haud licebit omittere, . . ." This is from a section of about three pages added to this edition, not found in the 1527 edition (with the title, Enarrationum in Evangelia Matthaei, Marci, et Lucae, libri duo), regarding the right and duty of inferior magistrates to resist their superior, suggesting that Bucer had only recently learned of merum imperum.

[58] Dialogi, no. 6, p. Fii.

emperors to protect and advance, rather than decrease, the freedoms and rights of the estates.[59] Their merum imperium gave them power "to govern the entire life of their subjects according to divine, natural, imperial, and their own laws."[60]

Although other Lutheran writers did not submit the concept of the right of the sword to such intensive

[59] Ibid., no. 9, pp. Viii-Viii^{v}.

[60] Ibid., no. 9, p. Xiii^{v}. Fridreich, one of the protagonists, is speaking: "So sag nun was gewalts wirt durch Kai. Maie. den stenden des Reichs zu gestellet? Ists nitt Merum Imperium? Ists nitt gewalt, gesetz und Statuten zumachen, und das ganz leben der iren nach götlichem, natürlichem, Kaiserlichem, und aigen Statt rechten zu regieren." Later, p. Xiv, he says that "das ampt der obren die Merum Imperium haben volkommen zu regieren, seye das böss abtreyben und das gut aufrichten, so weyt die grentzen seind yedes gewalts unnd oberkaiten." This applied, apparently, to even "die geringeste unnd schwecheste oberkait" who has merum imperium (p. Zii^{v}). Bucer's conception of merum imperium must derive, directly or indirectly, from Bartolus, who had attributed to this term wide powers, including even that of legislation, and had conferred it rather freely upon inferior authorities. Not even Bartolist lawyers, however, conceived of this power as broadly as did Bucer. See Gilmore, Argument, pp. 37-42, and below, ch. 8, pp. 245-53 and ch. 9, pp. 315-18.

Erwin Hölzle, "Die Idee einer Altgermanischen Freiheit vor Montesquieu," Historische Zeitschrift, Beiheft 5 (Munich, 1925), pp. 22-23, argues that Bucer's advocacy of "old German" freedoms was based not on the "tyrannical" Roman law, or on law given by the emperor, but on old Frankish law. Bucer did not hesitate, however, to use Roman law for ends favorable to his cause.

legal analysis as did Bucer, their very use of the term involved them in a legal problem. They could speak with some validity of "authority," in a loose sense, coming directly from God to the princes, but "the sword," in a legal sense and according to legal theory, was conferred on inferior authorities by the emperor and remained under his "cumulative" jurisdiction. Even though it might come ultimately from God, the legal authority of the estates was, according to widespread belief, dependent on, and therefore subject to, the emperor. They could hardly use that sword against the superior from whom it came.

The supporters of resistance struggled to find an equally legal rebuttal. Some replied that the sword came not from the emperor alone, but from the Kaiser und Reich, or even just the Reich, or else, as we have seen, argued that the emperor was merely the Werck-Zeug through whom God gave the sword.[61] Many writers cited the

[61] Monnerus, "Von der Defension," Hortleder, II, 183, asserted that the sword was "uns vom Reich befohlen," and could be used "eben wider den, durch welchen es uns gegeben ist," that is, the emperor. The idea that the princes' authority came from the entire Empire was to become widely accepted later in the century, but was not a prominent element of Lutheran thought. See below, ch. 9, pp. 338-40. According to Jean Bodin, however, Les six livres de la république (Paris, 1583; 1st pub. 1576), II, 6, p. 322, the electors customarily protested the day after the emperor's coronation that they held their states of the empire, not of the emperor. This was evidence, he thought, for the aristocratic nature of the imperial government.

historical case of the Emperor Trajan, who, as he handed the sword of office to his newly appointed marshal, told him to use it for the emperor when he commanded what was right, but against him when he commanded otherwise. Even a sword received from an earthly superior could, therefore, be used against him.[62] To many observers, however, it seemed that such presumption on the part of the inferior recipient of the sword was a clear transgression of the bounds of his authority. To the argument that no one could exercise more power than had been committed to him (by the emperor), Bucer had a spokesman in his ninth Dialogue give the familiar reply that although this was once true of the empire, as it had been of the Hebrew kingdom, the present estates had powers of "self-government" loaned to them by God. The protagonist insisted, however, that this power and these regalia from God came through the emperor and could be exercised only as he allowed. Bucer's strongest reply

[62] One encounters this story frequently in the resistance literature of this century. The major classical source for it is Dio Cassius, Roman History (Loeb ed., New York, 1925), VIII, 343, and it is mentioned by Pliny in his Panegyric on Trajan. A few examples of it in the Lutheran writings are Iustus Menius [Melanchthon?], "Von der Nothwehr Unterricht" (1547), Hortleder, II, 164, and his Loci Communes, 3rd ed. (1543), CR, XXI, 704; Luther's disputation of May 9, 1539, in Drews, p. 564; Monnerus, "Von der Defension" (1547), Hortleder, II, 183.

to this argument was that since merum imperium is ultimately from God, its bearer is more responsible to God than to his immediate superior (who is only God's servant). On this (extra-legal) basis, the Christian authority's office could be conveyed through the imperial majesty, but in no way limited by it.[63]

Whatever the validity of their claims, the Lutherans operated on the assumption that their princes possessed the power of the sword by right of their office. In replying to a book brought by Charles V to the conference at Regensberg in July, 1541, they inserted into the article on church discipline a statement sanctioning the German bishops' exercise of mixtum and merum imperium, given by emperors and princes. This is significant because, according to Roman law and most medieval commentators, merum imperium could not be delegated by one who held it as a concession from another, but only by those who held it by right of office. German jurists of the sixteenth century adopted the position, however, that

[63] Dialogi, pp. Xiii^{v}-Yi. Philip of Hesse's Denkschrift for the Reichstag of Speier, 1543, in Max Lenz, Briefwechsel Landgraf Philipp's des Grossmüthigen von Hessen mit Bucer, II, "Publicationen aus den königlichen Preussischen Staatsarchiven," XXVIII (Leipzig, 1887, 177, prepared with Bucer's help, also stated that merum imperium, the sword and the power to make statutes and ordinances, was "von Gott ufferlegt" upon the princes, graves, lords and cities.

the princes could delegate it as readily as the emperor, and the Lutherans shared in the development of this idea.[64] Luther himself once suggested to his table-mates that the jurists had dealt the emperor a bad hand; he had only a "claimant's sword" (gladium petitorium) while the princes had a "sword of possessors" (gladium possessorium), leaving the emperor with some power of the sword, but dependent on the approval of the princes for its exercise, while the princes could use theirs freely.[65]

[64] Protestantes ad Caesarem de libro Ratisbon (July 12, 1541), CR, IV, 476-505. In section B, "Responsio principum et statuum coniunctorum Augustanae Confessionis de libro exhibito Imperatori Carolo Aug. 12 Julii," written by Melanchthon, it is stated that "In titulo de disciplina, breviter inserta est particula de Episcopis Germanicis, qui merum et mixtum imperium habent in suis ditionibus." "Hanc rem agimus, non impedimus, quo minus Episcopi possideant opes et imperia, attributa ab imperatoribus et principibus." Melanchthon's German translation, p. 504, renders "merum et mixtum imperium" as "Regalien und weltliche Regierung," another example of a broad definition of that term. For the question of delegating merum imperium, see D. 1, 21, 1, and Gilmore, Argument, pp. 27-28, 33-34, 41. For the later German jurists' treatment of delegation, see below, ch. 9, pp. 318-22.

[65] WA, Tischreden, IV, p. 388, dated May 9, 1539. "Die Juristen haben dem keiser ein bose spiel gemacht: Er hat das schwert von sich gegeben, ita ut nos habeamus gladium traditum possessorium; caesar vero tantum habet in nobis gladium petitorium." Luther's use of the first person plural suggests his frequently expressed belief that he was truly a "member" of the authority with whom he here identified himself. See also Müller, "Luthers Äusserungen," p. 78.

With this power, plus their rights of coinage, tolls, mining and making alliances with foreign powers, the princes might indeed be compared to kings and princes who "recognized no superior."[66]

Lutheran writers, with all their emphasis on the independence of the princes from the emperor and their imperial powers within their territories, seem to have indeed constructed a confederation of near equals rather than a unified imperial government. Nevertheless, they continually referred to the princes as "inferior authorities" (untere Obrigkeiten), and gave repeated evidence of their consciousness of, and pride in, the Holy Roman Empire of the German Nation. Since this empire was a continuation of the ancient Roman Empire, the princes could still be considered as successors of

[66] Luther, in a letter of 1531 to Bruck, Hortleder, II, 94, said that the electors were equal to all other princes and kings, and even superior to some. The right of the estates to make alliances was based, according to the "Ausführung ihrer Unschuldt" of John Frederick of Saxony and Philip of Hesse (1546), Hortleder, II, 325, on the Golden Bull of 1356, and Wicks, "Rathschlag" (1531), Hortleder, II, 73, implied that it was a natural corollary of their right to resist and their position as Beisitzer of the emperor.

the Roman magistrates.[67] A basic element of this view of the German constitution was that the emperor did not rule alone, but in cooperation with the princes and (as the cities argued) the cities. The principle that power ought to be divided rather than concentrated in one individual derived, thought Martin Bucer, from creation, when God distributed power widely to guarantee the best management of human affairs.[68] The government of the empire, said one jurist, is like that of Rome when the senate elected the consuls, or of Venice where the Doge is controlled by the senate, or of a cathedral chapter which shares power with its bishop.[69] Luther, upon whom this jurist may have had influence, compared the emperor to a Bürgermeister or a rector, neither of whom ruled the city or university alone, but had with him councillors, colleagues or professors who controlled and resisted him when necessary.[70] Luther called the

[67] Gierke, DGR, III, 692. Cf. below, ch. 9, where it is shown that jurists of later decades had much difficulty preserving the notion of the continuity of the empire and its magistracy.

[68] Enarrationes, p. 57^{v}, "Profecto qui in unum transferre hominum conatur, potestatem quam pridem Deus, ut rebus humanis maxime conducebat, dispartitus est in plurimos, is ordinatione Dei resistit."

[69] "Juristischer Rathschlag" (1530), Hortleder, II, 81.

[70] WA; Tischreden, IV, 240, dated February 7, 1539.

electors "aequales Caesari" who, as "parts of the empire," were also "parts of the emperor."[71] They ruled "together with the emperor in a common council of the Holy Roman Empire," and without their agreement, his power was "nothing."[72] This senate, said Melanchthon, elected and could depose the emperor, and its majority approval (as required by corporation law) was necessary before his edicts could be passed on to the other princes and the cities for their approval.[73]

[71] Drews, Disputationen, p. 570. In a disputation on May 9, 1539, he said, "Elector princeps non est privata persona, sed sunt aequales Caesari, sunt partes constituentes Caesarem septem electores. Ipse Caesar est caput, ipsi membra, etc. Sunt enim pars Imperii, ergo etiam sunt pars Caesaris." The notion that the electors were "parts of the emperor" no doubt derives from chapter 24 of the Golden Bull of 1356, in which injury to an elector was accounted as lese majesty, owing to the electors' being members of the emperor's body ("ipsi pars corporis nostri sunt"). See Karl Zeumer, Die Goldene Bulle Kaiser Karls IV, "Quellen und Studien zur Verfassungsgeschichte des Deutschen Reiches im Mittelalter und Neuzeit," (Weimar, 1908), II, Heft 2, p. 39. The Gloss. ord. on C. 1, 29 speaks of magistrates as "principis tanquam capitis membra," and the idea occurs fairly frequently in juristic literature. See also C. 9, 8, 5 and C. 12, 1, 5 and their glosses. For other references, see Kantorowicz, King's Two Bodies, p. 208, n. 42, and Wilks, Problem of Sovereignty, p. 457, n. 4, p. 458, nn. 1 and 2.

[72] "Erklärung D. Martin Luthers, von der Frage, die Nothwehr belangendt" (Wittenberg, 1547), Hortleder, II, 151. WA, Tischreden, IV, 388, dated May 9, 1539.

[73] "De dignitate principum, quibus electio imperatoris in Germania commendata est" (1554), CR, XII, 82-83.

Most writers discussed all the estates, not just the electors.[74] One theologian, who opposed resistance, nevertheless considered the "Imperial Majesty" to be made up of the electors, princes and the other estates as well as the emperor, and when all seated together they were called the "Senatus et summus Magistratus Romani Imperii." The decisions of the "greater part" of them were "decreta summi Magistratus in summo Imperio."[75] Similarly, Johann Wicks spoke of the princes as "Beysitzer" of the emperor.[76] Another theologian regarded the princes and estates as lords responsible for the whole German nation;[77] the court preacher of

[74] The Gloss. ord. on C. 9, 8, 5 and 12, 1, 5 had included the Senate and lesser magistrates in the corpus of the prince, and John of Salisbury thought of the Prince together with the other magistrates or judges as the head of the body. In sixteenth-century England, Henry VIII declared that he as the head and the Parliament as members were "knit together in one body politic." These sources are cited by Kantorowicz, King's Two Bodies, pp. 207, 208, n. 42, 228, and Gaines Post, Studies in Medieval Legal Thought (Princeton, 1964), pp. 343-44, n. 30; 369-70.

[75] "Bedencken" (1531), Hortleder, II, 11. Herbert Helbig, "Königtum und Ständeversammlungen in Deutschland am Ende des Mittelalters," in Alburn E. Lousse (Louvain, [1961]), II, 92, notes that the emperor was restricted by "die Mitregierung der in Corporationen geeinten und repräsentativ vertretenen reichsunmittelbaren Stände."

[76] Wicks, "Rathschlag" (1531), Hortleder, II, 73.

[77] "Ein theologisches Bedencken" (1531), Hortleder, II, 68.

Saxony called the electors and estates "ordained authorities, next to and with the emperor;"[78] and a poet, in the name of the "Teutschen Lands," wrote:

> Dann du bist nicht unser Halsherr,
> Sonder zu schirmen Gut und Ehr,
> Erwölt uber das Römisch Reich,
> Chur und Fürsten mit dir gleich,
> Haben ihr Freyheit und ihr Recht,
> Wa du sie wöltest wie die Knecht,
> Eignen, das kan und wird nicht seyn.
> Dann sie seynd die Beysitzer dein,
> An denen, als an das Reichs Rath,
> Das Regiment gleich so wol stat,
> Als an dir, das merck wol und eben.[79]

In short, these writers were opting for a share in the governing of the empire for all the estates. This required that, to some extent, distinctions of rank among members of the estates be overlooked just as those between the emperor and the estates who ruled with him. Martin Bucer, speaking for the imperial cities which were then attempting to assert their equality with the other estates, complained that, although the cities were as much members of the empire as any other estate, even

[78] "Erste Antwort" (1548), Hortleder, II, 194-96, 198.

[79] "Klag des deutschen Lands, gegen Carolo V. dem Keyser, des unbillichen Bekriegens" (1546), Hortleder, II, 120. Gierke, DGR, III, 508-14, treats the development of this sharing of power by the estates and the emperor from the thirteenth to sixteenth centuries. See also Offler, "Late Medieval Empire," p. 221.

the evangelical princes treated them "als bauren."[80] He insisted that an authority with a large territory or a hereditary right to rule had no inherent superiority over an elected official or one with a small territory.[81] "Iustus Menius" (Melanchthon?) exhorted every "temporal regent" who carried the sword, whether he were called emperor, king, prince or Bürgermeister, to act as a commanding officer of God.[82] By implication, titles and grades of authority were to be of minor significance, at least if an injustice or evil were to be suppressed. All authorities were to be regarded as essentially equal, since all magistrates, "whoever they are," as Bucer ex-

[80] Letter to Philip of Hesse (March 16, 1542), in Lenz, Briefwechsel, II, p. 61. He cited the Golden Bull of 1356 to support his argument. While the problem of the cities in relation to the princes in the Reichstag is closely related to this study, I have felt it advisable to avoid becoming engrossed in it. It is treated by Gierke, DGR, I, 300-02, 697-710; III, 696, n. 27, who lists jurists who gave to imperial cities the rights of princes.

[81] Dialogi, p. Ziv. The ambiguous position of the imperial cities resulting from the Lutheran emphasis on the legal and constitutional status of the princes is discussed by Baron, "German Imperial Cities," p. 426-27. See also above, n. 20.

[82] "Von der Nothwehr Unterricht," Hortleder, II, 159.

pressed it, were ordained by God.[83] Princes and cities were not so much to be "emperors" in their realms as to have equality in their right of the sword, a right which depreciated lofty titles and elevated lowly ones. Roman law allowed an authority's colleagues to supercede him if he were absent or negligent, so that the princes and estates, as "colleagues" of the emperor, could step in, as Johann Wicks argued, when this "other authority" neglected his duty.[84]

[83] "Responsiones ad Quaestiones," p. 351[V]. In a sense, this willingness to disregard distinctions of rank was quite medieval. George deLagarde, Recherches, pp. 68-69, points out that to medieval eyes, a corporation of students, a city, a principality or a kingdom represented diverse forms of the same phenomenon. They may have had different rights and attributes, but all derived from a "unique genre" or a common "form," the universitas. With the addition of the religious point of view, this could well describe Lutheran thought. Empire, prince and city were to them gleichgültig, as noted by E. Wolf, Idee und Wirklichheit des Reiches im deutschen Rechtsdencken des 16. und 17. Jhs., "Reich und Recht in der deutschen Philosophie, ed. Karl Lorenz (Stuttgart, 1943), I, 71. On pp. 86-87, he describes how the Lutheran jurist Johann Oldendorp considered all magistrates to be vicars of God, including under the term "magistrate" the emperor, Bürgermeistern, and Landgrafen. In his Ratschläge zu einer guten Politie (1530) (which I have not seen), Oldendorp failed to distinguish clearly between cities and provinces, but rather considered them both as corporations.

[84] "Rathschlag," Hortleder, II, 72, ". . . die andere Fürsten unnd Stände teutscher Nation, von wegen der andern Obrigkeit Unfleiss und Mangels, den Gerichts-Zwang haben . . . ." The Roman law source is D. 26, 5, 19, which allowed decurions to appoint tutors when no other official with this power was available. Wicks' emphasis on the estates as colleagues of the emperor,

No one denied, however, the emperor's superiority in dignity or the essential unity of the empire under him. Although Luther recognized that the emperor was not a monarch like the kings of France and England, he emphasized that the electors, even though "members of the emperor," did not act as the empire's "highest, most eminent head," for only their power, not their dignity and worth, was equal to that of the emperor.[85] No superior on earth could judge or punish them "except the Imperial Majesty alone."[86] Only the "dignity" or "majesty," of course, was superior, not the person, but, although the emperor shared this majesty with others, he retained supremacy in it for himself. Although the Lutherans attributed great power to the princes, and may at times have doubted that the emperor was a true monarch, they

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based on Roman law, was perhaps the clearest Lutheran expression of the principle which was later to form a crucial element in the argument of the Vindiciae contra tyrannos. See below, ch. 5, pp. 184-86.

[85] WA, Tischreden, IV, 236-37 (February 7, 1539), pp. 788-89, ". . . nicht als dem fürnehmsten und öbersten Haupt, wie dem Kayser; denn gleichwol die Churfürsten mit dem Kayser, in gleicher Gewalt sind, doch sind sie nicht in gleicher Dignität und Würde." E. Wolf, Idee und Wirklichkeit, p. 70, suggests that the equality of all authorities was a Gleichheit (each having a highest instance), but not a Gleichartigkeit.

[86] "Schrifft D. Martin Luthers an D. Gregorium Bruck, Churfürstl. Sächsischen Cantzler" (1539), Hortleder, II, 94.

were unwilling to deny the existence of the empire. They may have elevated the electors and princes as "parts of the emperor's body" or as members of the imperial majesty, but these were, after all, conceptions and phrases derived from the medieval monarchical tradition. The Lutherans could, therefore (although not without ambiguity), attribute powers which were equal to those of the emperor to officials who were also his inferiors within the imperial government. Whether this government was an aristocracy or a monarchy, it was at least unified, and was not simply a confederation of states.[87]

One of the most influential Lutheran treatises on resistance, the Bekenntnis of the pastors of Magdeburg (led by Nicholas von Amsdorff) well illustrates Lutheran thinking on the nature of the empire.[88] This work, an

[87] This problem of the imperial constitution confronted the jurists of the late sixteenth and early seventeenth centuries as well. See below, ch. 9, and Gierke, DGR, III, 693.

[88] Bekändtnüss, Unterricht und Vermahnung der Pfarrherrn und Prediger der christlichen Kirchen zu Magdeburg (April 13, 1550), in Hortleder, II, 1053-91. The tract is summarized by J. W. Allen, A History of Political Thought in the Sixteenth Century (London, 1928), pp. 103-6, and Irmgard Höss, "Zur Genesis der Widerstandslehre Bezas," Archiv für Reformationsgeschichte, LIV (1963), pp. 209-13, neither of whom seem to be fully

apology for the armed opposition offered by that city to the Augsburg Interim and imperial armies, justified resistance by a simple syllogism: inferior authorities being obligated by divine command to resist violent infractions against divine and natural laws, and the present persecution of Protestants meeting this condition, all Christian authorities in the empire must defend themselves and their subjects against imperial forces.[89] Following a statement of faith which established the authorities of Magdeburg as "Christian," the major premise was explained. The inferior authorities of Germany recognized the emperor as "the highest regent" (der oberste Regent) of the empire, but since they, like him, were all servants of God, their duty to obey him was binding only insofar as it did not conflict with

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aware of its debt to earlier Lutheran thought. Allen, p. 104, asserts that it was "the first formal enunciation of a theory of rightful forcible resistance by any Protestant who can be called orthodox." The authors of the Bekenntnis indicated their awareness of earlier writings by stating that they would add nothing new to what earlier accounts had said was allowed by imperial laws (p. 1080). As for Luther, they lamented his being "etwas dunckel und schier widerwertig" on the subject of resistance. "Er hat nemlich beyde Theil wöllen inne halten." Robert M. Kingdon, "The First Expression of Theodore Beza's Political Ideas," Archiv für Reformationsgeschichte, XLVI (1955), p. 94, thinks it "probable" that the writers of the Bekenntnis were influenced by earlier Lutheran writers such as Luther and the publicists of the Schmalkaldic War. For the tract's influence, see below, ch. 4, pp. 113-16.

[89] Bekändtnüss, p. 1054.

their higher obligation.[90] Their obedience was limited also by the conditional nature of their obligations to the emperor in the laws of the empire. Beyond mere disobedience, however, their right forcefully to resist the emperor was founded especially upon their independent authority derived directly from God. Owing to this authority, the emperor could not remove them from office, nor did their tenure and duty to punish evil-doers expire upon his death.[91] The power to punish was, after all, only the power to execute the vengeance of God, and this "honor" He had divided among all legitimate authorities.[92] The empire, then, in the view of these pastors,

[90] Ibid., pp. 1072-74, 1076-77.

[91] Ibid., pp. 1075, 1076, 1078.

[92] Ibid., p. 1079. "Und das ist nun der Obrigkeit straffe, zum Schutz oder zur Rache, und eben so viel als wann Gott selbst straffete, es sey nun den untern durch den Obern, oder gleiches Gewalts und Obrigkeit durch gleichen, oder den Obern durch den Untern. Dann Gott hat diese seine Ehre, Rache zu uben und Schutz zu halten, getheilet mit aller ordentlichen Obrigkeit, nicht mit der höchsten alleine, viel weniger mit einer eintzelen Personen, . . . wie dann der Apostel Paulus als auch oben gesagt, Indefinite redet, unnd niemands Stand, Person noch Misshandtlung ausnimpt, . . ."

was a government in which there was indeed a supreme head to whom obedience was normally due, but in which the inferior authorities were not at all inferior in respect to their divine calling and the immediacy of their divinely sanctioned authority. They were at once inferior to the emperor and, in a sense, his equals.

Ambiguity had existed in the relationship of estates to emperor in the late Middle Ages, and it remained to plague the sixteenth century. As Gierke has shown, the "idea of the state" (Stattsbegriff) had invaded the German principalities at the expense of the earlier unitary, corporational structure of the empire, due largely to the idea applied to the empire in the fourteenth century by Bartolus, that any universitas not recognizing a superior could claim many of the rights attributed by Roman law to "the state." The princes and imperial cities which claimed to have no superior except the imperial majesty (which exception was readily overlooked) looked upon themselves as holders of these rights. They were, in practice, independent states more than imperial officials. On the other hand, the territories and cities continued to be regarded as members of that one state spoken of in Roman law, and their political leaders as successors of the Roman imperial magistrates.

Within the hierarchy of corporations making up the empire, tension existed continually between these two basically different conceptions of the empire.[93]

Lutheran ideas concerning the relationship of inferior to superior authorities are important precisely because of their combination of corporational and confederational thought. At a time when, in more centralized monarchies, medieval doctrines of resistance within a unified corporate society were being suppressed, these Germans combined old ideas of resistance by a king's inferiors with the newer doctrines of the universitas which recognized no superior. This gave inferior magistrates practically sovereign powers, as well as the right of resistance. Whereas other medievel inferior authorities lost power to increasingly centralized kingdoms, the German estates gave new dignity and power to

[93] Gierke, DGR, III, 381-82, 452-53, 638-40, 691-97, 703; and Johannes Althusius, 4th ed. (Breslau, 1929), ch. 5, where Gierke emphasizes the strength of the feeling among German jurists that the empire was a "unitary state." On Bartolus' thought concerning the empire, see C. S. N. Woolf, Bartolus of Sassoferato (Cambridge, 1913), pp. 107-208; Gilmore, Argument, pp. 39-40; Ewart Lewis, Medieval Political Ideas (New York, 1954), II, 455-56. Waldeck, "Die Publizistik des Schmalkaldischen Kriegs," pp. 54, 55, discusses how the Territorialstaat "dissolved" the old Roman imperium in the sixteenth century, emphasizing the disjunctive side of the picture. This entire problem is treated more fully below in ch. 9.

the calling of "inferior magistrate." The Huguenots, given their own national traditions and institutions, could no doubt have developed theories of resistance by inferior magistrates without this German precedent, but one is tempted to place them in debt to the Lutheran "inferior authorities" who, although they possessed far more autonomous power than did the magistrates of France, became models for the "inferior magistrates" of Huguenot political thought.

CHAPTER III

EPHORS AND THE AUTHORITY OF THE COMMUNITY: ANTECEDENTS OF THE MAGISTRAT INFERIEUR

Conspicuous by their absence from Lutheran resistance literature were references to the authority of the community. The princes' obligation to protect their subjects from the emperor's rapacity was owed not to the community but to God, from Whom came their vocatio to use the sword. The community of subjects played an essentially passive role in resistance, except insofar as heads of households were to protect their families (an obligation, again, deriving from their divinely established vocation). Many writers who spoke of "the estates" (Stände), meant individual princes and cities, not the imperial diet which "represented" the community. Melanchthon was perhaps the only writer to place the source of authority in the community, but, like other Lutherans after 1530, was undoubtedly somewhat pessimistic regarding the usefulness of the Diet for

resistance.[1] Instead, he looked to the seven electors, whom he compared to the "ephors" of ancient Sparta as aristocratic checks on monarchy with the power to remove from the emperor his imperium.[2]

Calvin, on the other hand, compared the ephors to "the estates" as the assembled meeting of the estates-general, illustrating a major difference between Lutheran thought and that of many Calvinist writers.[3] While Melanchthon compared the ephors to an aristocratic body which acted for, or represented, the whole empire in an essentially legal manner (he also drew a parallel between

[1] Judicium . . . principi electori factum, CR, III, 126. He does, however, emphasize that princes cannot make important laws and decisions without the consent of the estates, referring, apparently, to the diet.

[2] De dignitate Principum, quibus Electio imperatoris in Germania commendata est (1554), CR, XII, 82-3. Commentarii in politica Aristotelis (1530), CR, XVI, 440, where he cites Thucydides (History of the Peloponesian War, I, 131, Loeb ed. [New York, 1919], I, 221) as his source for the ephors.

[3] John Calvin, Institutio Christianae religionis (hereafter cited as Institutes), IV, 20, 31 (ed. of 1536), CR, XXIX, 248. Among the historians who have suggested Melanchthon as a source for Calvin's "ephor-theory," are Josef Bohatec, Calvin und das Recht (Graz, 1934), p. 142, and Ernst Wolf, "Widerstandsrecht," in Religion in Geschichte und Gegenwart (Tübingen, 1962), VI, 1687. John T. McNeill, "The Democratic Element in Calvin's Thought," Church History, XVIII (1949), 163, suggests Zwingli as the source. The ephors, however, were widely known by this time, and Calvin could have learned of them from any of his humanist friends.

the ephors and the Parlement in France),[4] Calvin thought them similar to more broadly based institutions which in some sense "represented" the political community. Calvinist writers were to build upon this foundation until they had made ephors of not only princes and estates, but also of inferior magistrates--all of whom "represented" the authority of the community. The magistrat inferieur was not equivalent to the untere Obrigkeit. The difference was caused, in part, by the influence on Huguenot thought of ancient and late medieval conceptions of royal power limited by agents of the community (such as the ephors).[5] Among the Reformers, Melanchthon gave evidence of knowing some elements of this ancient tradition, but Calvin initiated the adaptation of this tradition to the needs of the Protestants and their inferior

[4] Commentarii, CR, XVI, 440. "Sicut Lacedaemonii addiderunt ephores, quibus scribit Thucydides licuisse capere regem. In Germania sunt electores, in Gallia certi principes curiae parlamenti tamquam ephori regum."

[5] A brief summary of the ancient and medieval sources of Huguenot thought may be found in Albert Elkan, "Die Publizistik der Bartholomäusnacht und Mornays "Vindiciae contra tyrannos," Heidelberger Abhandlungen zur mittleren und neueren Geschichte, IX (1905), 22-25. A better account of the Huguenots' relationship to late medieval thought is in deLagarde, Recherches, pp. 265-69. Also useful is Cardauns, Widerstandsrecht, pp. 23-34, but this must be used with care.

authorities.

As old as democracy was the problem of how the community was to exercise its authority against a tyrannical governor. In ancient times tyrannicide was sometimes praised, but more widespread was the confidence in a mixed form of government. In a mixed constitution the major elements of the community (usually the popular or middle class, the aristocratic and the monarchical elements) possessed certain institutionalized powers in the state, creating checks upon each other which prevented any one element from gaining domination.[6] With the disappearance of "state" institutions in the early Middle Ages, resistance and deposition in Germanic lands devolved to magnates and great vassals acting as de facto public authority. This was justified by the customary right of self-help, later to be refined as the right of

[6] For discussions of the ancient ideal of mixed government, see Ernest Barker, Greek Political Theory (London, 1918), pp. 44, 50, 116-17, 333-34, 339-42; J.P. Mayer et al., Political Thought, the European Tradition (New York, 1939), pp. 14-15, 51, 58; George H. Sabine, A History of Political Theory, 3rd ed. (New York, 1961), pp. 77-80, 112-15, 154-55, 163. On tyrannicide, see Aristotle, Politics, II, vii, 13, and Cicero, Pro T. Annio Milone Oratio, in The Speeches of Cicero, Loeb ed. (New York, 1931), pp. 6-123, esp. par. 80, pp. 94-97.

diffidatio in feudal law.[7] The early medieval kingdom owed its unity, such as it might be, to the king himself, so that the "community" could not be conceived of apart from him, and he alone could exercise its authority; hence, "community" action against him was impossible. Even the members of the king's council, whom the Huguenots considered representatives of the community, acted only as individuals, not as members of a corporate body. Only private persons could resist, and tyrannicide was as justifiable as killing a robber in self-defense.[8]

After the twelfth century, however, the revival of Roman law and the influence of canonistic corporational ideas of the Church led to the notion that the people constituted a true universitas or corporation which could itself exercise political authority, even against

[7] For the early Germanic right of resistance, see Fritz Kern, Gottesgnadentum und Widerstandsrecht, 3rd ed. (Darmstadt, 1962), pp. 145-74. For a discussion of feudal resistance, see Carlyle, Medieval Political Thought, III, 52-66.

[8] John Dickinson, in his Introduction to The Statesman's Book of John of Salisbury (New York, 1927), pp. lxxiv-lxxvi, discusses John of Salisbury's lack of any conception of community action. See also Lewis, Political Ideas, I, 194-95, 248-49.

the king.[9] Since a corporation must always act as a unit, a common political maxim required that resistance to a tyrant must be carried out by, or in the name of, "the whole people." Writers expressed this principle in various ways. Aquinas taught that the public authority could depose a tyrant by the "right of the multitude," and Ockham allowed that in certain cases the "kingdom" was superior to the king and could depose and imprison him.[10] Gerson also said that the "whole community"

[9] Lewis, Political Ideas, I, 271; Dickinson, Statesman's Book, pp. lxxv-lxxviii; J. Russell Major, The Estates General of 1560 (Princeton, 1951), pp. 3-4. For the influence of ecclesiological and theological corporational ideas on political thinking, related to the use of the term corpus mysticum, see Kantorowicz, King's Two Bodies, pp. 15-16, 207-32. The growth of the concept of the state in medieval public law is treated at length by Post, Medieval Legal Thought.

[10] Aquinas, De regimine principum, I, 6, Opera omnia, ed. V. J. Bourke (New York, 1950, repr. of ed. of P. Fiaccadori, Parma, 1865), XVII, 230, "Videtur autem magis contra tyrannorum saevitiam non private praesumptione aliquorum, sed auctoritate publica procedendum. Primo quidem si ad jus multitudinis alicujus pertineat sibi providere de rege, non injuste ab eadem rex institutus potest destrui, vel refrenari ejus potestas, si potestate regia tyrannice abutatur." William of Ockham, Octo quaestiones, Q. II, ch. 7, in Melchior Goldast, Monarchia S. Romani Imperii (Graz, 1960, repr. of ed. of Frankfurt, 1614), II, 341, "Rex enim superior est toto regno: et tamen in casu est inferior regno: quia in casu necessitatis potest regem deponere et in castro detinere . . ." See Lewis, Political Ideas, I, 270. For similar statements in other writings, see Gierke, Political Theories, pp. 143-44, n. 130.

could correct or remove a tyrant, and cited Aristotle (Politics, bk. V) to prove it.[11] In independent republics, said Coluccio Salutati, resistance required a decree of the people, for as criminal punishment was a public act done by community authority, so must be the overthrow of tyrants.[12]

Although these statements clearly placed the authority of the community behind resistance, forbidding all private undertakings, medieval writers were less successful in identifying the instruments by which public authority took action. They usually referred to the traditional aristocratic leaders who once had acted individually against the king, but now could claim to act corporately for the whole realm. Occasionally, a writer might indicate precisely which nobles were to undertake resistance, but usually the task was assigned to an

[11] De auferabilitate papae ab ecclesia, in Goldast, p. 1413, "Sicut enim tradit Aristotel. 5. Polit. quod ad communitatem totam spectat principis vel correctio vel totalis destitutio, si inemendabilis perseveret." This passage is translated in Lewis, Political Ideas, II, 406.

[12] De tyranno, ch. 2, in Emerton, Humanism and Tyranny, p. 145. See also P. S. Lewis, "J. J. des Ursins" 103-21.

[13] The fourteenth-century author of Fleta, I, 17, cited in Carlyle, Medieval Political Theory, VI, 31, referred specifically to the counts and barons of the curia regis as those obliged to restrain the king.

indeterminate group of the natural leaders of the kingdom. John of Paris assigned it to the "barons and peers of the realm," Aegidius Romanus to the "gentlemen and great men of the country," Marsilio of Padua to the men of "quality" who made up the *valentior pars* which acted in the name of the whole people, and, in the fifteenth century, Nicholas of Cusa spoke in general of the "praesides and rectors" who governed in behalf of the whole empire.[14] Writers who interpreted the *lex regia* in the manner of Hugolinus and Azo, considering the Roman people's grant of authority to the emperor to be revocable, had to decide who were, in the Middle Ages, these Roman people who could revoke the emperor's authority.[15] Again, the answers were vague. William of Ockham suggested without further explanation, that the emperor could be removed

[14] John of Paris, *De potestate regis et papali*, in Goldast, *Monarchia*, II, 127. Aegidius Romanus, *Li livres du gouvernement des rois*, III, 2, 10, a thirteenth-century translation of *De regimine principum*, ed. S. P. Molenaer (New York, 1899), "Quer puis que les tyranz n'aiment fors lor propre bien, les gentiz hommes et les hauz hommes du païs qui cen voient ne le puent soufrir, ainz s'emuevent contre le tyrant." Marsilio of Padua, *The "Defensor pacis,"* I, 12, 3-4, trans. Alan Gewirth (New York, 1956), pp. 45-46 (for a full discussion of the concept of *valentior pars*, see Gewirth, *Marsilius of Padua, the Defender of Peace*, I [New York, 1951], 182-99).

[15] For a discussion of this problem, see Wilks, *Problem of Sovereignty*, pp. 111-12, 184-94.

by "those to whom the Romans have given their power," while his contemporary, Lupold of Bebenburg, was only slightly more specific, including among the Roman people the electors, princes, counts, and barons of the empire.[16]

Although the conception of the community acting through these nobles was widely accepted in the later Middle Ages, and their activity was often thought to be corporative rather than individual, the feudal element in their resistance did not disappear.[17] This element was partly responsible for the failure of medieval writers to agree on which officials or bodies ought to exercise the will of the community, for they were forced, in the absence of regular institutions of public power, to appeal to those feudal nobles who could effectively put their theories into practice. The "feudal-public" nature of resistance in the late Middle Ages was exemplified by the Ligue du Bien Public formed against Louis XI in 1464, made up of a random collection of French nobles, but justifying its existence by appealing to the public

[16] Ockham, Octo quaestiones, II, 8, in Goldast, Monarchia, II, 341. Lupold of Bebenburg, De iure regni et Imperii Romani, ch. 17, cited in Carlyle, Medieval Political Theory, VI, 40.

[17] See Kern, Gottesgnadentum, p. 230.

good.[18] The Huguenots were to continue to operate under this combination of feudal and public resistance, but placed far greater emphasis on the public authority by which the nobles acted, partly because they usually envisioned the nobles as members of the estates-general, not merely as powerful individuals.

The estates, of course, had been recognized since the thirteenth century as a means of expressing the will of the community. In varying degrees, they had asserted themselves in matters of taxation and legislation, and sometimes claimed authority to control succession to the throne and the choice of regents.[19] The estates of some

[18] Philippe de Comines, Mémoires, I, ch. 2, in Mémoires pour servir à l'histoire de France, ed. Michaud and Poujoulat, I série (Paris, 1837), IV, 3. In 1464, he says, John II, Duke of Bourbon persuaded Philip the Good of Burgundy to assemble an army in his lands, "ce que semblablement feroient tous les princes de France, pour remonstrer au Roy le mauvais ordre et injustice qu'il faisoit en son royaume: et vouloient estre forts pour le contraindre, s'il ne se vouloit ranger. Et fut cette guerre depuis appellée le Bien Public; pour ce qu'elle s'entreprenoit soubs couleur de dire que c'estoit pour le bien public du royaume."

[19] For a general summary of the powers of the estates, see Robert Howard Lord, "The Parliaments of the Middle Ages and the Early Modern Period," The Catholic Historical Review, XVI (1930), pp. 140-44, and Carlyle, Medieval Political Theory, VI, 89-110, 206-18, 463-501.

countries (notably England) claimed a right of resistance or deposition.[20] They formed an institutional check on rulers unknown in the early Middle Ages, and provided a "preventive" resistance which better reflected the community's authority than the older curia regis, since the third estate took part. In the sixteenth century, Claude de Seyssel spoke of the estates as an element of the "frein" of "la police" which limited the French monarchy.[21] Moreover, the conciliarists who often applied their principles of ecclesiastical government to the state, added weight to the scholarly argument for the supremacy of estates over kings. In the sixteenth century, John Major, the conciliarist teacher of several Huguenots, strongly supported the

[20] Kern, Gottesgnadentum, pp. 232-33, and n. 498, pp. 369-71, discusses rights of resistance in Hungary, Aragon and England. E. Lousse, La société d'Ancien Régime (Louvain, 1943), p. 341, notes a jus resistendi possessed by the "order" or estate as a kind of corporate vassal.

[21] La monarchie de France (1519), I, 13-17, ed. Jacques Poujol (Paris, 1961), pp. 120-25. In addition to the frein of "la police," Seyssel postulated those of "religion" and of "justice." There were, he thought, three estates besides the first (the clergy), these being the nobles, the middle class and the lower class.

right of the estates to depose tyrants in the name of the community.[22]

Of course, few medieval estates had ever realized the great power against kings the Calvinists claimed for them. The estates were nearly always dependent on the king, who with few exceptions could convoke them himself; their power increased in proportion to the strength of the king and his central government, not, as was once thought, in proportion to their decline. The power they attained derived from their control of the purse-strings, not from a threat of deposition seldom

[22] John Major, De authoritate concilii, supra papam, in Jean Gerson, Opera omnia, ed. DuPin (Antwerp, 1706), II, 1139, "Exemplum in simili: Franciscus dicitur communiter Rex totius Regni Franciae, et non modo est super unam Provinciam Galliae; sed super totam categorematice, non obstante quod praecipua pars est super ipsum, a qua authoritatem habet, quae non potest tollere ab eo Regnum suum, sine rationabili et arduissima causa." Major refers more clearly to the power of the estates in his Historia majoris Britanniae et Scotiae of 1521. See Allen, Political Thought, p. 337. For conciliar theory, see Brian Tierney, The Foundations of Conciliar Theory (Cambridge, Eng., 1955), who does not, however, deal with secular politics, and Wilks, Problem of Sovereignty, pp. 455-523. The importance of conciliar thought in the gradual institutionalization of political resistance is shown by Francis Oakley, The Political Thought of Pierre d'Ailly (New Haven, 1964), pp. 114-129, 155-162. He also points out the influence of conciliar thought on John Ponet, Buchanan, Beza and the Vindiciae, pp. 224-230.

mentioned and rarely carried out.[23] The Calvinists' vision was apparently blurred by their tendency to see the action and authority of estates in historical instances of deposition by powerful nobles and inferior officials such as the German electors or the ephors of Sparta.[24]

This close association of nobles, inferior officials and estates colored the Calvinists' view of history, and had significant consequences for their political thought. In the first place, claims for the power of the estates were no doubt enhanced by assimilating some of the independence of the feudal nobility. On the other hand, the nobles themselves gained the honor and responsibility of

[23] Lewis, Political Ideas, pp. 272-73. J. Russell Major, Estates General, p. 7, argues that "just as a decline of royal authority after 1300 was accompanied by a decline of the Estates General, so did the revival of royal authority around 1450 bring about a revival of the Estates General. To understand this relationship between the king and the estates it is necessary to remember that between the middle of the fifteenth and last quarter of the sixteenth century the national assemblies were generally considered to have no power independent of the king. Indeed, they served to increase his power by enabling him to extend his influence into fields of activity ordinarily denied to him."

[24] Beza, for example, in his De jure magistratuum (1574), ed. Klaus Sturm (Neukirchen-Vluyn, 1965), pp. 50, 60, cited both the electors and the ephors as examples of resistance by estates. Above all, François Hotman was responsible for this confusion of functions. See below, ch. 4, pp. 152-58.

"representing" the corporate people through association with the estates. The private resistance of the nobility and the struggles of individual towns against royal power could be interpreted, now that both the nobles and the towns were members of the estates, as resistance by the estates undertaken in the name of all the people. Thus the Vindiciae contra tyrannos could maintain that the resistance of one province or town could have the sanction of the entire community.[25] Third, by being associated with the estates, the tyrant-killing inferior officials of history appeared to have been acting in the name of the people, and thus they became the archetypes for the inferior magistrate of the sixteenth century. Such a magistrate, although not a member of the estates, and often merely an appointee of the king, could now act against his superior in the name of the community.

For the theory of resistance by inferior magistrates, this usurpation of popular authority by officials dependent on the king was of great importance. It meant that the bureaucratic structure of offices created by medieval kings to overcome feudalism was now being turned upon the kings themselves as it came to be regarded as the creation

[25] See below, ch. 5, n. 42.

of the community. Just as Calvinist writers rescued the estates from their ambiguous position as organs of both the king and the community by making them purely organs of popular authority, so they freed the king's magistrates from dependence on him. Medieval thinkers had not solved the problem of how to combine royal authority over the council, estates and other officials with the rather vague notion that these institutions also represented the community. Nicholas of Cusa had regarded the emperor's council, the diet and even the appointed officers as agents of both the emperor and the people, but failed, like the thinkers before him, to assert their independence from royal or imperial authority.[26] This assertion was finally made by some of the Calvinists, most notably by Beza and the author of the Vindiciae, who thought even appointed magistrates dependent on the people.

Appointive magistrates, of course, had long been independent of royal control to a limited extent. Medieval jurists had allowed judicial officials to "interpret" or even refuse to enforce the king's illicit commands.

[26] Lewis, Political Ideas, I, pp. 264-65, 271-75, discusses this ambiguity in the position of royal officials, the royal councils and the estates, and also the views of Nicholas of Cusa.

perhaps the most significant examples of this practice were the parlements of France which could refuse to register royal edicts, and which Seyssel had in mind when he envisioned la justice as one of three bridles on the power of kings.[27] In theory, at least, this was a more continuous, institutional check on the ruler than the irregular and informal resistance of the feudal nobility. It was based, however, upon the supremacy of law rather than upon the authority of the people and it required neither the approval nor the existence of the estates. Hence, Erasmus could propose "the authority of the council, the dignity of the magistrates, and the force of the laws" as restraints on the arbitrary will of kings without mentioning the community.[28] Judicial

[27] Charles H. McIlwain, The Growth of Political Thought in the West (New York, 1932), pp. 366-67; Lewis, Political Ideas, I, 271-72; Gierke, Political Theories, p. 186, n. 296, cites several juristic sources for the right of judges to interpret or oppose the king's unjust decrees. Seyssel, Monarchie, I, 10, ed. Poujol, pp. 117-18. Fortesque observed, De natura legis naturae (1461?), I, 16, that judges in England were bound never to heed the commands of the king which contradicted the law of the land. See also below, ch. 8, pp. 290-95.

[28] Margaret Mann Phillips, The "Adages" of Erasmus, A Study with Translations (Cambridge, Eng., 1964), p. 349. This comment on the authority of magistrates, a subject which Erasmus rarely mentioned, was made in Dulce bellum inexpertis, in the 1515 edition of the Adagia. In the Querela pacis (Munich, 1961, facs. repr. of ed. of Basel, 1517), p. 48, he urged "primates" and magistrates of all kinds to cooperate in the work of peace with the wisdom

restraints might still be based upon popular sanction, since law was commonly thought to emanate from the community, and judicial officials represented that law. But as long as the king was considered the "living law" and the source of all jurisdiction, it was difficult to prove the magistrates' unqualified dependence on the people and law, and their independence of the supreme magistrate.

The independence of appointive magistrates in Calvinist literature, then, insofar as it rested on the authority of the community, was due more to their association with the estates and with historical "defenders of the people" against tyrants than to the medieval tradition of magisterial review of royal rescripts. In making this association, however, the Calvinists were not being original, but were following an ancient practice of categorizing magistrates according to their function. One such category had included magistrates who limited and resisted royal power, and had traditionally included the ephors of Sparta. Since the ephorate was the single ancient institution most cited by later writers on resistance, their literary career well serves

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of kings and the piety of priests. This was hardly an appeal to armed resistance. Erasmus' influence, so great in other areas, was negligible (so far as I am aware) on the theory of inferior magistrates.

to illustrate the tradition of which the Calvinists were a part.[29]

The five ephors were elected annually to an office with power to convoke assemblies, to control foreign affairs, to oversee internal affairs, and to try, punish and depose the kings who mishandled their office.[30]

[29] While some historians have dismissed the use of historical examples, especially ancient ones, by sixteenth-century writers as a sort of intellectual jargon of the age, without great significance, it is undoubtedly more correct to assert that such precedents had, in some sense, a morally obligating force for men of the Renaissance. See Domenico Maffei, Gli inizi dell'umanesimo giuridico (Milan, 1964), pp. 118-23.

[30] Glenn R. Morrow, Plato's Cretan City. A Historical Interpretation of the Laws (Princeton, 1960), pp. 57-58. Among the Greek writers who mentioned the ephors were Herodotus, Persian Wars, I, 65, Loeb ed. (New York, 1921), I, 77, who believed Lycurgus to be their creator; Xenophon, Constitution of Sparta, VIII, 3-4, in Scripta Minora, Loeb ed. (New York, 1925), p. 163, who thought they were created by powerful citizens under Lycurgus; Plato, Laws, III, 692A, Loeb ed. (London, 1926), I, 219; and Aristotle, Politics, II, 9, 19-24, ed. E. Barker (New York, 1958), pp. 77-78. Plato regarded the ephors as not far removed from government by lot, being the most democratic of the checks on the Spartan king. Aristotle criticized the tendency for the ephorate to decline into democracy, but was not opposed to the office itself which, he admitted, helped to pacify the people. Sixteenth-century critics of this institution probably obtained their arguments from Aristotle (see below, ch. 6, n. 31).

Cicero, in a passage frequently cited in later centuries, compared them to the cosmoi of Crete, established to counterbalance royal power, and to the plebeian tribunes of Rome, who limited the power of the consuls.[31] At the alleged time of their creation by King Theopompus, the king's wife is said to have complained that his sons' power would be limited by these officials. The king's response, as recorded by Aristotle and Valerius Maximus, and repeated by numerous Renaissance writers, was that though their power might be more limited, it was also more durable.[32]

The ephors later made their way into medieval literature. Ptolemy of Lucca, for example, recorded Aristotle's comparisons of the ephors to the cosmoi of Crete and the Hundred and Four of Carthage, and compares

[31] De re publica, II, 33, Loeb ed. (London, 1928), p. 169.

[32] Valerius Maximus, Factorum et dictorum memorabilium libri novem, IV, ch. 1, De moderacione, ext. 8, Teubner ed. (Leipzig, 1865), p. 174. After quoting Theopompus' reply to his wife, Valerius adds, "optime quidem: ea enim demum tuta est potentia, quae viribus suis modum inponit. Igitur Theopompus regnum legitimis vinculis constringendo quo longius a licentia retraxit hoc ad benivolentiam civium propius admovit." Cf. Aristotle, Politics, V, 11, 2-3, ed. Barker, pp. 243-44, who also agreed with Theopompus' remark, in spite of his earlier criticisms. See also Plutarch, "Lycurgus," VII, in Lives, Loeb ed. (New York, 1914), I, 225.

all three to the Roman senate under the kings. Foreshadowing the Renaissance tendency to find parallels between contemporary and ancient magistrates, Ptolemy then argued that the government of the Greeks was similar in many ways to that of the medieval empire (regimen Graecorum multum concordare cum nostro).[33] Nicholas Oresme and Jean Gerson were also aware of this tradition, for both found opportunity to cite Theopompus' proverb in support of limited royal powers.[34] The ephors were mentioned again in 1436 by Juan Ximines Cerdan, a former justice of Aragon. In his Letra intimada he defended this office, with its great power over the king of Aragon, arguing that the justice had been created in the eighth century on the model of the Spartan ephors

[33] Aquinas, De regimine principum, IV, 18-19 (II, ch. 5 to end written by Ptolemy) in Opera omnia, XVI, 284-85. Comparisons between ancient and contemporary magistrates are found throughout Ptolemy's work, the connection often being drawn etymologically, as was often done in the Renaissance.

[34] Nicholas Oresme, Traictié de la première invention des monnoies, ed. M. L. Wolowski (Paris, 1864), p. CXXXVI. For Gerson, see P. S. Lewis, "Jean Juvenal des Ursins," p. 109, who discusses Gerson's Vivat rex.

described by Valerius Maximus.[35] This account of the justice's creation was legendary, but Cerdan's argument does represent another attempt to garb a contemporary inferior authority with robes of ancient dignity and authority, a practice which became common in Renaissance Europe.

Calvin's reference to the ephors as "popular magistrates," comparable to the three estates in the sixteenth century, reflects the traditional view of the ephors as agents of the authority of the community better than did Melanchthon's comparison of them to what he considered the "aristocratic" seven electors.[36] It also illustrates

[35] Fori et observantiae regni Aragonum (Ces'Augusta, 1542), fol. xlix^{v}, (the same in all pre-1551 editions). For a full discussion of the powers of the Justice of Aragon, both real and fictitious (the latter as reflected by the supposed "oath" of Aragon, which Hotman procured from a Spaniard in Geneva and quoted in his Franco-Gallia, and which subsequently became a standard illustration of the powers of inferior magistrates in Huguenot literature) see Ralph E. Giesey's forthcoming book, If Not, Not: The Oath of the Aragonese and the False Fueros of Sobrarbe. Hotman, Franco-Gallia (Frankfurt, 1586), pp. 149, 153-54, compared the ephors to the Justice and, like Cicero, to the plebeian tribunes of Rome, officials who were also highly popular with limited monarchists of the Renaissance.

[36] Both Calvin and Melanchthon, however, were closer to traditional interpretations than was Zwingli, who, in his sermon, Der Hirt (1524), CR, XC, 36, compared the ephors and the Roman tribunes to German gild-masters, and compared all three to the "shepherds" or pastors of the church who kept watch against evil.

the confusion of historical magistrates and estates so common in Huguenot literature. In Calvin's view, all such popular magistrates as the ephors, the tribunes of Rome or the demarchs of Athens were obligated to resist tyranny. Similar power, he thought, was "perhaps" held by the estates of his day, and they, too, were to act as divinely-ordained guardians of popular liberty.[37]

This ephor-passage in the 1536 edition of Institutes seems, however, to limit resistance in the sixteenth century to the estates, indicating, perhaps, that Calvin distinguished between the estates, who could resist, and magistrates, who could not. In other passages, however, Calvin attributed the right of resistance to officials not members of the estates. In a sermon delivered

[37] Institutes, IV, 20, 31 (ed. of 1536), CR, XXIX, 248. "Nam si qui nunc sint populares magistratus, ad moderandam regum libidinem constituti, quales olim erant qui lacedaemoniis regibus oppositi erant Ephori, aut romanis consulibus tribuni plebis, aut Atheniensium senatui Demarchi, et qua etiam forte potestate, ut nunc res habent, funguntur in singulis regnis tres ordines, cum primarios conventus peragunt, adeo illos ferocienti regum licentiae, pro officio intercedere non veto, ut si regibus impotenter grassantibus et humili plebeculae insultantibus conniveant, eorum dissimulationem nefaria perfidia non carere affirmem, qua populi libertatem, cuius se Dei ordinatione tutores positos norunt, fraudulenter produnt." This wording remained unchanged in all subsequent editions.

November 4, 1545, he acknowledged the right of the faithful to use the sword when sanctioned by public ordinance, such as when God provided a Christian prince under whom they could resist. This sermon was given shortly after Calvin had heard of coming war against the Lutherans in Germany, and his reference to a Christian prince no doubt reflects the influence of Lutheran ideas of resistance.[38] In later years, when war became a reality, Calvin again appealed to princes and magistrates, as well as to the estates. In 1560 he asked the Lutheran princes for their good offices in supporting the Huguenots. His greatest desire was that Anthony of Navarre, as the oldest prince of the blood, assert his rights during the king's minority. Calvin's correspondence at this time urged the rapid arming of Huguenot forces to fight under those Christian lords to whom should fall the government during the minority. His attitude toward the Estates-General at the time was negative, for he

[38] Sermon on Psalm 115, CR, LX, 462, ". . . combien que les fideles puissent user de glaive, quand cela se fera par ordonnance publique, comme quand Dieu aura donné quelque prince Christien, nous aurons les munitions, les moyens, le prudence . . . ."

feared it would be dominated by the Guise faction.[39] Although he had misgivings about the conspiracy of Amboise, due to the dishonor it would bring upon the Gospel, he admitted that it was lawful for the princes of the blood and the parlements of France to defend their legal rights, and that the subjects might join their armed resistance.[40] In 1563, Calvin expressly endorsed the "magistrates and estates" to whom was committed the care of the republic and the duty of restraining the prince, using force if necessary.[41] He

[39] For Calvin's attitudes concerning politics and preparations for war after the death of Henry II, as revealed by his correspondence, see Bohatec, Calvin und das Recht, pp. 151-161, 172-203.

[40] Letter of Calvin to Coligny (April, 1561), in Jules Bonnet, Letters of John Calvin (Philadelphia, 1858), II, 382, cited in Allen, Political Thought, p. 59.

[41] Sermon on I Samuel, CR, LVII, 552, ". . . attamen fateor quaedam adversus hanc tyrannidem licita sunt remedia: veluti quum constituti alii sunt magistratus et ordines quibus reipublicae cura est commissa qui principem in officia continere poterunt atque etiam si quid tentaret eum coercere." Calvin's use of the word "coercere" might be cited as a reply to Hősz, "Zur Genesis," 203-4, n. 13, who argues that Calvin's use of the word "intercedere" in the Institutes, IV, 20, 31, is to be interpreted strictly to mean peaceful opposition, not armed resistance, as is reflected by the French translation of this passage, "opposer et resister." "Coercere" was used by the Vindiciae to refer to armed resistance.

mentioned no specific magistrates or methods of action, but seems to have considered several kinds of authorities to be sharers, as Hans Baron suggests, in the sovereign power of God, and thus to have a mutual duty to censor the actions of the king.[42]

Resistance by inferior magistrates in Calvin's thought was, according to Baron, an integral part of his total political outlook, in which monarchy was limited by aristocracy. Contrary to the views of Wolzendorff and Bohatec, who regard Calvin's grudging acceptance of resistance, as expressed in his ephor passage and elsewhere, as a mere acknowledgment of what existing human laws and institutions approved, not corresponding with his political ideals, Baron argues that Calvin's views were essentially consistent, that he regarded all inferior authorities as the ideal instruments of aristocratic control over monarchy.[43] In spite of Calvin's implication

[42] Calvins Staatsanschauung und das Konfessionelle Zeitalter (Munich, 1924), p. 93.

[43] Baron, Calvins Staatsanschauung, pp. 75, 89-93. Kurt Wolzendorff, Staatsrecht und Naturrecht, pp. 95-96. Josef Bohatec, Calvin und das Recht, pp. 133-34, 204-5, n. 284. The argument of Wolzendorff and Bohatec rests on the belief that Calvin simply accepted the norm of the "dualistische Ständestaat" in evaluating the power of the estates, thus resting his position on positive law. To explain Calvin's statements allowing resistance by magistrates apart from the estates, Bohatec asserts (p. 153) that Calvin merely accepted the "genossenschaftliches Widerstandsrecht" of positive law (for

in his ephor passage that resistance was possible only in states where assemblies of estates already existed, and his failure to mention in that passage the resistance of inferior magistrates, it is evident that he favored limited monarchy in principle, and that he believed that many lesser officials, not simply members of estates, possessed the power to resist.

In part, this power of magistrates to resist their superiors derived from Calvin's belief (similar to that of the Lutherans) that all magistrates were equally ministers of God, differing only in function and dignity.[44] All authorities were qualitatively equal, in that all were limited by the purpose for which God created them.

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which see E. Lousse, La société d'Ancien Régime, pp. 273-75, 339-42.) Marc-Edouard Chenevière, La pensée politique de Calvin (Geneva, 1937), pp. 336-37, rejects the views of Bohatec in favor of those of Baron.

[44] In his Commentary on I Peter 2:13-14, CR, LXXXIII, 244, Calvin argued that, although the emperor held the summum imperium and might seem to be beyond comparison with other magistrates, Peter here referred to an eminence held by all who exercised public power and who must be obeyed as much as kings. Calvin referred here to Romans 13:1, interpreting it, as the Lutherans did, to refer to all authorities who were ministers of God, not only to kings. In the Institutes, IV, 20, 7, CR, XXX, 1097, he said, "Praeterea inter ipsos magistratus, tametsi variae sunt formae, nullum tamen discrimen hac in parte est, quin pro Dei ordinibus suspiciendae a nobis omnes sint."

Authorities of all magnitudes, from fathers to kings, were to secure the obedience of their subjects as a step towards obedience to God.[45] Further, the power of all authorities was limited by the respect which was due to the callings (vocatio) of their subjects. The public power of kings and magistrates differed not at all in this respect from that of husbands over wives and masters over journeymen.[46] The normal obedience of subjects to their superiors was due to the dignity of the office as created by God, not to the person who might use that dignity to cloak his folly or cruelty.

[45] Institutes, II, 8, 38, CR, XXX, 294.

[46] This organic view of society in Calvin has been noted by Josef Bohatec, Calvins Lehre von Staat und Kirche (Breslau, 1937), pp. 636-37. Among his sources are Calvin's Sermon on Job 31 (1554?), CR, LXII, 657, ". . . if faut bien qu'un chacun regarde son estat et sa vocation, et que nous apprenions de nous renger à telle modestie, qu'un maistre n'opprime point son serviteur, que le serviteur ne se rebecque point contre son maistre: mais qu'un chacun s'acquite de son devoir, tellement que Dieu soit servi en degré souverain," and p. 660; De fugiendis impiorum sacris, CR, XXXIII, 275, and the Sermon on I Timothy 3:3-5, CR, LXXXI, 279, where he compares the kingdom to the family and the king to the father. The limits upon the king, then, are rooted in the very nature of things, and are not simply the result of a contract between king and sovereign people as suggested by Emile Doumergue, La pensée ecclesiastique et la pensée politique de Calvin (Lausanne, 1917), pp. 477-85, 507-9.

Calvin clearly allowed disobedience when the superior exceeded his limits and, in effect, abrogated his own power,[47] but, since disobedience need not entail resistance, this aspect of Calvin's view of society and politics did not by itself sanction resistance.

When combined with Calvin's statements on the ideal form of government, however, his notion of an organic society governed by an intrinsically limited system of authority clearly becomes the basis for his notion of resistance by inferior authorities. In the Institutes, IV, 20, 8, Calvin clearly expressed his preference for either pure aristocracy or aristocracy mixed with a "popular" element. He had favorable opinions of monarchy as well, but his writings suggest that he became increasingly dissatisfied with monarchical government, though his ambiguity has created much dissension among

[47] Institutes, IV, 20, 22, CR, XXX, 1110; IV, 20, 32, CR, XXX, 1117. Both of these references are to material Calvin added in the 1559 edition, indicating that the distinction between the office and its holder, and the implications of that distinction, came to him, or were serviceable to him, only at this late date on the eve of the wars. Charles Mercier, "L'esprit de Calvin et la democratie," Revue d'histoire ecclesiastique, XXX (1934), p. 42, is wrong in stating that Calvin did not make this distinction.

his interpreters.[48] In the passage cited here, he expressed no preference among the forms of government in the 1536 edition, but the 1543 edition reflects his preference for aristocracy, to be followed in 1559 by a justification for this preference stating that kings very rarely ruled as they should and that, owing to man's vices and imperfections, it is "safer and more

[48] Cf. Mercier, "L'esprit de Calvin," pp. 44-47; Gilbert Beyerhaus, "Studien zur Staatsanschauung Calvins," Neue Studien zur Geschichte der Theologie und Kirche, VII (1910), 108-29, who analyzes Calvin's anti-monarchical passages. Chenevière, La pensée politique, p. 225, argues that, although Calvin's statements against monarchy became more severe throughout his life, they were only against the abuses of monarchy, not the institution itself. See also p. 190. McNeill, "The Democratic Element," pp. 160-62, argues against Chenevière, maintaining that these statements were truly opposed to monarchy, and says that Calvin favored aristocracy, perhaps tempered by democracy. Josef Bohatec, Bude und Calvin (Graz, 1950), pp. 457-64, esp. p. 464, where he argues that Calvin combined the ancient "pneumatic-charismatic" idea of rulership with his religious emphasis, resulting in a "pneumatocratic" rulership in his church and the state; generally he emphasizes the organic element in Calvin's thought. Bohatec, Calvins Lehre, pp. 124-64, presents a more traditional analysis of Calvin's ideal of mixed government, opposing both those, like Doumergue, who find in Calvin pure democracy and others like Rudolph Treumann, Die Monarchomachen (Leipzig, 1895), p. 35 and others, who think Calvin favored pure aristocracy.

tolerable" for several to hold the power of governing so that they might mutually assist, instruct, admonish and censor each other.[49]

Whatever Calvin's final judgment on the ideal form of government may have been, it is clear that it would have required at least that the power of government be divided and that the magistrates who shared it act as "co-adjutors" to prevent the liberty of which they were guardians from being violated. This concept of inferior magistrates sharing governmental power and a responsibility to act as censors over each other and over the king was to become crucial in the thought of several Calvinist writers, especially the author of the

[49] CR, XXIX, 1105-6 (for the additions of 1543); XXX, 1098-99 (for the additions of 1559). After noting the tendency for any form of government to become corrupt, he added, in 1543, "Equidem si in se considerentur tres illae (monarchy, aristocracy, democracy), quas ponunt philosophi, regiminis formae, minime negaverim vel aristocratiam, vel temperatum ex ipsa et politia statum, aliis omnibus longe excellere." To this he added, in 1559, "Non id quidem per se, sed quia rarissime contingit reges ita sibi moderari, ut nunquam a iusto et recto discrepet eorum voluntas; deinde tanto acumine et prudentia instructos esse, ut unusquisque videat quantum satis est. Facit ergo hominum vitium vel defectus, ut tutius sit ac magis tolerabile plures tenere gubernacula, ut alii aliis mutuo sint adiutores, doceant ac moneant alii alios, ac si quis plus aequo se efferat, plures sint ad cohibendam eius libidinem censores ac magistri."

Vindiciae contra tyrannos. Calvin also bequeathed to his followers his belief that the ephor-like officials who restrained royal power might be either the estates or ordinary inferior magistrates. An organic view of society in which all levels of authority were qualitatively alike, and in which resistance to the abuse of authority was an inherent part of the system, when carried out by the proper authorities,[50] was also his contribution to later writers, although this conception was shared by Lutherans.

In his opinions concerning the source of authority, Calvin seems to have been more in sympathy with the Lutherans than with the ancient tradition of the authority of the community which influenced some of his followers. Although he associated the ephors with the estates and must have known that the ephors and tribunes had represented the democratic element in ancient Greece and Rome, he usually portrayed inferior magistrates as

[50] Calvin, of course, limited resistance to magistrates, forbidding such activity by the masses. See, for example, Institutes, IV, 20, 23, CR, XXX, 1111, and his Sermon on Melchizedek (1560), CR, LI, 643-44.

having received their authority from God.[51] Most recent commentators have agreed that Calvin was not a proponent of popular sovereignty and that he did not think of inferior magistrates as representatives of the community. He emphasized the direct sovereignty of God over all men, a sovereignty shared with no one, allowing God personally to ordain all political authorities, even "popular magistrates."[52] Although Calvin had followed the

[51] McNeill, "The Democratic Element," pp. 160, 163-66, 168-69, emphasizes the democratic implications of Calvin's reference to the ephors and tribunes. Doumergue, La pensée . . . politique, pp. 502-3, follows the opinion of A. Kuyper, Het Calvinisme, Oorspong en Waarborg onzer constitutionelle Vrijheden (Amsterdam, 1874), p. 48, that Calvin's inferior magistrates are "social authorities" who represent social groups vis à vis the authority of the government, and conciliate that authority with the liberty of the society. This view must be dismissed as an attempt to read into Calvin some ideas of late nineteenth-century liberalism. So firmly did Calvin consider all authority to come directly from God that he interpreted I Peter 2:13-14, which contains the command to obey kings and the governors sent by them, to refer to governors sent by God (quod mandato Dei praesunt et ab eo mittuntur). See his Commentary on I Peter, CR, LXXXIII, 243-45 and above, n. 43. For a conflicting statement, however, recognizing that magistrates' authority derives from the king, whose "hands" they are, see Institutes, IV, 20, 23, CR, XXX, 1111.

[52] Mercier, "L'esprit de Calvin," p. 44, argues that Calvin considered the franchise to be only a privilege, not a right, and that popular election designated the person, but did not delegate power. "Ces magistrats, bien qu'inférieurs, possèdent, en effet, une autorité propre; s'ils ne sont pas les délégués du peuple, ils ne sont pas non plus les simples représentants du prince, mais ils tiennent leurs pouvoirs directement de Dieu." Beyerhaus, "Studien zur Staatsanschauung Calvins,"

medieval tradition of comparing institutions of his own day with those of the past, and had helped to popularize the figure of the ephors in sixteenth-century thought, he had failed to imbibe from that tradition the notion that the ephors and other ancient magistrates had usually represented the authority of the community in its struggles against tyrannical government. For Calvin, as for the Lutherans, resistance was possible because the grant of authority by God to all political officials diminished the distinctions between royal and subordinate authority. It remained for later Calvinist writers to breathe the spirit of popular sovereignty into Calvin's formal governmental structure, finding the common denominator for all magistrates to be not only the mandate of God but also the mandate of the community.

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pp. 86-97, 145; Chenevière, La pensée politique, pp. 90, 324, 336-37; Baron, Calvins Staatsanschauung, pp. 91-92; Bohatec, Calvins Lehre, pp. 135 and 206, where he argues that for Calvin the Estates-General did not represent the people but were only magistratus populares who protected their rights. The French translation of the Institutes of 1541, in fact, rendered "magistratus constituez pour la deffense du peuple." See Hösz, "Widerstandslehre Bezas," pp. 203-4, n. 13.

CHAPTER IV

INFERIOR MAGISTRATES IN CALVINIST LITERATURE TO 1572

Dissimilarity between the political thought of the Huguenots and that of the Lutherans has led most observers to discount the possibility of significant Lutheran influence on Calvinist theories of resistance.[1] The ideas of Beza, Barnaud and the Vindiciae can seemingly be explained with reference to ancient and medieval influence alone. Above all, the emphasis on community authority in Huguenot thinking came from a tradition in which the Lutherans did not share. The

[1] See, for example, K. B. Hundeshagen, "Über den Einfluss des Calvinismus auf die Ideen von Staat und Staatsbürgerlicher Freiheit," Sammlung von Schriften über Bern'sche Kirchengeschichte, XVI (1842), 12; Max Lossen, "Die Vindiciae Contra Tyrannos," Sitzungberichte der k. bayer. Akademie der Wissenschaften, philol. und histor. Klasse, I (1887), 243-44; Harold J. Laski, Introduction to A Defence of Liberty Against Tyrants (London, 1924), pp. 10-12. Other historians allow that the practical example of Lutheran resistance, if not Lutheran thought, may have influenced Calvinist thinking. See Elkan, "Die Publizistik der Bartholomäusnacht," pp. 4-5, 11, and deLagarde, Recherches, pp. 253-54.

scarcity of references to Lutheran sources in Calvinist political writings is not, therefore, surprising. On the other hand, more than coincidence seems to be involved in the appearance, in the space of four decades, of two remarkably similar theories of resistance among two groups of Protestants. Before analyzing Calvinist political literature of the 1550's and 1560's, therefore, it is necessary to discuss briefly the possibility of Lutheran resistance theory and ideas concerning inferior authorities.

Calvin himself, it must be remembered, participated in the tradition of community authority only nominally, and many Calvinist writings before 1572 revealed little familiarity with it. Moreover, Calvin held views remarkably similar to those of the Lutherans, and, as some recent historians have begun to suspect, Lutheran influence on several writings of this period is highly probable.[2] Particularly suggestive are the personal

[2] Several recent historians pointed out possible German influences on Calvinist thought. To Ludwig Cardauns, Die Lehre vom Widerstandsrecht (1903) must go the honor of being the first to insist upon this influence. His fault, however, is that he saw German influence in many places where convincing evidence is lacking. E. Fahlbusch, "Monarchomachen," Religion in Geschichte und Gegenwart, 3 Aufl. (1960), IV, 1092, represents the recent state of the problem by suggesting that Beza's De jure magistratuum evidences "the influence of the still hardly investigated Lutheran Monarchomachs."

contacts among the reformers who made the Rhine River a channel of communication between England and Switzerland, France and Germany. The need and opportunities for discussion of common political problems must have been ample as exiles, pastors and teachers made contact throughout the cities and territories of this region, some of which territories were actively concerned with resisting higher authorities.[3] Calvinists undoubtedly discussed politics with Lutherans. Calvin himself, it has been suggested, may have been influenced by his stay (1538-1541) in Strasbourg (the city praised by Erasmus for its "ideal" mixed constitution), where he may have made contact with republican ideals and Bucer's ideas on

[3] Geneva's struggle against the Dukes of Savoy may be of special significance, because of that city's great influence on Huguenot politics. Various attributes of sovereignty were claimed by the Genevan magistrates, as when in 1568 the Council of 200 assumed the right of pardon for criminal offense, or when the magistrates used the title "Magnifiques et très honorés Seigneurs," which contemporaries thought to be "titres de souverains." See Henri Fazy, Les constitutions de la republique de Genève (Geneva, 1890), pp. 75-76, et passim, and "La Saint-Barthélémy et Genève," Mémoires de l'Institut National Genevois, XIV, 1879, pp. 55-58, and Alfred Cartier, "Les Idées Politiques de Theodore de Bèze," Bulletin de la Société d'Histoire et d'Archeologie de Genève, II, 1900, pp. 200-1. There is an interesting possibility that such aspirations to sovereignty may have influenced the theory of inferior magistrates. The ways in which the magistrates of Geneva, as well as those of many other towns and territories, manifested their aspirations for higher power or independence need to be carefully studied with this end in view.

inferior magistrates.[4] In addition, there were political connections, typified by Hubert Languet, the emissary of Saxony, who was acquainted with Lutherans and Calvinists on both sides of the Rhine.[5]

The political thought of Pierre Viret, the Reformed theologian of Lausanne and Lyon, also reflects German influence.[6] Viret viewed all political office as depending directly on God rather than on a prince or an electorate, so that political resistance was possible if led by a Christian magistrate, and if they who resisted had some degree of self-government, as those who lived "like lords unto themselves except for some small

[4] H. Strohl, "Le droit à la résistance d'après les conceptions protestantes," Revue d'histoire et de philosophie religieuses, X (1930), 132, n. 3. Baron, "Calvinist Republicanism," 31, 35-40, emphasizes that in Calvin and his followers were fused Protestantism and the "civic world of the city-state," and notes especially the influence of Strasbourg and Bucer on Calvin. The influence of Bucer is suggested also by McNeill, "The Democratic Element in Calvin's Thought," p. 164. The evidence for this, however, is not conclusive, and Chenevière, La pensée politique de Calvin, pp. 222-25, casts doubt upon the whole idea, save that the ideal of the mixture of aristocracy and democracy may have been shown to him by Strasbourg's government, although no less by that of Geneva. For the suspected influence of Melanchthon on Calvin, see above, ch. 3, n. 3.

[5] Oskar Scholz,"Hubert Languet als kursächsischer Berichterstatter und Gesandter in Frankreich während der Jahre 1560-1572," Hallesche Abhandlungen zur neueren Geschichte, II (1875), 8-9, 18.

[6] See Robert Linder, The Political Ideas of Pierre Viret (Geneva, 1964), pp. 138-42.

recognition they owed to princes." This provision, it will be recalled, is exactly that of Bucer in his Dialogi of 1535 (see above, pp. 56-57) except that the latter required the magistrate to have merum imperium in his territory.[7] Linder suggests that Viret may in turn have influenced the Bekenntnis of Magdeburg, Beza, Hotman, Goodman, Knox and Ponet.[8] His influence on Beza and Hotman is very probable, for they were all at Lausanne together for several years after 1548, and the atmosphere of discussion along the Rhine may well have spread their ideas to the exiles from Britain. The Bekenntnis, however, can be quite fully explained as an outgrowth of preceding Lutheran literature, and its importance lies not in reflecting Calvinistic ideas of

[7] Pierre Viret, Remonstrances aux fideles (Geneva, 1547), pp. 236, 331-38; Traittez divers pour l'instruction des fideles (Geneva, 1559), pt. 5, p. 288; cited by Linder, Pierre Viret, p. 137, n. 48, 50. On p. 139, n. 54, Linder suggests that Bucer may have been a connecting link between Viret and the Schmalkaldic resistance to Charles V. Viret's idea of resistance by self-governing powers may, of course, have been based upon the Swiss constitution. Calvin (whose ephor passage in the Institutes, IV, 31, 22, appeared in 1536) may also influenced him, but not in this particular argument.

[8] Linder, Pierre Viret, pp. 139-41.

resistance, but in its own impact on the Calvinists.[9]

The most apparent connection of the Bekenntnis with Huguenot literature was through the title page of Beza's anonymously published Du droit des magistrats of 1574, which affirmed that Beza's book had been "published by those of Magdeburg, 1550." Bossuet's belief that Du droit was published during the siege of Magdeburg long held currency,[10] although some nineteenth-century historians regarded this reference to Magdeburg as an attempt to disguise the real author, a Frenchman who probably knew of the Magdeburg tract only indirectly, perhaps through Sleidanus' account of it in his Commentarium, book 22.[11] At the end of the nineteenth

[9] Robert Kingdon, "The Political Resistance of the Calvinists in France and the Low Countries," Church History, XXVII (1958), 226-30, emphasizes that the example of Magdeburg and the Bekenntnis formed a thread running through the various Calvinist theories of resistance by inferior magistrates.

[10] See G. de Polenz, "Le célèbre traité De jure magistratuum, etc, est-il d'origine allemand, ou francaise?" Bulletin de la Société du Protestantisme Français, VIII (1859), p. 379, IX (1860), pp. 278-80. Since Beza's tract was first written in Latin, we shall hereafter refer to it by its Latin title.

[11] See, for example, Lossen, "Die Vindiciae Contra Tyrannos," pp. 243-44. Johannes Sleidanus, Commentariorum de statu religionis et Reipublicae, Carolo V. Caesare, Libri XXVI (Frankfurt, 1610, 1st pub. 1555), pp. 625-26.

century, Beza's authorship was conclusively established, and a more accurate view of the influence of Magdeburg could be formed.[12] Cardauns and, more recently, Kingdon, have shown that in 1554 Beza cited the resistance at Magdeburg in his De haereticis as an example of how Christian inferior magistrates ought to protect religion in their territories against the external violence of the faithless and heretical.[13] Whether or not Beza had

[12] Alfred Cartier, "Les idées politiques de Théodore de Bèze," Bulletin de la Société d'Histoire et d'Archeologie de Genève (1900), II (1898-1904), 190-93, proved Beza's authorship, although this was suggested earlier by MacCrie, Life of Andrew Melville (Edinburgh, 1824), I, 427. For a fuller history of the controversy over the tract's authorship, see Klaus Sturm, introduction to his edition of De jure magistratuum, pp. 12-15.

[13] Beza, De haereticis a civili Magistratu puniendis Libellus (Geneva, 1554), p. 133. Cardauns, Widerstandsrecht, p. 49. Cardauns was not, however, aware that Beza wrote De jure, and took the reference to "those of Magdeburg" only as a witness of the general influence of German ideas on France. Kingdon, "First Expression," pp. 92-93. See also his Geneva and the Coming of the Wars of Religion in France, 1555-1563 (Geneva, 1956), pp. 71-72. Beza's "literary dependence" on Magdeburg is still doubted, however, by Sturm, introduction to De jure, p. 20. Vittorio de Caprariis, Propaganda e pensiero politico in Francia durante le guerre de religione, I (Naples, 1959), 16, n. 42, argues against Kingdon that this was not a "first theorizing on the right of resistance," since the book was written "only" to combat the ideas of Castellio, and any ideas it may have had about resistance "faithfully reflected the position of Calvin." Aside from the fact that the book's major purpose has no necessary bearing on the meaning of this passage, it is well to remember that Calvin never spoke of "inferior magistrates" as such, and that Beza could not have borrowed this term from him. A major

seen the Bekenntnis by 1554, his reference in 1573 to its correct date of publication indicates more than second-hand familiarity. In any case, Beza's emphasis in 1554 on the duty of inferior magistrates to protect religion in their own territories against all emenies (which constituted only a part of the argument in De jure) faithfully represented the central teaching of the Bekenntnis and of many other Lutheran writings. That the Bekenntnis was read in other countries is also certain, for we know that Knox possessed a copy and that the work was later in demand among Dutch Protestants.[14]

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defect of Caprariis' book is its complete lack of concern for the problem of inferior magistrates.

[14] See Kingdon, "The Political Resistance of the Calvinists," pp. 226-30, and Works of John Knox, ed. David Laing (Edinburgh, 1895), II, 453-54. Dutch theories of resistance, which have hitherto been regarded solely as Calvinist in origin and substance, (See H. D. Foster, "The Political Theories of Calvinists before the Puritan Exodus to America," American Historical Review, XXI (1916), 496-97), probably owe much more to Lutheran ideas of resistance than has generally been assumed. Marnix de St. Aldegonde, for instance, in a letter of March 27, 1580, to William of Orange (in G. Groen van Prinsterer, Archives ou correspondance inédité de la maison d'Orange-Nassau, 1st series, VI [Leiden, 1839], 280), dealt with the problem of why the early Christians had not resisted the Roman emperors, a problem which had burdened the Lutherans much more than it had the Huguenots. His answer also reflects a knowledge of Lutheran sources. The reason they did not resist, he said, was that "ils estoyent tous personnes particulières, n'ayans puissance du glaive, ni authorité aux Estats ou membres de l'Empire, et par conséquent n'ayans nulle vocation de Dieu . . ." Cf. a letter of Villiers to William of Orange of March 17, 1580 (in

The ideas of resistance developing in the middle decades of the century almost certainly absorbed much of the ideology of Lutheran resistance as well as the inspiration of its example.

Calvinist political literature of the two decades after 1550 accepted without question the right of assemblies of estates to resist kings. In the face of unreliable representative institutions, however, justification had to be found to allow inferior authorities not members of the estates to lead resistance. Three basic solutions were offered, each reflecting a different view of magisterial power. The first was that of the Lutherans, allowing resistance by princes and cities possessing authority derived directly from God, with little account taken of the authority of the community. A second solution was to augment the medieval practice of inferior magistrates reviewing royal edicts by emphasizing the right of ordinary judges to bring the king to justice. While this argument might be based only on the authority of law over kings, it could also support the idea that judges were agents of the community which had

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Groen van Prinsterer, VII, 271) which expresses the writer's familiarity with the story of Luther and the jurists who changed his attitude towards resistance, a story he had heard in his youth and had read in Sleidan's history.

created the law. The medieval tradition of community authority formed the basis for the third solution. Nobles and estates, and other officials associated with them, could resist a tyrant in the name of the whole community. This scheme was sometimes presented with the variant that if the proper officials failed to act, the community, or individuals within it, might exercise its authority by rebellion and tyrannicide. Calvinist writers gravitated, in varying degrees, to each of these positions or to various combinations of them, but not, until after 1572, achieving anything like a comprehensive political theory. Common to all of them, however, was a tendency to elevate the status of inferior magistrates and to overlook what distinguished them from kings.[15]

Three exiles from Britain, Knox, Goodman, and Ponet, a Scottish Calvinist, Buchanan, and two continental Calvinist theologians, Peter Martyr and Zacharias Ursinus, illustrate these different approaches to the problem of inferior magistrates and resistance. While

[15] An Italian jurist of the early sixteenth century, Marius Salamonius, had clearly expounded the essential equality of magistrates and kings on the basis of the popular origin of their authority. See De principatu libri septem, ed. M. d'Addio (Milan, 1955), (first pub. Rome, 1544, written between 1511 and 1513), pp. 19-20. There is no direct evidence that he influenced Huguenot writers, but his book was republished in Paris, 1578 and in Cologne, 1581.

Knox thought in an essentially Lutheran manner, perhaps due either to his reading of the Bekenntnis or of Calvin, Goodman, although not an advocate of popular sovereignty, allowed anyone to take up the sword if the authorities failed to act, and Ponet, believing that the estates and magistrates received their authority from the people, hoped that the public officials would play the part of ephors, but also allowed the people to act in emergencies. The power of judges to try the king was briefly suggested by Knox, emphasized by Ponet, and elaborated by Buchanan, who made clear the popular source of law and the authority of judges. Martyr and Ursinus likewise upheld the power of ordinary jurisdiction, Ursinus emphasizing the authority of the community as well.

Knox, while travelling throughout Switzerland in 1554, discussed political issues with various pastors and learned men.[16] He left no record of the questions that occupied their attention, but Henry Bullinger of Zurich, in March 1554, sent a short treatise to Calvin

[16] "A Comfortable Epistle to his Afflicted Brethren in England," in Works, III, 235-36, expressed Knox's belief, after his many discussions, that civil law was not always just and that what men considered treason was not always sinful. At this time he was just beginning to accept the legitimacy of resistance. Knox may have visited Viret at Lausanne. See Linder, Pierre Viret, p. 140.

in which he answered four questions posed by Knox. Two of these concerned succession to a throne, the other two involved resistance to idolatrous magistrates by authorities with military power and obedience to pious authorities rather than to an idolatrous king.[17]

Knox never delineated clearly how or by whom resistance should be carried out. His First Blast of the Trumpet Against the Monstrous Regiment of Women, written late in 1557, discussed resistance only briefly, at the end charging the nobility and estates to repress Mary Stuart's "inordinate pride and tyrannie to the uttermost of their power." He then confused the issue by saying that it was the duty "as well of the Estates as of the People" to remove "that monstre in nature" and to pronounce the death penalty on her defenders.[18] Whether "the people" participated in, or only sanctioned, these undertakings is unclear. He proposed to treat these matters further in his Second Blast, an abortive work

[17] "Certain Questions Concerning Obedience to Lawful Magistrates, with Answers by Bullinger," Works, III, 221-26. Bullinger answered the first question in favor of Edward VI, but admitted truth on both sides of the second and third questions, and refused to answer the fourth at all.

[18] Works, IV, 415-16. For a useful, but unnecessarily critical discussion of Knox's political thought in general, see Allen, Political Thought, pp. 106-16.

which finally took the form of four propositions annexed to his Appellation, published in 1558. The fourth of these affirmed that the same men who elected and appointed one who became a tyrant could justly depose and punish him.[19] This probably reflects the influence of Zwingli, ruling out direct popular action except where the rulers were elected, as Zwingli had put it, by the gemeine Hand.

The problem of resistance was treated further in his Appellation and the Letter to the Commonalty, published together in 1558. The Appellation was Knox's appeal to the estates and nobility of Scotland against the condemnation of the Scottish bishops, which led him to argue for the duties of temporal magistrates in religious affairs. He referred specifically to "rulers, magistrates, and judges," implying that royal officials, even ordinary judges, had the power to resist. Promoting "true religion" and defending their "brethren and subjectes" were duties owed to God. They must also counsel and admonish the king if he acted against God's Word and, evidently, depose or kill him as an idolator if he proved recalcitrant. Failure to do so made them

[19] Works, IV, 540.

traitors no less than if they refused him his just support when attacked by enemies.[20]

Knox continued, however, to stress the role of the people in maintaining religion and resisting idolatry. They and the magistrates, he said, could "punish to the death" their opponents, and he maintained that the "Nobilitie, Judges, Rulers, and People of England" could have resisted and even executed Queen Mary. He qualified these assertions, however, by stipulating that each man must act according to his "vocation" or his "possibilitie." It was "the duetie of every man in his voaction, but chefely of the Nobilitie, which is joyned with theyre Kinges, to bridel and represse theyr folie and blind rage." More was expected of the nobles whom God had "armed with the sword of justice," than of ordinary men.[21] Knox's Letter to the Commonalty, in fact, allowed common men to resist idolatrous rulers only by confessing the truth and by supporting the preaching of true religion. In addition, the "commonalty"

[20] "The Appellation from the Sentence Pronounced by the Bishops and Clergy, Addressed to the Nobility and Estates of Scotland," in Works, IV, 494-95.

[21] Ibid., pp. 497-504, 507. For similar Lutheran statements concerning vocatio, see above, ch. 2, nn. 8-13.

were to concur with their nobility in suppressing the tyranny of the bishops.[22] He seems to have still agreed with his advice in 1554, that the common people should leave the slaying of idolaters to the civil magistrate and only take care to keep themselves undefiled.[23]

Although Knox failed to make clear who could resist tyrants, he at least seems to have believed that private men could not resist by force of arms. Knox was undoubtedly aware of the tradition which made the entire community responsible for removing tyrants,[24] but if he went "further than does the Vindiciae," as Allen maintains, in making all men responsible for "repressing" an impious king, this was due not to any conception that the people were the source of royal power but to Scriptural commands to resist idolatry. His basic position was that of the Lutherans, allowing every man to resist according to his vocation, but limiting armed

[22] "A Letter Addressed to the Commonalty of Scotland," 1558, in Works, IV, 524. See also pp. 526-28, 531-32, 534.

[23] "A Godly Letter of Warning, or Admonition to the Faithful in London, Newcastle, and Berwick," in Works, III, 194.

[24] In 1564, he explained that the "people of God" who were obligated to suppress idolaters were "the people assembled together in one body of one Commonwealth." See his "History of the Reformation in Scotland," Works, II, 442.

resistance and deposition to the nobles and authorities who acted in God's name.[25] He did not explain whether the nobles and authorities were to proceed individually or corporatively, or whether in conjunction with the estates or apart from them.[26] A brief indication that magistrates might take action apart from the estates was left unexplained. These failings, however, were common to many Calvinist writers.

Goodman's How Superior Powers Ought to be Obeyed was published in Geneva the same year as Knox's Appellation, and is similar to it in many respects.[27] His opinion of the duty of the nobility to defend true religion and bridle the king, and his emphasis on

[25] I see no justification for Allen's observation, Political Thought, p. 106, that although Knox may have known the Bekenntnis of Magdeburg, "to suggest that Knox wrote his Appellation, as, in any appreciable degree, a result of his acquaintance with this or any other tract, would be entirely absurd."

[26] It is well to remember, however, that in Scotland all members of the nobility were members of the estates. Knox may have assumed that the nobility would always act through that body. See R. H. Lord, "Parliaments," pp. 132-33.

[27] Christopher Goodman, How Superior Powers Ought to be Obeyed (1558), The Facsimile Text Society (New York, 1931). Goodman, an exile from England, was a friend of Knox, and also consulted Swiss scholars before writing his book. See Linder, Pierre Viret, p. 141. His work seems to have been written earlier than Knox's Appellation, the preface being dated January 1, 1588. See Allen, Political Thought, pp. 116-18.

resistance according to one's vocation ("be it counsel, learning, auctoritie, power in bodie or soul") are among the basic ideas shared by both. But if no proposition "can be found in the Appellation which is not in Goodman's work," as Allen argues, the reverse is not the case. Goodman had lost faith in the English Parliament under Queen Mary and, perhaps as a result, he appealed more clearly to the "inferior officers" of the realm than did Knox. The Queen's counsellors, he maintained, were established to "brydle the affections of their Princes and Gouvernours." The justices in the towns, "as Maieres, Shryffs, Baylyfes, Constables, dealers and all other suche inferior officers" were to administer justice, defend the innocent and punish all transgressors, "blasphemours of Goddes holie Name . . . as be the bloodthurstie papistes." To all of these, as well as to "Noble men" and "Rulers" he enjoined the responsibility to promote God's glory and "to defend all those whom He committed to [their] charge."[28] This protection of the people was an obligation owed to God, for, as Goodman repeatedly stated, magistrates were created by God. Yet Goodman's was not as paternalistic a view as that of Knox or most of the Lutherans, for he, like

[28] Goodman, Superior Powers, pp. 77, 34-36, 95.

Salamonius (see above, n. 15), spoke of kings and governors as "but a portion and members" of God's people, "albeit they occupie the chief roume and office." Since both rulers and ruled are of one body, the people have a certain "liberty" "which becommeth members of one bodie and brethern." Since they have this liberty, the people are partly responsible when a ruler is allowed to become a tyrant.[29]

Goodman at this point took another decisive step beyond Knox. Whereas Knox, in spite of hints to the contrary, restricted the use of the sword to those called to wield it, Goodman openly urged the multitude of Christians to punish the tyrant themselves when no inferior magistrate would do it. He expressed dismay at the widespread debates over who could resist, "as thogh any were exempted out of that nomber which do professe the Name of God." To be sure, he admitted, everyone knows that redressing the disorders caused by a tyrant "chiefly belongeth to inferior Magistrats," but all Christians have the warrant of God's Word and God Himself as captain, and "the whole multitude are therwith charged also, to whom a portion of the sworde of iustice is committed, to execute the iugementes which the

[29] Ibid., pp. 149-50.

Magistrates lawfully commande." Especially in the event that the magistrates cease to do their duty, the people are left without officers, "and then God giveth the sword into the people's hands, and he him self is become immediately their head . . ." When they had no magistrates, the people were obligated to enforce the laws against those who were no longer public officials, but private men.[30]

In spite of his approval of community action against tyranny, however, Goodman's allusions to popular "liberty" are not equivalent to "popular sovereignty," for he seems not to regard the magistrates as creations of the people. His lack of confidence in the "Parlament house" (which was so filled with papists that not even Edward VI was able to reduce the number of saints' days!) did not lead him to substitute for it inferior magistrates as the voice of the people. These officers acted in the authority with which they were "as wel charged before God as king or Emperour." The people's portion of the sword appears to have been given

[30] Ibid., pp. 142-52, 180, 185, 187-88. Goodman's belief that a portion of the sword was committed to all recalls Luther's assertion that he was a "member of the Prince and authority." See above, ch. 2, n. 4.

by God only when "there were no magistrates."[31]

Goodman's fellow-exile from England, John Ponet, openly taught that all "Kinges, Princes and governours have their authoritie of the people," and that for this reason their vices were to be "corrected and punished by the body of the hole congregacion or common wealthe." Those to whom the people gave authority he regarded as proctors and attorneys, and, although they were chief members of the body politic, they were "but membres," and ordained for the people, not the people for them. A Commonwealth could live "when the head is cut of, and may put on a new head."[32] How the "whole body" was to carry out this task was, however, still a problem.

Ponet looked first to the estates, then to the magistrates and judges. Harking back to ancient tradi-

[31] Ibid., pp. 79, 152.

[32] A Shorte Treatise of politike pouuer (Strasbourg?, 1556), repr. in Winthrop S. Hudson, John Ponet (1516?-1556) Advocate of Limited Monarchy (Chicago, 1942), pp. 61, 105-8. Allen, Political Thought, p. 118, states that this book "links with the Bekenntnis of Magdeburg rather than with the Appellation," and is followed in this opinion by Hudson, p. 126. I see little similarity between Ponet and the Bekenntnis. Hudson regards the Bekenntnis and Ponet's Treatise as part of a "new trend" in Protestant thought. This may be true of Ponet, but the Bekenntnis, as we have seen, reflected earlier Lutheran thought, a fact of which both Allen and Hudson were unaware.

tion, he regarded the ephors of Sparta and the tribunes of Rome as officials ordained, respectively, to restrain kings from oppressing the people and to defend popular liberty against "the pride and injury" of the nobles, considering these to be examples of how God had ordained and disposed "the state of the politices and common wealthes . . . that the headdes could not (if they wolde) oppresse the other membres." These officials he compared to the diet in Germany and the "parliaments" in France and England. He warned those called to "councelles and parliaments (and so to be makers of lawes . . .)" not to neglect their duty or betray the confidence placed in them by the people. He recalled the high constable of England whose duty it had been to summon the king before Parliament or other courts.[33]

[33] The English reverence for the High Constable appears to be not unlike the French admiration of the Chancellor of France as a legal check on royal power, and the semi-mythical tradition of the Justice of Aragon. The Constable had already been resurrected in the sixteenth century by Thomas Starkey, A Dialogue between Reginald Pole and Thomas Lupset, ed. K. M. Burton (London, 1948) (written between 1533 and 1536), p. 165, who desired that the former power of the Constable to call Parliament when the King fell into tyranny should be transferred to a council of fourteen members, "even like as the authority of the prince may not rest in him alone, but in him as the head joined to his counsel as to the body." This council, made up of the Constable, the Marshal, the Steward, the Chamberlain, two doctors of divinity, two doctors of canon law and two of common law, plus four nobles, was to "have the authority of the

He was aware of the laws for the punishment of princes who murdered, raped, and betrayed their subjects, and urged "those that be iudges in common wealthes . . . to summone and cite them to answer to their crimes, and so to procede, as they doo with others."[34] Finally, "if the nobilitie, and those that be called to common Councelles" did not execute their authority, the people could complain to a "minister of the worde of God" who, as attested by St. Ambrose, had power to excommunicate even kings and princes.[35] Ponet thus seems to have had some notion (albeit fragmentary) of a formal procedure for resistance appropriate to the great officers of the crown, the Parliament, the royal council, the judges and the nobility in general.

Failing these remedies, however, Ponet emphatically asserted that any private person could kill the tyrant. He considered nobility to be the result, rather than the prerequisite, of resistance. "The name of Nobilitie," he said, and "those that be called heroical or noble

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whole parliament in such time as the parliament were dissolved," in order to prevent the king and his council from infringing on the laws (p. 156).

[34] Shorte Treatise, pp. 111-12, 106, 113. To support his important idea of ordinary judges proceeding against the king, he cites "the prophet" of the Old Testament who warned the rulers of commonwealths, and those "that be judges and other ministers of iustice," to judge without respect of persons.

[35] Ibid., pp. 117-19.

personages" descended from those who, in the far distant past, had delivered oppressed people from the hands of cruel governors, and so had distinguished themselves from their otherwise equal fellow-men.[36] Ponet carried the authority of the people to its extreme, for, although he argued that inferior magistrates should act for the people to whom they owed their authority, he treated them not as representatives with "full power" to bind the people by their decisions, but as delegates whose decision to tolerate a tyrant could be overridden by popular action.

Perhaps Ponet's most significant provision was for the judgment of the king's crimes by ordinary judges, an important step in the growth of the community's control of the ruler through its inferior magistrates. Neither the conception of the ruler being subject to the law nor that of his authority originating in the community had overcome the belief in the late Middle Ages that, in normal circumstances, his authority was supreme. The civilians taught that the king was the source of law and was _legibus solutus_, bound by human law only by his

[36] _Ibid._, p. 109. He recalls Livy's account (_Ab urbe condita_, IV, 13-15) of how L. Quintius commended Servilius Ahala for killing the tyrant Sp. Maelius, for in so doing, Quintius said, he had ennobled himself.

own voluntary submission. Common opinion had it that writs did not run against the king, and some writers insisted that the king, like the pope, could be judged by no one save God.[37] Late medieval thinkers faced the problem of how to place the ruler "under the law without making the populus superior in the constitution."[38] The authority of the community was regarded as superior to the sphere of royal authority only "casually," or when the king had already forfeited his claim to office. The embryonic institutions developed to give the community continuous control over the king had continued to suffer from the principle that the king was above the laws of the realm as long as he functioned properly, and was himself the fount of any jurisdiction possessed by the inferiors who might wish to show that he had functioned improperly.[39] The judgment of a king by ordinary magistrates represented the triumph of the idea that the law

[37] See Lewis, Political Ideas, I, 246-47, 252, 265-66; Wilks, Problem of Sovereignty, p. 469-72; E. Kantorowicz, "Mysteries of State: An Absolutist Concept and its Late Medieval Origins," Harvard Theological Review, XLVIII (1955), pp. 74-76; Post, Medieval Legal Thought, pp. 469-70.

[38] Wilks, Problem of Sovereignty, p. 206.

[39] See Lewis, Political Ideas, I, 265-74. For a full discussion of the casual jurisdiction of the people over the king (and vice versa), see Wilks, Problem of Sovereignty, pp. 203-29, esp. pp. 203-4, 220-27.

was created by the people, and that the magistrates, as representatives of that law, were by extension representatives of the community. Law had long been considered the creation of the community,[40] but as long as the magistrates who administered this law were merely royal agents, the law and the community were at a disadvantage. Ponet suggested a solution to this problem by locating the source of the magistrates' authority in the community.

What Ponet suggested became the basis of George Buchanan's system of opposition to tyrants.[41] God had

[40] Lewis, Political Ideas, I, 259-61, mentions Ockham and Fortesque as two writers who formally argued for the popular source of law. See Ockham, Dialogues, pt. 3, tr. 2, bk. 2, ch. 28 (quoted in Lewis, pp. 307-8), and Fortesque, De laudibus legum Angliae, ch. 13 (quoted in Lewis, p. 329), for whom the law created by the community was one aspect of the dominium politicum. In sixteenth-century France, the jurist Hugues Doneau upheld the popular origin of law and, as well, the right of judges to ignore illegal royal rescripts. See Carlyle, Medieval Political Theory, VI, 308-10. For a discussion of the royal codification of French coutumes in the sixteenth century, and the opposing principle of the origin of these coutumes in the estates, see René Filhol, Le premier Président Christofle de Thou et la réformation des coutumes (Paris, 1937), pp. 60-140.

[41] Buchanan, De jure regni apud Scotos, translated as The Powers of the Crown in Scotland, by Charles F. Arrowood (Austin, Texas, 1949). Although not published until 1579, the work was probably written in the late 1560's to justify the enforced abdication of Mary, Queen of Scots, in 1567. See Allen, Political Thought, pp. 336-42, and Arrowood's introduction, pp. 3-34.

called judges not only kings, but gods (Psalm 82:6), attributing to them His own grandeur. The judge's voice was the voice of the law, and the voice of the law was that of the people.[42] Buchanan was not free of medieval ambiguity concerning the source of the law, for he also considered the law to be the voice of the king; hence, the king condemned by a judge or by the law was self-condemned, standing before the court of law, not as a king, but as a simple defendant. "The judge knows the defendant by but one name, that of the crime of which the plaintiff accuses him."[43] The king's inferiority to the judge, however, was no longer due merely to his prior forfeiture of office. In a court of law, the king was equal to all other defendants even before convicted of crime. Hence, the ordinary inferior magistrate was superior to the king standing before him because he spoke with the voice of the people. "No one," Buchanan argued, "who appears before a judge appears before an inferior."[44]

[42] Powers of the Crown, pp. 135-36.

[43] Ibid., pp. 138-41.

[44] Ibid., p. 130. If the king refused to be brought to trial, Buchanan advised treating him like any other criminal against whom it was lawful to use force. In such a war, he argued, the "enemy" could justly be killed by "the whole people" or by a single individual. Buchanan seems not to have envisioned any other inferior

This magnification of ordinary jurisdictional power also characterized the thought of Peter Martyr and Zacharias Ursinus. Martyr, a refugee from Italy who later settled in Zurich, was with Ponet in Strasbourg from 1554 to 1556, where, in his commentary on Judges, he discussed the powers of inferior magistrates, describing them in legal terms, much in the manner of Bucer whom he had met during his stay in Strasbourg between 1542 and 1547.[45] Bucer had limited resistance to those inferior powers with merum imperium and a great degree of self-government, but Martyr's standards were not so high. He recognized that inferior powers were subject to their superiors "by feudal law, as they say," and serve as their ministers or vicars. The one prerequisite for having a right to resist was the possession of jurisdiction, whether acquired by heredity or by grant of an emperor, king or republic. A noble with a title but without jurisdiction was equivalent to other private men who could not resist. Officials with jurisdiction over cities and provinces, he argued, must

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magistrates than judges taking part in resisting the tyrant. In this sense, as well as in other, more philosophical, respects, Buchanan was somewhat removed from most other Calvinist writings on resistance.

[45] Commentarii in librum Judicum (Zurich, 1571). See also C. Schmidt, Peter Martyr Vermigli. Leben und ausgewählte Schriften (Elberfeld, 1858), p. 203.

refuse the prince's commands to force their subjects into false religion. The prince must normally be obeyed, it is true, but only "as far as the altar."[46] Inferior officials obtained the right to resist from the laws of the emperors, kings and republics by whom they had been admitted to the administration of public affairs. They were instituted to rule the republic justly and piously within the territory alloted to them, and acted "ex officio" when they opposed the superior power for religious reasons.[47]

Martyr seems not, however, to have considered these officials agents of the people. To abdicate their office

[46] Commentarii, pp. 36, 37. Martyr did not explain fully what he meant by "jurisdiction." Late medieval and sixteenth-century jurists commonly distinguished between jurisdiction as a "genus," which included merum imperium, mixtum imperium and "simple jurisdiction," and as a "specie," which was equivalent to "simple jurisdiction" or the cognizance or minor civil cases. It would be more likely that Martyr meant jurisdiction as a genus, since he spoke of the rulers of cities and provinces, who generally had more than just simple jurisdiction. By "jurisdiction," Martyr probably meant something very similar to what Bucer had meant by "merum imperium."

[47] Ibid., p. 37. These "minor princes" "ab Imperatoribus, Regibus, et Rebuspub. tanquam adiutores ad res administrandas asciti sunt, quo iustitia magis magisque vigeret. Ut itaque recte, iuste ac pie Rempublic. pro parte sibi commissa regerent, instituti fuerunt. Quamobrem ex officio faciunt, quando religionis causa potestati superiori sese opponunt."

when confronted by an impious command, he thought, would be to desert a divine calling.[48] All magistrates, in fact, were established by God Himself, whether the selective instrument had been senatorial or royal appointment, popular election or hereditary succession.[49] Evidently Martyr did not consider popular sanction, any more than nobility, a sufficient authorization for a magistrate's right to resist.

Martyr's view that possessors of jurisdiction, no matter how they had received it, held their swords from God, was basically a Lutheran position. His lack of regard for nobility, however, was far removed from Lutheran ideas. Not once did he mention the estates, with their aristocratic privileges and constitutional powers. He supported resistance by non-noble inferior officers who were not members of the estates, and who had possibly derived their jurisdiction from the king

[48] Ibid., p. 37[v]. In 1545, his De fuga in persecutione had justified flight from persecution, but this he apparently applied to private men alone. It had been written in reply to a query from a Swiss Protestant, and similar answers were written also by Calvin, Melanchthon, Bucer and Viret. See Schmidt, Peter Martyr, pp. 53-57.

[49] Commentarii, pp. 172[v]-173.

himself. A position so favorable to towns offers evidence of the influence upon Martyr of his years in Strasbourg and his acquaintance with Martin Bucer.

One of Martyr's students in Zurich in 1560 was Zacharias Ursinus, a former student and devotee of Melanchthon, and a friend of Hubert Languet. While in Zurich, Ursinus accepted Calvinism under the tutelage of Martyr, and in 1562 he entered the theological faculty at Heidelberg, where the Palatine court was becoming a center of Calvinist resistance to Habsburg power and an international center of Calvinist thought and teaching.[50] In view of his environment and background, Ursinus' support of armed resistance by inferior magistrates is not surprising.[51] If magistrates could defend themselves

[50] Claus-Peter Clasen, The Palatinate in European History, 1559-1660 (Oxford, 1963), pp. 3-19, 35-39. J. F. Hautz, Geschichte der Universität Heidelberg (Mannheim, 1864), II, 51. Heidelberg's importance as a center of Protestant diplomatic activity is emphasized in Walter Platzhoff, Frankreich und die deutschen Protestanten in den Jahren 1570-1573 (Munich, 1912). Interestingly, the major professors in the "Sapienz-Collegium" at Heidelberg were called "ephors," and Ursinus' first appointment in 1561 was to this position. See Hautz, pp. 51, 65-70, 448-55. Ursinus himself does not, however, mention ephors in connection with resistance.

[51] His thoughts on resistance occur in his Exercitationum liber secundus (Neustadt, M. Harnisch, 1590), in the section entitled, "Dispositiones Aliorum Exercitiorum in materiis item Theologicis." Most of Ursinus' Latin works were not published until after his death in 1583, and I have not been able to determine exactly when

and their subjects from "atrocious injury" of a temporal nature, he reasoned, how much more could they when such injury was done to religion. Since the "superior magistrate" was subject to the laws, his tyranny could be punished by "ordinary power . . . that is, either the inferior magistrate or the consensus of the people." Ursinus, unlike Martyr, recognized the importance of the community's authority, by which a magistratus furiosus could be removed from office, but he followed Martyr in incorporating resistance into the ordinary system of jurisdiction. Inferior magistrates, he said, were established to aid the superior in things just, and restrain him in things unjust. Their power to constitute other magistrates authorized them, he reasoned, to punish men who caused violence and injury. Hence they were bound to protect their subjects against tyrants of all

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he wrote these "Dispositiones." Other short works bound with this one bear dates ranging from 1569 to 1574.

kinds.[52] Private subjects had no right to resist except when no ordinary power protected them, when they might deal with the tyrant "as a private assassin."[53] Ursinus did not clarify whether private resistance was based upon the ultimate authority of the corporate people or simply on ancient rights of self-defense. His references to "public authority" and the "consensus of the people" indicate, however, his bent toward the corporate authority of the people rather than toward the Lutheran allowance of private resistance by the laws of self-

[52] Exercitationum, Dispositio 44, pp. 564-65. Among his arguments, the first was that "ab officio magistratus superioris; quod sit subiectus legibus; Ideoque ipsius etiam tyrannis et latrocinia sint ab ordinaria potestate, coërcenda, quae est vel magistratus inferior, vel consensus populi." Subsequently, he argued "ab officio magistratus inferioris; quod quorum est constituere magistratus, eorum sit etiam, enormiter grassantes coërcere, aut tollere. . . . A simili, Quia magistratus furiosus recte amoveatur auctoritate publica subditorum, ut Nabuchodonosor; Huic autem similis sit grassator." As far as I am aware, Ursinus is the only writer apart from his student, David Pareus, to argue a right of resistance from the inferior magistrate's right to constitute other magistrates. Pareus, In divinam ad Romanos S. Pauli Apostoli epistolam commentarius (Geneva, 1617) (1st ed., Heidelberg, 1613), pp. 1063-64, repeats Ursinus' arguments with minor additions (without acknowledging his major source). Pareus is significant, however, in continuing this tradition in Heidelberg. The possible influence of this city on Huguenot political thought and on theories of resistance needs to be further investigated.

[53] Exercitationum, p. 566-67.

defense. In Ursinus, the traditional authority of the community bolstered the right of ordinary magistrates to resist, although it also meant, as it had for Ponet, that individuals in that community might act in lieu of the magistrate if necessary. In any case, Calvin's populares magistratus were indeed becoming "popular."

The resistance literature of the French Huguenots in the fifteen-sixties does not reflect the notion that inferior magistrates could, through administering the law, act as agents of the law-making community. At first, in their pressing concern that the Estates-General and the princes of the blood control the regency, they were little concerned with ordinary magistrates. Some radical ideas of resistance allowed private individuals to seek justice on their own,[54] but most

[54] See, for example, Morel's letter to Calvin of August, 1559, CR, XLV, 597, and La defense civile et militaire des innocents et de l'eglise du Christ (1563), cited by Caprariis, Propaganda, p. 113. Such individual resistance was taken to be "divinely inspired" rather than an act in the name of the community. See, for example, the defense of the murder of the Duke of Guise by Jean de Poltrot in Sentences redoutables, et arrests rigoureux de jugement de Dieu. a l'encontre de l'impiete des tyrans (1563), in Memoires de Condé (Alahate, 1743), V, 65, and Jacques Spifame, Lettre adressee de Rome à la Royne (n.d., n. p.), pp. Aiv^{V}-Bi, and Bii, where he says "en ce que iustement a executè Poltrot, ne s'est rien fait par la temerité des hommes, mais de l'authorité de Dieu . . . ." (cited by Caprariis, p. 108, n. 118).

Huguenots limited resistance to the estates and princes of the blood. Eventually magistrates entered their thinking, at first as agents of God, later as representatives of the community.

The Huguenots' resistance in this period of the wars was directed against the Guise faction in control of the young king, not against the king himself. The nobles and estates, they believed, limited the king, not as a separate bloc of power, but as a body of colleagues. The Discours par dialogue, sur l'edict de la revocation de la paix, whose author regarded France as a monarchy "composed of aristocracy and the popular estate," emphasized this unity of king, estates and princes of the blood.[55] The latter, he said, had a part "par espoir" in the crown, while the estates made up the "mystical body of the realm," united to "the organic head" of the body, the king.[56] After 1572, the Huguenots

[55] (Paris, 1568). After observing this mixed construction of France, the author refers, p. Ciii, to the familiar reply of Theopompus to his wife regarding the stability of the state when limited. The context, that of the financial restrainings on the king, is the same as that in which Oresme had cited Theopompus' remark.

[56] Discours par dialogue, pp. Diii, Div, "Lesquels estats sont le corps mystic d'icelle [i.e. the realm], et le Roy le chef organique d'un tel corps, estant reuni." For the late medieval development of this idea in France and England, and for other expressions of it in the sixteenth century, see Kantorowicz, King's Two Bodies, pp. 218-32, who points out, p. 220, "that in the organological

did turn against the king and did emphasize the power of the community over him, but the degree to which this represented a change from their earlier thought has probably been exaggerated. Although later Huguenot writers regarded magistrates as representatives of the people, they continued to regard them as colleagues of the king as well.

Many Huguenot pamphlets of this period treated the role of the princes of the blood and the estates in managing the affairs of the king and the kingdom during the king's minority.[57] Both the princes and the estates were thought to have power to appoint members of the

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concept of "body politic and mystic" the constitutional forces remained alive which limited the royal absolutism." Cf. Ralph E. Giesey, "The French Estates and the Corpus Mysticum Regni," in Album Helen Maud Cam (Louvain, 1961), I, 153-71, for the thought of Jean de Terre Rouge (fl. 1420).

[57] References to many of these writings are to be found in Georges Weill, Les theories sur le pouvoir royal en France pendant les guerres de religion (Paris, 1891), pp. 62-80, and in Caprariis, Propaganda, I, 1-141, 375-439 passim. Caprariis contrasts the rather disjointed, circumstantially conditioned writings before 1567 with the more moderate, theoretical works on constitutional government or mixed monarchy after that date. See also Allen, Political Thought, pp. 304-6, and Elkan, "Die Publizistik der Bartholomäusnacht," pp. 13-16.

king's council[58] and to deliberate on all political affairs.[59] The princes' power to sanction armed resistance to the Guise faction was affirmed in 1560 by "the leading jurisconsults of France and Germany, and the most famous Protestant theologians," who gave their approval to the conspiracy of Amboise.[60] Above all, said an author more openly opposed to the king than most of his fellow Huguenots, the estates could legitimately depose a tyrant.[61]

[58] This was asserted by the Synod at Poitiers, 1560. See Jean Aymon, Tous les synods nationaux des èglises reformées de France (La Haye, 1710), pp. 13-14, and Kingdon, Geneva, p. 85. The princes of the blood were to choose the councillors from names submitted by the estates. This was directed against l'Hôpital who had not been so appointed. This role of the estates in appointing officers of the crown was to be greatly amplified by the Vindiciae.

[59] Question politique, s'il est licite aux subjects de capituler avec leur prince, in Histoire de nostre temps (n. p., 1570), p. 368, cited in Caprariis, Propaganda, I, 432, n. 154.

[60] Jacques-Auguste de Thou, Histoire universelle (London), 1734), III, 468, records that the doctors considered the princes of the blood to be "nez souverains magistrats du Royaume en pareil cas." Beza's account of their verdict in his Histoire ecclesiastique describes the princes as "nes en tels cas legitimes magistrats," and adds that one of them was sufficient to sanction the enterprise. See Johann Wilhelm Baum, Theodore Beza (Leipzig, 1852), II, 94, n. 16.

[61] Just complaincte des fideles de France, contre leurs adversaires papistes, et autres (Avignon, 1560), p. 37, cited by Caprariis, Propaganda, I, 46, n. 131.

Critical events soon destroyed the Huguenots' reliance on the princes of the blood and even shook their faith in the estates,[62] but history furnished traditions of resistance by other inferior authorities who had been associated with the princes and estates in governing the kingdom and suppressing tyranny. The administration of justice, said Jacques Spifame, had originally been distributed by the French kings to men of wisdom and prudence, that is, to the nobility in general, whose peculiar "ornaments" were the sword and the fief.[63] The Memoires des occasions de la guerre of 1567 insisted that, although the estates had always been the "unique et souverain" body for reforming abuses in the realm, the lords of the kingdom had occasionally found it necessary to arm themselves to give force to their demands for an Estates-General. The prime example of this was the League of the Public Good, by which the lords, "who were said to be protectors and defenders of

[62] Caprariis, Propaganda, I, 436; Question politique, pp. 369-70, cited in Caprariis, p. 433, n. 156. This tract also lamented the decline of the Parlement and the peers from their former status, a sentiment shared by the Discours par dialogue, p. Ci.

[63] Discours sur le conge impetre par Monsieur le cardinal de Lorraine, de faire porter armes defendues à ses gens (n. p., 1565), pp. 3-6, cited in Caprariis, Propaganda, I, 138-39, nn. 193, 194.

the said public good," attempted to force Louis XI to convoke the assembly.[64] The Question politique argued that the estates had been called yearly by the princes who drove the Roman tyranny out of Gaul, and that, "having begun so well," the realm continued to improve. The kings for several centuries called together the princes, barons, lords and wise men of the realm, either with the estates "or sometimes without them," their assembly being called "Parlement." "For the consolidation and confirmation of such a laudable enterprise," the kings then created the twelve peers of France without whom they could do nothing, and whose great authority made them, as "peers," "pareil au Prince souverain."[65] Members of the king's council and his sovereign courts of parlement were bound, according to the Discours par dialogue, to ensure the fulfillment of the king's promises (referring to the Edict of January, 1562), which had been made with the consent of the council and courts. Earlier French kings had always

[64] Memoires des occasions de la guerre, appelée Le Bien-public, rapportez à l'estat de la guerre presente (n. p., 1567), pp. 6-8, 16.

[65] Question politique, pp. 368, 370-71, cited in Caprariis, Propaganda, I, 432-33, nn. 154, 155. François Hotman, Franco-Gallia (Geneva, 1573), p. 120, specifically refuted this idea that the peers were so called because they were equal to the king. They only shared, he says, a common dignity and authority.

made laws with "the authority of their privy council and the approval of the sovereign courts of France, especially that of Paris which represents the estates." These "magistrates and officers" were called by the king "to participate with him in the responsibilities of the crown."[66]

This belief that the Parlement of Paris represented the estates illustrates a feature common to many of these Huguenot writings. They generally agreed that the Estates-General had been the primary means of limiting the king, but that other officials (who in reality long antedated the estates) had become associated with the estates in this task. Frequently, care was not taken to distinguish more than superficially among these officials. The estates, the nobility, the officers of the crown and even the magistrates of towns and provinces were all classified as protectors of the people and true religion.[67] Their association of these officials with

[66] Discours par dialogue, p. Bi, Biv-Ci[v].

[67] This confusion of magistrates was not universal, however. Beza, for example, although he had allowed inferior magistrates some powers against the prince (see above, n. 13) in his De haereticis, limited resistance to tyrants in his confessio fidei of 1560 to the seven electors in Germany and the estates in other monarchies, whom he considered to be "superior powers," and excluded from such action the inferior magistrates who differed "not at all, or only a little," from private persons. See his Tractationes theologicae, 2nd ed. (1582), I, 55,

the estates did not mean, however, that Huguenots suddenly recognized them as agents of the people. The synods of the Reformed Church continued to teach that the authority of all political leaders was from God, and various Huguenot writers assumed this to be true.[68] "Kings, princes and magistrates," declared a consistory of Huguenots, were given the sword by God in order to punish civil and criminal offenders and to preserve the church.[69] Magistrates clearly were not yet taken to be representatives of the community, but, by the same token, their independence from the king was promoted by their

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cited in Wolzendorff, "Staatsrecht und Naturrecht," p. 104, n. 1. Similarly, in a letter of June 25, 1568 to a group of Dutch exiles in England, he objected to their belief that "ordinary magistrates" could resist tyrants. See his Epistolarum theologicarum . . . liber unus (Geneva, E. Vignon, 1573), pp. 165-66. For a fuller discussion of Beza's hesitancy to sanction war and resistance, see A. Picard Théodore de Bèze, ses idées sur le droit d'insurrection (Cahors, 1906).

[68] Hermannus Obendiek, Die Obrigkeit nach dem Bekenntnis der reformierten Kirche (Munich, 1936), pp. 9-13. Among the many indications that political authority derived from God, see the Response chrestienne et déffensive, in Memoires de Condé, I, 370, and Jacques Spifame, Lettre addressee de Rome, pp. Giv-Gii, cited in Caprariis, Propaganda, I, 108, n. 117.

[69] Beza, Histoire ecclesiastique (Antwerp, 1580), II, 151-52. Here the ius gladii was seen in its legal context, for with it "le Magistrat fait punition des meschans ou en leurs biens ou en leurs corps." This power was roughly equivalent to mixtum et merum imperium. Nevertheless, it was "le glaive corporel et visible qu'il a de Dieu," and not, apparently, from the king, as juristic literature insisted.

immediate dependence upon God.[70]

The idea that magistrates received their authority from the community continued, however, to progress. Two factors may be suggested as contributing to this development: the practical experience the Huguenots gained in creating their own magistrates, and the work of François Hotman, to whom the association of magistrates with estates suggested that both were agents of the community. The Huguenots' ecclesiastical organization, established at their first national synod in Paris, 1559, consisted of a system of provincial, general, and national synods at the base of which stood the local congregations, who elected their own deacons and elders, who in turn chose the pastors. This organization was partially political, for each congregation, colloquy and synod constituted a unit of taxation and had its own military force. The Synod at Sainte-Foye in 1561 elected two chefs généraux or "protectors" over the two

[70] Some Calvinists still admitted, however, that magisterial authority came from the king. See, for example, the letter of Pierre Viret to a colloquy at Montpelier (1561?) in Beza, Histoire ecclesiastique, I, 887, where he forbids private persons from usurping the power and execution which pertain only "au Roy et aux magistrats deputés par iceluy. Cf. the Remonstrance envoyée au Roy, par la noblesse de la religion réformée du païs et Conté du Maine (August 10, 1564), in Memoires de Condé, V, 291.

provinces of the Parlements of Bordeaux and Toulouse, under whom were their colonels and the captains of the churches in each colloquy. Their purpose was to defend the churches and, if necessary, to lead forces against "his majesty."[71] It is not surprising that a royal edict of 1562 proclaimed that the creation of magistrates, laws, statutes and ordinances was a task reserved to the king.[72] The Huguenots paid no attention to such edicts and as their faith in the princes and the Estates-General declined, they applied the principles of election and of authority deriving from the people to the republican political system they drew up at Millaud and Nîmes

[71] See Aymon, Tous les synods, pp. 1-12, and J. W. Thompson, The Wars of Religion in France, 1559-1576 (New York, 1909), pp. 321-25. The decisions of the Synod of Sainte Foye are recounted by Beza, Histoire ecclesiastique, I, 803-4, where he adds his own reason for these officials, that it is for "l'office des magistrats et non des particuliers d'oster des marques de l'idolatrie."

[72] deLagarde, Recherches, p. 125. The magistrates created by these synods, says deLagarde, "une fois en place étaient qualifiés de magistrats royaux. Et l'on pouvait ainsi continuer à servir le roi sous leurs ordres." If true, this suggests one way in which the Huguenots may have learned that magistrates could be at once both "royal" and "popular," that is, how they could be considered representatives of the community even though they were members of the royal administration.

between 1573 and 1575.[73] Not only did they create many new magistrates, but even provided that one from each generality, along with a noble and deputy of the third estate, should represent that generality in the Estates-General, a clear indication of the new role being assigned by the Huguenots to inferior magistrates.[74]

[73] See Léonce Anquez, Histoire des assemblées politiques des réformés de France (1573-1622) (Paris, 1859), pp. 7-21; Philippe Corbière, De l'organisation politiques du partie protestant arrêtée à l'assemblée générale tenue à Millau en Decembre 1573 (Montpellier, 1886). For a short summary, see Thompson, Wars of Religion, pp. 500-1.

[74] Anquez, Histoire des assemblées, p. 10. Cf. Michel Reulos, "Synodes, assemblées politiques des réformés Français et théories des etats," in Album E. Lousse, II, 104. In 1594, the General Assembly at Sainte-Foye decreed that provincial assemblies be composed of three representatives of each colloquy, a noble, a pastor and a magistrate. See Anquez, p. 64, and Reulos, p. 106. In general, Reulos argues that many procedural and organizational aspects of the regular Estates-General and the provincial estates were adapted by the Huguenots into their own organization. He suggests that the tripartite structure was preserved by adding the magistrates in place of the clergy. Reulos also cites (p. 104, n. 7) a speech made in the Estates of Brittany (for which see Le trésor des harangues (Paris, 1680), p. 154f, in which it was recalled that Henry II had called deputies of all the parlements to a meeting of the three estates in Paris in 1558, where one of them, according to de Thou, thanked the king who had created "un quatrième Ordre des Magistrats, qui rendent en son nom la Justice au peuple, et l'avoit joint aux autres Ordres du Royaume. . . ." Charles IX, said the speech, had assembled a similar group at Moulins, and the meetings of the estates at Blois in 1579 and 1588, as well as the assembly at Rouen in 1596, were all composed of the clergy, the nobility and "officers of the courts of Parlement and mayors and eschevins of the

There can be little doubt that the Huguenot writings after St. Bartholomew's Day, 1572, which considered the inferior authorities of France, whether elected, hereditary or appointed by the king, to be dependent on and representative of the people, were greatly influenced by these developments in the organization of Huguenot ecclesiastical and political assemblies.

While the Huguenot assemblies included magistrates as members of the estates, Hotman found historical evidence that magistrates had often attended the "council of estates" throughout French history. His Franco-Gallia, besides having had a great influence on other Huguenot writings, is an important illustration of this tendency to associate "inferior magistrates" with the estates and thus to give them popular sanction. Hotman did not deal specifically with inferior magistrates, and he mentioned resistance only rarely, yet he may well have helped to channel earlier currents of thought into the Huguenot writings after 1572. Hotman's major objective was to show, on the basis of historical evidence, that the kingdom of France had been an elective monarchy, limited by the general "public council." This council had acted under the authority of the people, but by "people,"

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towns." I have not had opportunity to investigate this problem of the magistrates as a "fourth estate."

Hotman, like other Huguenots, meant the estates.[75] The "public and solemn council of the nation," which later ages had called "the assembly of the three estates," had had supreme charge over the administration of Franco-Gallia, and had exercised the people's authority in electing and deposing kings.[76]

That Hotman's "council" was to be equated with the Estates-General, however, or even with the three estates as ordinarily conceived apart from their formal assembly, is by no means certain. In the same paragraph, he described the council as a parlamentum of three estates and as a body presided over by the king seated in his golden tribunal, next to whom were the "princes and magistrates of the realm," followed by the delegates of the towns. This may have coincided with Hotman's view

[75] Franco-Gallia (Frankfurt, 1665), ch. 13, p. 166. In the first ten chapters of the 1st edition of 1573, Hotman made many references to the power of "the people" over the king of Franco-Gallia which, in the 1576 edition, perhaps after talking to fellow-Huguenots who feared the seditious implications of his terminology, he changed to read something like "people and estates," or "people, that is, the estates," or else he simply substituted "the estates" or a "council of estates" for "the people." For the comparison of editions, I am indebted to the variorum edition currently being prepared by Ralph E. Giesey.

[76] Franco-Gallia, ch. 12, pp. 133-34, ". . . summam regni Francogallici administrationem penes publicum et sollene gentis Concilium fuisse: quod posterior aetas Conventum trium Statuum appellavit."

of mixed monarchy (which combined royal, aristocratic and popular power), but did not agree with the actual structure of the three estates made up of clergy, nobility and the third estate.[77] Having apparently read Seyssel after the first edition of his own book in 1573, Hotman added to the 1576 edition Seyssel's view of the estates as an assembly composed of nobility, the "middle class" (among whom Hotman listed jurists and merchants) and the "lower class" (described by Hotman as artisans and peasants).[78] This again did not refer to the actual Estates-General of France. Some of the historical meetings of this "council of estates" to which Hotman referred were, in fact, meetings of the Estates-General, as in 1356, 1468, and 1484, but most of them were special assemblies of a less comprehensive nature. Hotman apparently did not distinguish between the old king's council and the newer "three estates," which is why he

[77] Ibid., ch. 13, pp. 162-63, ch. 12, 136.

[78] Ibid., ch. 12, pp. 134-35. Cf. Seyssel, La monarchie de France, I, 13, ed. Poujol, pp. 120-21.

was able to use the terms curia regis and curia parlamenti trium statuum interchangeably.[79]

Through his failure to distinguish clearly between the Estates-General and the "council," Hotman unwittingly associated ordinary magistrates, who had sat on the council, with the Estates-General. "Princes and magistrates," he pointed out, sat next to the king in the council of estates, and he cited a council convoked by Louis XI which was attended by university professors and members of parlement as well as by magistrates.[80] Moreover, the council of estates had not only included inferior magistrates, but had assisted in creating them. All the great officers of the realm, he argued, both administrators and advisors of the kings, had been appointed by, or with the advice of, the council, as in ancient Rome the people in comitia created the magistrates.[81] Having been created by the council, even those enjoying great power with the king were kept

[79] Franco-Gallia, ch. 17, pp. 249-55, where he cites examples of councils in the fourteenth and fifteenth centuries, and p. 170, "Posterioribus autem seculis dicta est Franciae Curia: interdum Curia Parlamenti trium statuum: interdum curia Regis Franciae: interdum praecise Parlementum statuum. . . ."

[80] Ibid., ch. 23, p. 269.

[81] Ibid., ch. 14, pp. 171-72, 176, ch. 19, 236.

within the bounds of their office by their fear of the council's censure.[82] The king could not remove these officials from office without judgment by a council of peers, for they were "magistrates of the kingdom or the republic of France."[83]

Although Hotman said very little about the right of armed resistance, his view of inferior officials as sharers in the royal authority was similar to the arguments of others, like the author of the Vindiciae, who made this view a part of their justification for resistance. The king, he thought, was limited by aristocratic and popular elements, and the "princes and nobles" who made up the intermediate estate stabilized the kingdom by combining in themselves elements of both the popular

[82] Ibid., ch. 12, p. 139.

[83] Ibid., ch. 18, pp. 234-35, where Hotman distinguishes between the king and the immortal kingdom which can always rule itself with or without a king, and p. 299, in a chapter added to the edition of Frankfurt, 1586, containing the fundamental laws binding the king of France. The seventh of these is "ut Regi non liceat magistratum aliquem Regni, sive Reip. Franciae, nisi caussa in Parium consilio cognita et probata, exauctorare. Quae lex ita passim tota Gallia nota et decantata est, ut testimonii non egeat." The last sentence probably indicates that Hotman developed the idea of the irremovability of magistrates from conversation with friends rather than from legal sources which he would certainly have cited if he had been able to.

element and the royal dignity.[84] Hotman cited, in the 1586 edition, a speech of Louis the Pious in which the king had assured the estates of Francogallia that they, as coadjutors of the king, had a part in the royal ministry according to their status, while he served as their "monitor."[85] Long before, however, in the 1573 edition, Hotman had minimized the difference between the king and inferior officials by viewing him, as Salamonius had done, as merely a "perpetual magistrate" who should be restrained by the nobles and other select men to whom the people had given this authority.[86]

[84] Ibid., ch. 12, p. 136. Since the popular and royal elements of a kingdom differed from each other so widely, "adhiberi tertium aliquem oportet intermedium, et utriusque communem, qui est Principum, sive Optimatum: qui propter splendorem et antiquitatem generis, ad regiam dignitatem accedit: propter clientelam, et (ut vulgo loquimur) subiectionem plebeio genere minus abhorret."

[85] Ibid., ch. 12, pp. 137-38. The king said to the council, that "unusquisque vestrum in suo loco et ordine partem nostri ministerii habere cognoscatur: unde apparet, quod nimirum vestrum admonitor esse debeo: et omnes vos nostri adjutores esse debetis."

[86] Ibid., ch. 1, pp. 9-10. ". . . qua de caussa, inquit, Optimatum et delectorum auctoritate, quibus eam potestatem populus permittit, tanquam freno coercendus est." The "inquit," interestingly, was added only in the 1586 edition, indicating that perhaps some readers had taken this to be Hotman's own words, and he wished to make it plain that Plato was their author. The French translation of 1574 speaks of "gens des biens et d'honneur comme representant la personne du peuple," whom Allen, Political Thought, p. 311, says are "surely the same as the officiarii regni and proceres of the Du droit and

In spite of the elevated position of the nobles and great officials, however, Hotman apparently considered the sanction of the people necessary for armed resistance. The War of the Public Good against Louis XI, he observed, had been fought by nobles in order to secure the convocation of a council after "the people had requested it." Such a request of the community spelled the difference between sedition and legitimate resistance.[87] He seems to have regarded the War of the Public Good as an enterprise sanctioned by the council of estates it was endeavoring to create, not simply by the nobles' rights as coadjutors of the king. Nevertheless, this very combination of popularly sanctioned authority and royal dignity in inferior magistrates was to be the heart of the theories of Beza and the Vindiciae contra tyrannos.

Of the three fundamental approaches to resistance by inferior authorities which the literature of these

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the Vindiciae." While Allen is right in not regarding these officials as the Estates-General, it cannot be said that Hotman was not thinking of the "council of estates" at this point.

[87] Ibid., ch. 23, pp. 267-70. The passage on p. 270 which allowed that resistance was just when the people sought the aid of the assembly was elided from the posthumous version of the Francogallia (brought out by his son Jean, in collaboration with Pierre Nevelet), which appears as Book I of a set of Hotman's old writings gathered under the title De iure regni Galliae libri tres and is printed in volume III of Hotman's Opera omnia (Geneva, 1600)--cf. p. 77.

middle decades of the century reveal, the most dominant was the Lutheran view (supported by Calvin) that resistance was justifiable since all authorities received their swords directly from God. This notion helped to prevent some writers, who supported resistance by the estates or by administrators of the law, from developing the conception that such resistance was sanctioned by the authority of the community. Ponet, Buchanan and Ursinus implied that their popular authority enabled ordinary judges to administer the people's law against the king, but this conviction seems to have had little influence on French Huguenot thinkers who probably still believed that jurisdiction and law emanated from the king, and that reliance on ordinary judges was not a firm foundation for resistance. The belief that appointive magistrates (including others in addition to judges) could possess an independence based upon authority derived from the people seems to have been mainly the result of their being associated with ephors, nobles and estates who were conceived to be agents of the community. This belief, combined with elements of magisterial independence and power stemming from the magistrates' dependence upon God, their qualitative equality with kings and their sharing with them the administration of justice,

found expression in the most comprehensive and influential of Huguenot writings on inferior magistrates, Beza's *De jure magistratuum* and the *Vindiciae contra tyrannos*.

CHAPTER V

BEZA'S DE JURE MAGISTRATUUM AND THE VINDICIAE CONTRA TYRANNOS

Nicholas of Cusa had suggested in the fifteenth century that the emperor's council and appointed officers, as well as the imperial diet, were agents of both the ruler and the community.[1] He thus had reflected a fundamental problem of political theory in the late Middle Ages, that of how to construct a constitution which gave full credit to the superiority of both the king and the people. Although the people may have originally given kings the authority to rule and still limited royal power through the estates and the law, it could not easily be denied that supreme authority belonged to the king and that the law, the magistrates and the estates were his creations. The dilemma this posed for Protestants wishing to resist their kings had not adequately been solved before 1570. The appeal to God as the source of magisterial power was effective in

[1] E. Lewis, Political Ideas, I, 273-74.

the short run, but was difficult to square with the realities of political power relationships. The appeal to law and its enforcement against the king by ordinary judges merely begged the question of the source of law and jurisdiction. A few writers had suggested that the law and magistrates were created by the community, but had simply overlooked, rather than grappled with, the claims of the king. What remained to be done was to deny these claims and to insist that the king himself, as well as the magistrates, was merely a minister of the community. This task was accomplished by Beza's De jure magistratuum in subditos and the Vindiciae contra tyrannos.[2] Enough historical reality remained in their

[2] Cited here will be the edition of De jure magistratuum edited by Klaus Sturm (Neukirchen-Vluyn, 1965), whose introduction offers a good summary of recent, as well as older, literature on Beza's authorship of this work and its relationship to the Bekenntnis of Magdeburg. The edition of the Vindiciae I have used is that of Edimbourg, 1579. Harold J. Laski, in his introduction to the English translation, A Defence of Liberty Against Tyrants (n. p., 1924), pp. 57-59, summarizes the arguments over the authorship of this work, concluding on the basis of Waddington (1893), Lossen (1887) and Elkan (1904), that Duplessis-Mornay was the author. More recently, Languet's stock has gone up. Ernest Barker, in "A Huguenot Theory of Politics," Proceedings of the Huguenot Society of London, XIV, 1, (1930), pp. 42-44, concludes that it was perhaps Languet or perhaps neither he nor Mornay. G. T. van Ysselsteyn, in "L'auteur de l'ouvrage Vindiciae contra Tyrannos," Revue historique, CLXVII (1931), pp. 46-59, decides, on the basis of a comparison of the sources used in each of the work's four parts, that Languet wrote most of part three and also the preface. Languet's work relies more heavily

thought, however, to prevent them from escaping the conviction that magistrates (unlike the estates) were still, in a sense, royal officials. The ambiguity of Cusa's remark is still present in these tracts, although cast in a different form due to their authors' conviction that the authority of the king was dependent on that of the community. Although magistrates might be members of the royal government, both they and their supreme head were "popular magistrates."

Some late medieval theories of resistance had been based largely on a dualistic conception of the relationship between the community or the estates and the king, in which the community, like a feudal vassal, was bound by a reciprocal contract to its lord as to an independent political power and was freed of any obligations by the lord's malfeasance. Thus freed, the community or its agents could take action against the king.[3] However, the addition to this situation of a third party, which

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on ancient and legal sources, he argues, and uses fewer analogies and is written in less elegant Latin. Concurring in this is Raoul Patry, Philippe du Plessis-Mornay (Paris, 1933), pp. 278-82.

[3] Resistance based upon a dualistic relationship between king and estates is described by Kern, Gottesgnadentum, Anm. 37, p. 371. Cf. Heinrich Mitteis, Deutsche Rechtsgeschichte, 9th ed. (Munich, 1965), p. 166.

combined in itself elements of both contracting parties, significantly altered the framework in which resistance was carried out. Limits on the king now arose from within the structure of his own government and were a result, not of ruptured obligations, but of permanent duties of the king's inferiors. Earlier, of course, the Lutherans had emphasized the unity of the emperor and inferior authorities of Germany in one corporate structure, an idea stemming largely from the medieval belief in the corporate unity of the king and his council.[4] Similarly, Calvin had regarded the estates, and, perhaps, magistrates, as coadjutors of the king. But neither the Lutherans nor Calvin had clarified the relationship of the community to this corporate government, leaving the possibility that the government, having received its authority directly from God, was still somehow independent of the community. While Beza and the Vindiciae did not fully explain their conception of the sovereignty of the people and their relationship to the government, a state nevertheless emerged from their writings in which the corporate governing body, consisting of a king and various types of inferior magistrates, was clearly responsible to the community of which it was a part.

[4] See above, pp. 62-64.

Beza and the Vindiciae combined the medieval tradition of the power of the community with the Lutheran and Calvinist notion of resistance from within a unified body to create a government in which magistrates might resist the king in the name of the people, operating not as a separate bloc of power, as in a dualistic government, but as sharers in the power of the king. The key to understanding the crucial position of inferior magistrates in these two works is the nature of the system of obligations by which their ideal state would be held together. In spite of some elements in these two works which could be (and have been) interpreted as "dualistic," the general thrust of their argument was decidedly in favor of a "monistic" system in which inferior magistrates could resist tyranny not only because they were agents of the community, but also because they shared with the king certain mutual obligations within the structure of the royal government itself.[5]

[5] Among those who have interpreted these writings, along with all the works of the Monarchomachs, "dualistically," are Gierke, Althusius, pp. 84-86, 138, 144, 156, 160-61, 213; Wolzendorff, "Staatsrecht und Naturrecht," pp. 123-79 passim; R. Treumann, Die Monarchomachen (Leipzig, 1895), pp. 57-60; and A. A. Van Schelven, introduction to the A. H. Murray edition of Beza, Concerning the Rights of Rulers (Cape Town [1956]), pp. 6-7; Hans Fehr, "Das Widerstandsrecht," Mitteilungen des Institutes für Oesterreichische Geschichts-Forschung, XXXVIII (1920), 2-4.

The element of dualism in De jure and the Vindiciae is due in large measure to their authors' use of the reciprocal feudal contract to illustrate the relationship between king and people. Neither author, however, utilized this analogy clearly or consistently, contrary to what one would expect if, as proponents of a dualistic state, they attributed fundamental importance to the analogy. On the assumption that kingdoms were fiefs, and were subject in some sense to feudal law, Beza believed that a king's treachery against his "vassals" or subjects caused his kingdom to revert to the "sovereignty," to be disposed of by those who represented it. On the other hand, the king was bound to his oath not only as a lord, but also as a vassal, swearing homage to the "realm" of which he was the most eminent subject.[6] The Vindiciae similarly treated him both as the lord of a fief and as a vassal of the kingdom or of God, the emphasis, however, placed usually on his

[6] De jure, pp. 58-59, 74-75. He cited the Consuetudines feudorum, II, 26, par. Domino and 47, both of which deprived of his fief a lord who committed a felony. From the Sachsenspiegel, III, 54, he obtained the analogy of the Holy Roman Emperor who, upon his election, swore fealty and homage to the Empire.

obligations as a vassal.[7] The only consistent theme in both works is the responsibility of the king, either as lord or vassal, to fulfill his obligations. He hardly appears as the possessor of an independent body of rights, as if he were king in a dualistic state.

More important than the feudal contract were the two covenants which both authors believed to be the foundations of Christian political society. No more does a dualistic state emerge from these covenants than from the analogy of the feudal relationship. Both authors described the two covenants of the ancient Hebrews, the first of which was between God on one hand and the people and king of Israel on the other, the second between the king and the people. In the first, according to Beza, the people and king together promised to observe the ecclesiastical and civil laws given to them by God. This contract, according to the Vindiciae, was not a civil matter, but was purely an "obligation to piety." In it, the corporate people and king jointly

[7] Vindiciae, pp. 10, 11, 15-17, 23-24, 75, 162. On p. 194 the author cited Bartolus' opinion, expressed in De tyrannia, ch. 9 (in Emerton, Humanism and Tyranny, pp. 145-46), that a delinquent lord might be deposed either by lords higher than he or else according to the lex Julia de vi publica, D. 48, 6, by which anyone offering violence to the public could be punished.

(in solidum) promised to uphold the church, each being responsible for the other and for the whole, just as joint debtors bound themselves and their co-debtors to pay what they owed.[8] The Vindiciae made explicit what Beza had implied, that the people and king, prior to their own political contract, were already united by the first covenant, in joint obligation to God. This prevented the second contract brom being the artificial, mechanistic agreement of Locke and other theorists of a more secular age. The king's failure to maintain true religion in no way freed the people from their responsibility. Rather, they were as guilty as he if they neglected to warn him, for they were responsible for his actions as well as their own.

On the basis of this mutual (but not reciprocal) obligation, the king and people then formalized their reciprocal obligations to each other in the second contract. Elements of a dualistic relationship appear in this agreement. The people, said Beza, gave its

[8] De jure, pp. 52-53. Vindiciae, p. 37. "Spondet Rex, spondet Israel, (universitas enim hominum unius personae vicem sustinet) et quidem coniunctim, non divisum, ut ex ipsis verbis apparet; incontinenti, non ex intervallo. Constituuntur ergo his duo Rei, Rex et Israel, ideoque aequaliter in solidum obligantur." For the joint obligation of king and people, he cited D. 46, 1, 23 and C. 4, 2, 5, the latter of which speaks of obligation in solidum.

consent to his rule on certain conditions which, if broken, freed them from their contractual obligations.[9] Beza failed to mention what the consequences of popular malfeasance might be, but the Vindiciae maintained that if the people failed to honor their side of the "mutual and reciprocal obligation" of the second contract, they were to be judged as traitors.[10] Moreover, neither Beza nor the Vindiciae denied that the king, dependent as he was upon the people, could punish those who transgressed the law. In exercising such power, the king might be said to have been freed of his obligation to protect these individuals from injury as a result of their having broken the contract. To this extent, the second contract established a truly reciprocal relationship.

The dualism implied by the second contract was seriously qualified, however, by the failure of both writers to consider the king an independent participant in the making of the contract, or to acknowledge that he could under any circumstances be freed from his oath. The people appear in both treatises as an independent

[9] De jure, pp. 53, 79-80. The notion of an original contract between the people and their king developed in the Middle Ages. For references to the medieval publicists, see Gierke, Political Theories of the Middle Age, pp. 38, 146, n. 138.

[10] Vindiciae, p. 170.

body which antedated the king and in no way depended on him. He was created for them, not they for him.[11] No man, the Vindiciae affirmed, could be a king by himself or reign without a people. The king was "of the same mould and condition" as the people, and "raised from the earth" and borne upon their shoulders to the throne where he undertook "the greatest burdens of the commonwealth."[12] Far from being an independent agent, the king was bound to his obligations absolutely, while the people's obedience was always conditional.[13]

The second contract, then, appears to have created a dualistic state only in a limited sense, while the first contract unconditionally bound the king and people together to an ethical ideal outside of themselves, hardly a situation in which king and people are united merely conditionally by a reciprocal agreement. Moreover, the king's breach of the second contract simply freed the people from their duty of obedience; it furnished no avenue for positive action, either expressly

[11] De jure, pp. 33-35. Vindiciae, pp. 86-89.

[12] Vindiciae, pp. 76-77, 82. This quotation, as well as subsequent quotations from the Vindiciae, is taken from the translation of 1689, A Defense of Liberty Against Tyrants, ed. Harold J. Laski (New York, 1924), p. 118 (hereafter cited "trans. Laski").

[13] Vindiciae, p. 196.

or by implication. Resistance against the tyrannical king was the duty of inferior authorities whose relationship to the king, and whose right to resist him, were based not upon the second contract, which provided merely for disobedience, but on a third agreement, binding them with the king to the people and to God, which could not be broken by royal misbehavior, and which obligated them to resist. If the king failed to perform what he had promised, thereby removing himself from office, they, as members of his "administration" were to exercise their continuing power to bring him to justice. They acted, of course, in the name of the corporate people. By extension, therefore, the people's authority to resist, exercised through their representatives, derived not so much from their being freed from obligations as from their continuing obligation incurred in the first contract. The ultimate foundations of this state, then, were of a monistic, not a dualistic, nature. The system of obligations on which royal power stood or collapsed were those which king, people, and magistrates swore, in solidum, to uphold. Crucial to this system were the inferior magistrates, who united in themselves both popular authority and elements of royal power.

The dual role of the inferior magistrates derived

largely from political circumstances. The magistrates were indeed members of the royal administration, but Huguenot political theory and necessity militated against their being mere creatures of the king and responsible only to him. Inferior magistrates, observed Beza, were indeed under the supreme magistrate, received their "command" from him and were approved and installed by him. But in reality they were not dependent on the sovereign as much as on the "sovereignty" (by which he seems to mean the supreme power of the state residing ultimately in the people, but expressed concretely by the system of political and legal offices of the realm.) When the sovereign died, the magistrates, like the undying sovereignty, continued to function. Before the next sovereign could administer the oath of office to them, he himself was required to swear fealty to the sovereignty. His act of administering the oath to the magistrates in no way made the king the source of their power, but merely confirmed the power they had by right of their office.[14] The French monarchy, Beza argued,

[14] De jure, p. 42. "Hi porro omnes etsi supremo magistratui subsunt, ab eoque mandata accipiunt, ab eo denique inaugurantur et approbantur, non tamen ab eo proprie pendent, sed ab ipsa (ut ita loquar) supremitate." Cf. Carlyle, Medieval Political Theory, VI, 373-375.

had been constructed on these principles, for its founders had followed the example of Romulus in attributing to the people the power of creating their own magistrates.[15]

Beza was careful to distinguish, however, between personal servants of the king's household, whose office depended on him and terminated with the king's death, and servants of the crown or kingdom who performed public functions pertaining to the courts of justice or matters of war. Only the latter, officials of the sovereignty, were independent of the king. Such were, in Israel, the chiefs of the tribes, the elders, and the captains of the thousands, the hundreds, the fifties and the tens. In Rome, they were the consuls and praetors, the urban prefect and the provincial governors, elected during the Republic by the people and by the Senate during the Empire. Presently, he observed, most Christian kingdoms had castellans, all of whom, though now hereditary, "have not changed the nature of their right and authority" which was originally a "public estate and charge." In addition, civic officials such as mayors, vicars, consuls, judges, syndics and council-

[15] De jure, pp. 46-48.

men were still elected by the people.[16]

The Vindiciae also insisted that the inferior magistrates owed their authority to the people. He occasionally spoke of the chief magistrates of provinces and towns as being established first by God and secondly by the prince (in tones reminiscent of the Lutherans), but his general theme is the dependence of magistrates on the people. The officers of the crown received their authority (at least formerly) from the people in the assembly of estates, which alone could remove them. In contrast to the king's personal officials, these men depended not on the king but on the kingdom, or sovereignty, upon which the king himself depended. In France, these officials included the constable, the marshals, the chancellor, the secretaries, treasurers and others who "heretofore were created in the assembly of the three estates."[17]

Since these officials were sworn into office by royal authority, however, were they not thereby

[16] Ibid., pp. 41-42. Beza apparently did not understand the personal nature of feudalism, speaking as he did of feudal officials with a "public charge." His affirmations regarding civic officials were also questionable, for many recent royal edicts had severely limited the "peoples'" right to elect them.

[17] Vindiciae, pp. 64, 88-89, 96 (trans. Laski, p. 131), Cf. pp. 46-47, 66, 210, 211.

responsible to the king rather than to the people? Beza freely admitted that the king could dismiss them if they failed to keep their oath, but only after the proper legal procedures and hearings. The laws, not the king who administered them, were to determine whether an official had broken his oath. Since the king and his officials had mutually sworn the same oath to the people to secure justice, they were responsible for each other's fulfillment of that promise. The basis for royal action against magistrates was, in fact, the same as for magisterial resistance to the king: both king and magistrates were responsible to the people, not to each other.[18]

The Vindiciae explained this mutual obligation of king and magistrates at some length, relying primarily on principles derived from Roman law. "The king," the author maintained, "swears that his most special care shall be for the welfare of the kingdom, and the officers of the crown take all the same oath." The breaking of

[18] De jure, pp. 43-44, 79. On pp. 43 and 80, Beza indicated that inferior officials might resist after being freed from their oaths, but these remarks seem to be inadvertencies, since his basic position was that magistrates' oaths were not sworn to the king and could not be broken by royal malfeasance. Theirs were obligations a quo nulla illius culpa absolvi possunt (p. 44).

faith by any of them or the king in no way excused the others from their oath of fidelity, for if several vowed the same thing, the default of one had to be made up by the rest. Their position was comparable to co-debtors equally responsible for a debt or co-tutors equally entrusted with the ward's affairs. In Roman law, any tutor could take action against a delinquent co-tutor on the ward's behalf; the co-administrators of a kingdom fulfilled their charge by bringing the delinquent king to justice.[19] The magistrates' oath made them more responsible to the people than to the king, for it was sworn first to them, and secondarily, or only formally, to the king.[20] Although the magistrates were members of the royal government, having sworn the same oath as the king, they were nevertheless agents of the people,

[19] Vindiciae, pp. 207, 209-210 (trans. Laski, p. 206). Among the Roman laws upon which this basic element of the Vindiciae's argument was founded, and which are here cited, was D. 26, 7, 3, "Si plures curatores dati sunt . . . ratum haberi debere etiam quod per unum gestum est." Co-tutors "dati sunt enim quasi observatores actus eius [of the chief tutor], et custodes: imputabiturque eis quandoque, cur, si male eum conversari videbant, suspectum non fecerint. Assidue igitur et rationem ab eo exigere eos oportet; et solicite curare, qualiter conversetur." He also cited D. 26, 10, 3, "Tutor quoque contutorem potest suspectum facere."

[20] Ibid., pp. 96. He mentions specifically, p. 32, the oath of the twelve peers of France. "Hi vero vicissim iurant, se non Regem, sed Regium diadema tuituros, Rempubl. consilio adiuturos, sacro Principis consilio in eam rem, pacis bellive tempore, assuturos, ut ex formula Patriciatus liquido patet."

thus performing a dual function. This represents the Huguenots' best solution to the late medieval problem of inferior authorities who were obviously dependent on the king, yet were regarded as agents of the community.

Any discussion of inferior magistrates in Huguenot literature must, of course, take into account that the Huguenots, unlike the Lutherans, distinguished between ordinary inferior authorities and the "estates." Both Beza and the Vindiciae divided inferior magistrates into two groups, some being members of the estates and others the ordinary officials such as officers of the crown and magistrates of towns and provinces.[21] A certain dualism might be implied by such a division if the estates were considered representative of the people while ordinary magistrates functioned only as members of the royal administration. Beza, in fact, twice equated the estates with the people, clearly implying that they "represented" them, but did not say that subordinate magistrates, whose duties were essentially administrative, were to be considered "representatives."[22] Moreover, the authority of

[21] De jure, pp. 39-40. Vindiciae, pp. 46-47.

[22] There is, however, no precise meaning given to "representation" in Beza's work, and my use of the term is necessarily as loose as his.

the estates exceeded that of the magistrates. As "protectors of the rights of the sovereignty," they were to restrain the sovereign. Since they could elect him, they could also judge and punish him, and restore matters "to their former condition."[23] The magistrates were obligated by their oath to defend the laws and the people, but their authority did not include the right to depose tyrants. They could use armed force, but only in consultation with the estates concerning the public good.[24] If the estates could not be assembled, all the inferior magistrates, or the "saner part" of them, could still resist, but ought also to demand that the estates be

[23] De jure, pp. 46-47, 67, 71. On p. 74, he states that when a king or emperor commited a felony against his vassals, that is, his subjects, he lost his feudal estate, not to the vassals themselves, but to the disposal of those "qui supremam illam potestatem referunt," by which he must mean the estates.

[24] Ibid., pp. 43, 67, 78. Perhaps Beza's reluctance to sanction the acts of magistrates not conforming to the wishes of the estates led him, in 1580, to advise a group of "brothers in Belgium" that inferior magistrates ought not to resist the Edict of Pacification of 1567 (by which Catholics were to be tolerated) which had been passed by the Archduke and the States-General. Otherwise, Beza still distinguished between private men and inferior magistrates, urging that all must act according to their "grade and estates," and that all magistrates, no matter what their rank, were obligated to protect true religion and drive out the false. See van Prinsterer, Archives . . . d'Orange-Nassau, 1st series, VII, 248-54

convoked. They should follow the example of David who, as a commander of the armies of Israel, (and thus an inferior magistrate), defended himself by arms after trying all peaceful means to guard himself from the tyrant Saul. He held himself, however, "within his limits," and contrived nothing against the person of the king, for only God or the estates had the right to take away his life or his royal power.[25] Following this example, the magistrates should resist "according to their rank," or "within the limits of their vocation," as the Lutherans had stipulated.[26] Beza's reluctance to allow ordinary magistrates to resist to the same degree as the estates (cf. above, ch. 4, n. 67) may be due in part to the magistrates' traditional role as royal (or local) officers rather than as agents or representatives of the corporate people. Beza did not, however, discuss this problem. In view of his total political outlook, it is unlikely that he considered magistrates more as royal than as popular officials.

The Vindiciae asserted more clearly that both the estates and the magistrates represented the people. The

[25] Ibid., pp. 45-46, 75-76, 78-79.

[26] Ibid., pp. 43, 70, 78-80. Private persons, of course, lacked the public vocatio necessary to resist (pp. 31, 40-41). Cf. Vindiciae, pp. 48, 65-66.

author had a clearer understanding of representation than did Beza, first acknowledging that the people, in jointly forming a covenant with God, represented "the office and place of one man." "The people" were, on one hand, those magistrates who held authority from the people, who had been established as "consorts of the empire" (quasi imperii consortes) to restrain the king and to represent the "whole body" of the people. On the other hand, they were the assembly of estates which was "an epitome or brief collection of the kingdom," and which handled all public affairs.[27] The estates, which represented "the whole body" in Israel, were the judges, captains, centurions and others, and in every well-governed kingdom they were the princes, officers of the crown, peers, lords and deputies of the provinces. Many of the officials whom Beza distinguished from the estates were viewed by the Vindiciae as members of that body. Even apart from the estates, however, these inferior

[27] Vindiciae, pp. 37, 46-47 (trans. Laski, pp. 90, 97). For discussions of the nature of representation in Monarchomach literature, see Gierke, Althusius, pp. 160-61, 213-15, 224-25; Wolzendorff, Staatsrecht und Naturrecht, pp. 89-94; and Bohatec, Calvin's Lehre, pp. 207-10. These discussions are based, in great measure, on technical questions of corporation law which the authors have read into the sixteenth-century writings.

magistrates were representatives of the people.[28]

The author of the Vindiciae sometimes followed Beza in assigning the task of resisting tyrants specifically to the estates.[29] However, he distinguished not between a "deposing" function of the estates and a "resisting" role for the magistrates, but between different grades of magistrates.[30] Officers of the kingdom as a whole, whether members of the estates or not, were to guard the laws of God and the contracts on which the state rested, judge and punish the tyrant who broke them, and free the entire kingdom from tyranny and impiety either peacefully or, if that failed, by armed force. The magistrates

[28] Vindiciae, pp. 89, 194, where he says "Superior vero, universus populus est, quive eum repraesentant, electores, palatini, patricii, ordinum conventus, et caeteri."

[29] Ibid., pp. 40-41, 204.

[30] Ibid., p. 90, where he observes that in Israel there were magistrates in the towns who held power similar to that held by other officials over the kingdom as a whole, except that it was limited to the towns themselves. These magistrates also, however, had an assembly, without whose advice nothing pertaining to the republic could be decided. Later, p. 99, he mentions that in France "there are also dukes, marquesses, earls, viscounts, barons, seneschals, and in the cities and good towns, mayors, bailiffs, lieutenants, capitols, consuls, syndics, sheriffs and others" to whom certain regions or cities had been committed for the protection of the people, "quatenus eorum iurisdictio patet," and adds, with perhaps a touch of regret, "etsi quaedam ex illis dignitatibus haereditariae hoc tempore habentur."

of cities or provinces were to rid only their own territory of tyranny. "The duty of the former," he said, "is to repress (coercere) the tyrant, that of the latter, to drive him from their confines (a suis finibus arcere tenentur)."[31] The officers of the kingdom were not to depose the tyrant, but only to "repress" him. Unlike Beza, however, he did not require that their resistance be authorized by the estates. He gives the impression that even "repression" resulting in the de facto deposition or death of the tyrant was carried out by the authority of the magistrates themselves, all of whom represented the people. Furthermore, even those with limited, local jurisdiction could apparently act in the name of the universal body of the people (see below, p. 189), in which name kings could be expelled or put to death.

Distinctions between magistrates and estates cannot, therefore, be interpreted as distinctions between agents of the people and agents of the king. Whatever his rank, each magistrate in his dual capacity acted on the people's behalf against one with whom he shared the administration of the realm. However, since Beza and the Vindiciae emphasized so strongly the representative character of

[31] Ibid., pp. 74, 207-10, 214-16 (trans. Laski, p. 207).

those who actually removed the king from office, it might appear that the magistrates' administrative role was far less significant than their representative capacity, and that resistance was, after all, carried out by one separate bloc of power, the people and its representatives, against another, whose administrators were only popular agents in disguise.[32] Further examination of the inferior magistrates' relationship to the king will indicate, however, that Beza and the Vindiciae both regarded inferior magistrates as full participants in the sovereign governing power and associates of the king in a corporate governing body.

We have already observed that the magistrates' oath did not separate them from, or oppose them to, the king, but made them responsible with the king to God and to the people. The government was a unitary corporation, deriving its unity not only from God, as the Lutherans had implied, but from the corporate people as well. For the Lutherans, the sword of authority came directly from God to the emperor, the estates and the princes, while

[32] Hösz, for example, "Zur Genesis," p. 213, emphasizes the notion of resistance by "Repräsentanten des Volkes," upon the breaking of the political contract, in Beza's thought.

the Huguenots observed it passing through the corporate people en route to the king, the subordinate magistrates and the estates. Thus Beza could say that "the governing of the realm is not placed entirely in the hands of the king but only the sovereign rank, since the inferior officials each have their own part according to their rank." Together this group constituted a corporation for which the sanior pars could make decisions. In Hebrew history, for example, the tribes of Reuben, Gad and Manasseh were once attacked by the other tribes for having become idolatrous. Beza maintained that even though no one tribe had power over any other, since all twelve were unum universitatis corpus, the better part had the right to reprove the errant members.[33]

The Vindiciae offered a fuller explanation of government by a corporation of near-equals. Why is it said, asked the author, that kings have eyes and ears without number, hands of greath length and feet of exceeding swiftness? Are they Argos, Gerien, Midas, and others? Of course not, he answered, for these descriptions refer

[33] De jure, pp. 43, 76. Beza applied the corporate analogy to the estates as well, pp. 54 and 75. For discussions of the maior et sanior pars in late medieval thought, especially that of Marsilio of Padua, see Wilks, Problem of Sovereignty, pp. 59, 116, 196, 263, n. 4; and Brian Tierney, Foundations of the Conciliar Theory (Cambridge, Eng., 1955), p. 116.

to the people who lend the king their faculties, without which the king could not survive. And what is said of the people universally ought to be understood of those who represent them. The officers of the crown are associates of the king in the administration of justice, and participants in the royal power and authority as assistants in affairs of state. Their presence at the coronation was not simply a pageant, because those rites committed the commonwealth to the king, as the principal tutor or guardian, and to them, as contutores or assistants who were to discharge not only their own particular duties but also to prevent the prince from bringing injury to the people. Failure to restrain the king when necessary made them equally as guilty as he, for such was the nature of their mutual obligation.[34]

Distinctions between grades of authority counted for little in such a government. If the magistrates faithfully prosecuted their erring prince, they could be thought of "as patrons, tutors or petty kings" (patroni,

[34] Vindiciae, pp. 86-89, 91, 196-99. On p. 89 officers of the crown are called "contra Regis in iure dicundo veluti Assessores, Regii imperii consortes." On pp. 48 and 203-04 occurs the common comparison of the king and magistrates to the Pope and Council. The notions that the cardinals were pars corporis papae and coadjutors of the pope were common in the late Middle Ages. See Wilks, Problem of Sovereignty, pp. 457-58, and Tierney, Foundations, pp. 95, 149.

tutores, reguli).[35] The author even described them as "living and speaking law," using terms ordinarily reserved for royalty.[36] The people, he said, had attributed the administration to all principal officers of the kingdom, but in addition they had created a king to prevent rivalries and factions among these men who were otherwise essentially equal.[37] The king might hold the first place in the realm, while individually they held the second, but together, as a corporate body, they were his superior.[38]

Like the German princes and estates, these magistrates "ruled with" their king. Illustrations of this the author of the Vindiciae found in the French constitution, in which suits between the king and his subjects,

[35] Ibid., p. 201. The magistrate's guilt for his inaction is stressed repeatedly, as on pp. 41, 50, 65, 196-99, 207, and no allowance is made for private persons to act when the magistrates fail to do so, except when it concerns a tyrant absque titulo whom anyone could kill.

[36] Ibid., p. 75. For medieval conceptions of the emperor and kings as lex animata, see Kantorowicz, King's Two Bodies, pp. 127-35.

[37] Ibid., p. 206, ". . . ne qua inter Pares aemulatio asset, rex institutus fuit, qui supremum in administratione reipub. locum teneret."

[38] Ibid., p. 199. On p. 91, the author offers the illustration of the council of seventy-one elders in Jerusalem who together judged the king just as he judged everyone of them in particular.

once handled by the peers of France, were now judged by the Parlement of Paris, the "court of peers." All decrees, treaties, declarations of war, or offers of peace made by the king were approved and registered by the Parlement of Paris, whose members had formerly been chosen and removed by the court itself. Furthermore, no letters of the king were valid until signed by the secretary and sealed by the chancellor, who could refuse to approve them if he wished. The Estates-General could refuse to consent to alienation of the royal domain, and the "council of state" reviewed, and had at times reversed, the king's decisions in capital cases.[39] Theopompus, King of Sparta, had himself expressed the ideal of government in the hands of many. After the ephors had been established as a check on royal power, he asserted that "the more [magistrates that] are appointed by the people to watch over, and look to the affairs of the king, the more those who govern shall have credit, and the more

[39] Ibid., pp. 97, 125-130, 152. Beza notes, p. 48, that Seneca, Epistle 108, sec. 31, in Seneca's Letters to Lucilius, trans. E. P. Barker (Oxford, 1932), II, 23, followed Cicero's De Republica, II, 31 (Loeb ed. London, 1928), pp. 162-67, in claiming an appeal from the king to the people, and adds that in the capital case of Horatius, who had killed his sister, the people absolved him after he had been convicted by the judges of King Tullus Hostilius.

safe and happy shall be the state."[40]

To solve the problem of making decisions in a government shared by many, the Vindiciae called upon the same principle which Beza had observed operating among the ancient Hebrews, and which was common in corporation law, the "majority" principle. Action taken by the "greater and wiser part" (maior et sanior pars) of the princes and optimates was understood to be the action of the whole body.[41] The Vindiciae went beyond this, however, allowing a single inferior magistrate to resist. Since the prince was established by the people as a whole, action against him could be undertaken only by the commandment of all, that is, "of those who are the representative body of a kingdom, or of a province, or of a city, or at the least of some one of them." This is not a negation of the corporative principle, however,

[40] Vindiciae, p. 102 (trans. Laski, p. 136). This is certainly not the usual rendition of what Theopompus said, but I have not yet located its source.

[41] Ibid., p. 50. "In summa: ut licet universo Populo repugnare, ita et Principibus Regni, qui universum repraesentant, non secus ac decurionibus pro corporis utilitate, contrahere. Ut vero refertur ad universos, quod publice per maiorem partem geritur. ita quod maior pars Principum seu optimatum fecerit, omnes; quod omnes, universus Populus fuisse dicitur." Also, on p. 196, he says that a tyrant may be repressed by the officers of a kingdom, or by some of them (aut saltem pluribus).

nor merely a defense of local autonomy. The single magistrate acted not in his own name, nor even in the name of his locality, but in the name of "all." He led the resistance as the *sanior pars* of the entire corporation.[42]

This right of one person to act in the name of all can be found in medieval corporational and conciliarist

[42] *Ibid.*, pp. 204-10 (trans. Laski, p. 209). On p. 210, he says, "singuli denique principem non constituunt, sed universi, Itaque universorum, eorum inquam, qui universos in regno, regione, urbeve quae regni partem faciat, representant, jussum expectent oportet, aut unius saltem ex illis, antequam adversus principem quidquam moliantur." Cf. Beza, *De jure*, pp. 53-54, who observed that one town (Jerusalem) had executed King Amaziah (II Kings 14:19). Allen, *Political Thought*, p. 323, argues that the *Vindiciae*'s position on representation was ambiguous since at times it made the *proceres* collectively the representatives of the people, at another time only one of them was sufficient. It seems rather that the author had one basic position: the *sanior pars*, whether it was made up of several *proceres* or one, could act for all. Treumann, *Die Monarchomachen*, p. 71, asserts that resistance led by one person indicates a lack of theoretical and practical unity in the state. This may be true for practical unity, but theoretical unity was not destroyed. The single magistrate's right to resist, in fact, depended on the unity of the whole political community. His authority was derived from the people, not merely from his own local community, a doctrine that was to influence German thinkers of the early seventeenth century. See below, ch. 9, p. 339.

teachings.[43] The concept that "what the magistrate does, the corporation itself is seen to do" (quod faciunt magistratus videtur ipsa universitas facere) was familiar to students of Roman law and, no doubt, to the author of the Vindiciae.[44] He chose, however, to justify such individual action by appealing primarily to the Roman law idea of obligation in solidum and to the joint responsibility of all tutors or guardians of a ward. This Roman institution was not merely illustrative, but was taken to be in some sense a normative legal precedent for the inferior magistrates' relationship both to the king and to the people. A government based on this model would be unitary, not dualistic,

[43] Cardauns, Widerstandsrecht, p. 68, cites Gerson, Opera, ed. DuPin (Antwerp, 1706), II, 973, who allowed one city or a few rational people to call a council. Wilks, Problem of Sovereignty, p. 222, n. 5, cites William of Ockham's statement that one person in a corporation could supplant another who neglected his duties, and, p. 263, n. 4, mentions the view of Tholemy of Lucca and Augustinus Triumphus that one man, such as the pope, might be a sanior pars.

[44] This phrase occurs in a gloss of Azo on C. 1, 54, cited from ms. by Post, Medieval Legal Thought, p. 356, n. 72. Similarly, Accursius' gloss on C. 1, 54, 1, ad v. Provincias, says that "Ipse magistratus universitatem repraesentat," and refers especially to inferior magistrates. Statements such as these would seem to be of great significance for theories of resistance by inferior magistrates, but this cannot be insisted upon, for they were not, to my knowledge, cited for this reason in the sixteenth century.

with each contutor or magistrate a member of a corporate body in charge of promoting the welfare and safety of the ward, or "the people," whom it represented in all legal matters. Each was responsible for the actions of the whole body, so that either the chief tutor of one of the coadjutors alone could act for the ward, and in his name, when all the others shirked their duties. The chief tutor, the king, was not the separate "subject of rights" in a state founded solely on his voluntary contract with the people, but was only the highest ranking minister whose duties and obligations were as great as, or greater than, those of his coadjutors, who together had more power than he, and could punish him for his mishandling of the ward's affairs. All of this was possible without a reciprocal, feudal type of contract, for not even the king could be freed from his obligations by the disobedience of the subjects.

The chief dualistic aspect of this government was that the people were bound to the king only conditionally, and thus were a "subject of rights" distinct from him, and had elected inferior magistrates to give themselves political power against him. Actual opposition to the king, however, came not from a body apart from him, but from members of the body of which he was the head. The people from whom he had separated himself in breaking

his oath had no power to resist him. The second contract, as we have seen, allowed only disobedience. Even the magistrates, we may suppose, could not, as "people," resist. Only after they had entered office by taking an oath to the kingdom (and to God), could they act against the king. They resisted him not because they had been freed from obligations to the king undertaken by the second contract, but because their joint obligations towards the kingdom continued to bind them. They could resist not simply because they represented popular authority, but because they were members of the royal government as well. In the final analysis, of course, the entire government rested on the authority of the people, and in this sense all political acts were done in their name, even those of the king. This only proves, however, that this state was basically a corporate unity, governed by ministers among whom the king was only slightly elevated above the rest.

Beza and the Vindiciae thus blended two different conceptions of government: one a semi-dualistic, feudal arrangement in which two parties pledged to abide by its terms until one of them broke his faith; the other a monistic, corporative system in which only one independent party, the people, set over them a group of administrators

who were never independent, but were all equally bound by their joint responsibility to care for the people. Inferior magistrates operated principally in this second system. The first provided the broad first principles for a people's rights against their king, but only the second provided the means to legally exercise these rights. Magistrates could appropriate the authority which the people and the law gave them to judge the king only as magistrates, that is, only after their oath to the kingdom had obligated them to be jointly responsible for the acts of the king. A system of checks and balances was not yet conceived, whereby separate legislative or judicial bodies could limit an executive. Inferior magistrates possessed both legislative and judicial functions, and were at the same time co-executors with the king. They shared in his legislative, judicial and administrative functions as members of one all-inclusive body, forming a corporate government the very nature of which included means of limiting and resisting the king.[45]

[45] An element of feudal decentralization appears in the Vindiciae, however, for on p. 104 we learn that each town of the kingdom had on its own behalf made a contract with the king and could also resist on its own, apparently because of this separate contract. Many historians have interpreted Huguenot thought as the reaction of feudalism to monarchical centralization, which the above passage seems to support. See, for example, Charles Labitte,

Huguenot political thought thus produced a possible solution to the problem of how popular sovereignty was to assert itself against royal supremacy. By combining

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De la démocratie chez les prédicateurs de la Ligue (Paris, 1865), pp. 64-65; Treumann, Die Monarchomachen, p. 56; deLagarde, Recherches, p. 257, who considers the doctrine of inferior magistrates a justification of their usurpation of local powers; Jacques de Missècles, Les Huguenots et la monarchie au XVI^e siècle (Colmar, 1928), pp. 7-10; Barker, "A Huguenot Theory of Politics," pp. 53-55; Thompson, The Wars of Religion, pp. 475-76; Roman Schnur, Die französischen Juristen im konfessionellen Bürgerkrieg des 16. Jahrhunderts (Berlin, 1962), p. 13. An important modification of the above view is that of Michael Walzer, The Revolution of the Saints (Cambridge, Mass., 1965), pp. 72-74, who argues that the Huguenots attempted "to transform feudal status into constitutional position," to "turn the 'valiant knight' into a conscientious office-holder," an argument which fails, however, to account for the non-feudal officials and the authority of the political community in Huguenot thought. Elements of feudal and provincial independence are indeed present in Huguenot politics, and, to some extent, in their writings, but these are outweighed by their emphasis on the corporativeness of the community and its ministers, whose joint responsibilities are stressed far more than their separate contracts, at least in the two treatises with which we are here dealing. We may best conclude with Pierre Mesnard, L'essor de la philosophie politique au XVI^e siècle (Paris, 1936), p. 325, that the power of the state was neither unified completely nor separated, but "composed of a hierarchy of distinct powers, of magistrates equally useful and adapted to their functions, which range from the simple private person to the "sovereign" or supreme magistrate. The latter has a delegation of authority for the whole country, each of the others in his domain." Mesnard refers here to Beza's work, but this accurately describes the thought of the Vindiciae as well, although both authors would also say that the "officers of the Crown" also had authority for the whole country. Cf. Allen, Political Thought, p. 325, who denies any notion of a federal state of independent communities in the Vindiciae.

the two powers in the inferior magistracy, they created a sovereignty which represented popular authority but which, at the same time, allowed for popular resistance against tyranny from within the structure of the government itself. In this sense, Huguenot thought was an important step from the irregular, independable institutions of medieval dualism to the modern constitutional state.

CHAPTER VI

MINOR HUGUENOT WRITERS OF THE 1570'S

The lesser Huguenot pamphlets of the 1570's continued to reflect the basic elements of the theory of inferior magistrates developed by Beza and earlier writers. Most of them, however, lacked the comprehensiveness of Beza and the Vindiciae, issuing their statements concerning inferior magistrates in the form of isolated maxims rather than as deductions from a total political system. As in the previous decade, several tracts expressed radical ideas of resistance, urging private men to resist when the magistrates failed to secure justice and the prince lowered himself to the level of a private person by making unjust commands.[1] Far more common, however, was a reliance on the estates to rid the realm of tyranny and, as we shall see, a continuing tendency

[1] See the Epistre aux délicats et flatteurs machiavelistes (n. p., 1575), p. 9, and Le politique, Dialogue traitant de la puissance, autorité, et du devoir des princes, in Simon Goulart, Memoires de l'estat sous Charles neuviesme (Meidelbourg, 1576-78), III, 65-66.

to associate magistrates of various kinds with the estates in accomplishing this task. Thus, a few writers justified the resistance of inferior magistrates by pointing to the authority they derived from the community, although others considered the Prince of Condé the bestower of the right to resist. The authority of God, however, continued to be the ultimate appeal of most Huguenots who supported magisterial resistance, an appeal which prevented several writers from grappling fully with questions of political power relationships which could too easily be solved by the claim of divine sanction.

Two treatises against which this charge cannot be made, and which stand out above the other writings of this period, merit individual consideration below. The anonymous Discours politiques des diverses puissances is notable for its relatively comprehensive presentation of an organic theory of the state, and the Politices Christianae of Lambert Daneau advanced beyond the maxims relied upon by other writers, treating the legal status of magistrates in some depth.[2] Both treatises

[2] Discours politiques des diverses puissances établies de Dieu au monde, Goulart, Memoires, III, 147-213. First published in 1574, according to Jacques de Lelong, Bibliotheque de l'histoire de la France (Paris, 1775), II, #27125. The author is, apparently, unknown. Goulart, p. 147, says only that it was written by a "bon et docte

struggled with the problem of magisterial independence from kings who were the source of magisterial authority, each emerging with its own solution, but each resting its case on the authority of the community. Most of the pamphlets of this period simply overlooked this problem, accepting the conclusions of men with more acute minds without investigating their premises.

Many Huguenot writers still placed their faith in the Estates-General. The estates of France, said the Reveille-Matin, were comparable to the Roman senate in that they were "as sovereign magistrates above the king." They could, like the Roman senate, depose the king, for they had been elected by the people expressly to prevent tyranny.[3] Le politique called the estates "autheurs des princes," and observed that they were as "deputies of

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personnage" and that it had fallen into his hands by a lucky encounter. Lambert Daneau, Politices Christianae libri septem (Geneva, 1596, 1st pub. 1577).

[3] Le Reveille-Matin des François et de leurs voisins (Edimbourg, 1574), Dialogue 2, pp. 80, 85-88. Nicolas Barnaud is given as the author by Henri Hauser, Les sources de l'histoire de France, (Paris, 1912), III, 249-51. Doneau and Hotman have also been considered by some. See, for a discussion, Charles Mercier, "Les théories politiques des Calvinistes en France au cours des guerres de religion," Bulletin de la Société de l'histoire du protestantisme français, LXXXIII (1934), 249-52. Cardauns, Widerstandsrecht, pp. 76-89, has a useful analysis of the sources used, or plagiarized, by the Reveille-Matin.

the people," the "sovereignty" to whom the king swore his oath of office.[4] To the author of the Question, a savoir s'il est licite sauver la vie, who was heavily influenced by Claude de Seyssel, the Estates-General of France were "principaux membres de la Couronne" who had as much power in relation to the king as did the seven electors of Germany vis-à-vis the emperor, in that by enforcing the Salic law they controlled the succession of kings.[5] Like the ephors of Sparta and the plebeian tribunes in Rome, the Estates-General had been established by the people, according to Pierre Fabre, to prevent the "loix de l'estat" from being broken. God had given the estates the sword as a sovereign power to be used to restore the realm to its original condition when upset by tyrants.[6]

At times the power attributed to inferior magistrates was nearly indistinguishable from that of the estates. One author granted to the estates a crucial role in making royal edicts, but stipulated that the

[4] Le politique, Goulart, Memoires, III, 67.

[5] Written at La Rochelle, April, 1573, in Goulart, Memoires, II, 183.

[6] Response au cruel et pernicieux conseil de Pierre Charpentier (n. p., 1575), pp. 21-23, 35. To support his view he cites Hotman's Franco-Gallia.

sovereign courts of parlement and the officers of the crown must also give their consent.[7] Le politique listed "puissances inferieurs" along with "deputéz du peuple" as those who made and removed princes, who, in times of tyranny, were "as sovereign magistrates above the prince" and whom princes could not remove because they derived from the "first source of governments established by God and by nature." If prevented from actually removing or punishing the tyrant, they could always withdraw their obedience from him and defend themselves.[8] In all monarchies and republics, said the Discours des iugemens de Dieu contre les tyrans, general and regional estates, councils and persons of authority checked the misuse of authority according to the means given them by God. The estates and inferior magistrates could depose the prince whom they had created.[9] Admitting that the estates no longer had the power over kings which their supposed

[7] Question, a savoir s'il est loisible aux suiets de se deffendre contre le Magistrat, Goulart, Memoires, II, 173.

[8] Goulart, Memoires, II, 67. The irrevocability of the magistrate's tenure was emphasized also by the Response a la Question a scavoir s'il est loisible au Peuple et a la Noblesse de resister par armes (1575), Goulart, Memoires, III, 232-33.

[9] Goulart, Memoires, II, 401, 404. God, he said, sometimes uses "des Estats et Magistrats inferieurs, lesquels par voye legitime desfont le Prince qu'ils avoyent estably sur eux, quand ils vient à les tyrannizer.

predecessors, the parlements, had enjoyed, another author appealed to the French nobility to rescue the realm from destruction, implying that the nobles who carried the sword given by God could exercise the powers no longer held by the estates.[10]

Only the Reveille-Matin seems to maintain Beza's distinction between the power of the estates to depose, and that of the magistrates to resist, the king. Its author equated the magistrates provided by the articles drawn up at Nîmes with the tribunes of the people in ancient Rome, who guarded civil liberty and initiated legal processes against high officials, but he did not involve the magistrates in the deposition of kings.[11] Even one "party" in a chateau, town or province, if it received no support from others, could undertake armed resistance, but again it could not actually overthrow the tyrant.[12] Other tracts did not make this distinction,

[10] Remonstrance aux seigneurs, Goulart, Memoires, III, 41-42.

[11] Reveille-Matin, Dialogue 2, p. 124. He refers to article 22 of this constitution brought from heaven by Daniel (see Dial. 1, p. 149) which provided for the accusation and trial of officials by the major, council and assembly of all Huguenot towns.

[12] Reveille-Matin, Dialogue 1, p. 90. I do not find in the Reveille-Matin any statement to substantiate Allen's assertion, Political Thought, p. 312, that the work attributes to subordinate magistrates a share of the sovereignty. Allen may be referring to p. 88, where

but left the constitutional position of inferior magistrates vis-à-vis the estates quite unclear.

Whatever their precise relationship to the estates, magistrates seem to have absorbed from them the right to resist. This was not, of course, the only source of their power. Remaining from the previous decade was the belief that princes of the blood not only could act against the king themselves, but could sanction the resistance of others. According to a tract written in response to the siege of La Rochelle in 1573, the Huguenots were authorized by the Prince of Condé, who, as a peer and councillor of France, was himself armed by the estates, the Queen Regent and the royal edicts;[13] "and

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the author calls the estates "souverains magistrats," but this cannot be applied to the magistrates as such. Mercier, "Les théories politiques," p. 251, emphasizes the feudal nature of the provision that any one party could resist. It is true that feudal law is cited in support of this, but the author first says that this is "loisible par tout droit et raison divine, humaine, politique et des gens," and emphasizes especially the natural law principle that one need not suffer simply because of the negligence of others.

[13] Question, . . . loisible aux suiets, Goulart, Memoires, II, 174-75. Although this author mentioned no specific edicts, Fabre, Response, p. 39, specified the Edict of January, 1562 (which he gives as 1561) as that which, along with the authority of the Estates-General, authorized Huguenot resistance. That edict had granted toleration to the Huguenots and allowed their synods to meet in places where they were not prevented by the magistrates. This provision making necessary the permission of the magistrate (a modified version of cujus regio, ejus religio?) was also included in the Peace of Monsieur, 1576.

also consequently, all other communities and cities" were armed.[14] According to François Portus Candiot, Condé's death in 1569 had made no difference, since "ce Prince vit maugré la mort," and the present conflict (1573) was a continuation of Condé's just war, not a new conflict needing new authorization.[15]

Generally, however, authorization for resistance was found in the people and in God. The Reveille-Matin favored the principle of election and of popular control over kings through agents of the community such as the

[14] Question, . . . loisible aux suiets, Goulart, Memoires, II, 175. The author contrasted the situation in his own day with that when the writers of Scripture forbade resistance. The early church, he observed, had not been protected by edicts, princes and magistrates, nor had the French Protestants been protected before the death of Charles IX. Since then, however, the proper authorities had a "vocation legitime d'user des armes" to defend religion. Cf. Fabre, Response, p. 39. With modifications, this was the same answer to scriptural commands to obey as that given by the Lutherans.

[15] Response . . . aux lettres diffamatoires de Pierre Carpentier, Advocat (1573), Goulart, Memoires, I, 356-57. This tract was written in reply to the Lettre de Pierre Carpentier Iurisconsulte, addressee à François Portus Candiot (1572), Goulart, Memoires, I, 323-40, which charged "the [Huguenot] cause" with making war without the permission of a magistrate since Condé, who had formerly given his authority, was now dead, and his sons were not yet of age (p. 334). Candiot replied that the Queen of Navarre, as tutrice of the young princes, must be taken into account, "laquelle eust esté chef de l'armee, si elle eust esté homme."

Roman senate and tribunes of the people or the English parliament.[16] In the event of tyranny, said Le politique, the people could elect leaders--apparently in addition to the regular inferior magistrates--as once they had elected the prince.[17] Pierre Fabre recognized that the authority of inferior magistrates came from the king, but he emphasized that it need not be renewed by each succeeding king since the magistrates had "the authority of the preceding king and of his predecessors." Magistrates were not, then, dependent upon the reigning monarch. In fact, all magistrates, including the king, had been created by the people, but all authority came ultimately from God, Who gave the sword both to the sovereign estates and to inferior magistrates. In short the officers of the crown and other leaders in the Huguenot army had been "ordonnez de Dieu et des Roys, et advouëz du peuple."[18] Other Huguenots, less willing to

[16] Dialogue 2, pp. 80-88. The author is unclear, however, about the status of inferior magistrates as such. He does not mention them along with the estates as agents of the people, except, perhaps, by analogy with the Roman tribunes.

[17] Goulart, Memoires, III, 67.

[18] Response, pp. 35, 46-47. As for the people of France who created the magistrates, Fabre asserted that the plus saine part was the Huguenot party; hence, according to corporation theory, all their leaders and captains were sanctioned by the people of France as a

mix popular sovereignty with their theology, continued to consider magistrates as simply the instruments of God.[19] One tract interpreted Romans 13:1 (as had the Lutherans) to mean that "tout Magistrat souverain et subalterne est puissance. Il est donc ordonné de Dieu." Thus, except for the king's power to punish inferior magistrates for failing to administer justice, king and magistrates "are equal, each in the execution of his charge." The magistrate's duty to God (not to the people) required that he uphold the laws when the king acted illicitly.[20] Thus, in spite of an increased awareness of the authority of the community in some of

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whole, not merely by a faction. Generally, he speaks specifically of the Estates-General, for "tout ce que est fait sous l'authorité d'une seul partie desdicts estats est legitimement fait, et sous l'authorité publique." (p. 38)

[19] See the Epistre aux délicats, p. 9, and Le tocsin contre les massacreurs et auteurs des confusions en France (Reims, 1579), p. 1.

[20] Question, . . . sauver la vie, Goulart, Memoires, II, 180-81. See also Eusebius Montanius, Een clare Beantwoordinghe uit Gods woort op deze vrage: oft een Christelike onderoverheigt haerder hoogeroverheit, dewelcke om der oeffeninghe der waren religie over haer ondersaten . . . (Middelbourg, 1588), a Dutch rendition of the theory of inferior magistrates which emphasized that counts, noble lords, burgomasters, echevins and other such offices had a charge from God as much as superior authorities, and a duty to resist tyranny. This tract may have been written in 1568, according to Doumergue, La pensée . . . politique de Calvin, pp. 526-29. A summary of its contents is in Mesnard, Philosophie politique, p. 367. Some writers, of course, preserved

these Huguenot writings, it was not well integrated into a total theory of government. Lacking such a theory, the minor Huguenot writers continued to rely heavily upon the divine origin of political authority to equalize the power of all magistrates and allow inferiors to resist the king.

Contrasted with the other minor Huguenot works of the 1570's, the Discours politiques des diverses puissances and Daneau's Politices represent more mature efforts to deal with questions of political theory. Many of these works, for example, neglected entirely the corporational theories which entered the thought of Beza and the Vindiciae,[21] other tracts treating them only

traditional distinctions. The author of the Question, . . . loisible aux suiets, Goulart, Memoires, II, 175, for instance, distinguished between the mera et absoluta power of the king and the inferior power of the subaltern magistrates, although this did not prevent him from allowing them to resist the king, for by so doing they resisted only the king, not the crown.

[21] For example, several tracts allowed individual towns to resist tyrants, but did not cloak this element of feudal decentralization under the idea of national corporate unity as did Beza and the Vindiciae. See Le Reveille-Matin, Dialogue 2, p. 92; the Epistre aux delicats (for which see Weill, Théories sur le pouvoir royal, p. 128).

briefly.[22] The corporate analogy, however, was developed into a relatively complete theory of government by the Discours, a tract which presented a theory of resistance by inferior magistrates within an organic community. Taking an Aristotelian approach, the author began his treatise by comparing the two kinds of government, the "economic" form as in a family and the "Laconique," in which "the king has only a certain power limited by the ancients and ephors who can control him." Both forms are natural, however, for both have the same divine source, and the same purpose of bringing celestial order into human society. Unlike the Lutheran thinkers who did not clearly distinguish familial from civil authority, this author insisted that the public character of the latter gave it powers not held by the former. Capital punishment, for example, was not a matter for the heads of families, but for the magistrates, without whom no laws could be enforced. The magistrate was the "ministre

[22] The Response . . . s'il est loisible . . . de résister, Goulart, Memoires, III, 230, 240, regarded human society as a hierarchy of corporations, each one having a superior who, as the head of a body, was equal in "genre, nature and condition" to all other superiors. When the supreme head became diseased, the princes, officers of the crown and "the estates of the city or the community" were to restore the body to health. Cf. Le miroir des François (n. p. 1581), of the Catholic writer, Nicholas de Montaud, pp. 310, 319.

ordinaire au monde" of the power of God to correct injustice.[23]

Hereditary kingship was also natural, for it reflected the divine, eternal government and perpetuated the life of the father in his descendants. "But the king ought not to think, he warned, that the people have not always the power to depose him and his lineage with the same right that they had to establish it," for he was only the protector of the commonwealth. The succession was always a public matter, for "after God, authority is in the multitude of the people" who communicate it to princes and keep a rein on public affairs. The people is prior and superior to the king, whom God gave to the people for their benefit.[24]

As Ovid taught, however, a multitude is a dangerous thing. Like "a man who has several feet, eyes and other natural senses," the state operates best when each member uses his own special talents. Only a society composed of prudent and virtuous people "always has a sovereign domination" and "to this entire assembly be-

[23] Discours politiques des diverses puissances, pp. 152-53, 155, 161. The author's account of the growth of civil government, p. 158, is almost purely Aristotelian.

[24] Ibid., pp. 156, 159, 194.

longs the sovereign jurisdiction over all individuals of the state, for it is there that the public power lies of which the prince is minister and deputy, and which is executed by those elected by this multitude and have their charges limited by the general consent." The people is composed of several colleges of the nobles and principal citizens who meet in a general assembly. A group of "councillors" hold "the lower offices among the people," and after these come the ordinary praetors who have charge of justice and "this honorable company is preferred to the prince."[25]

In spite of its overtures to popular authority, this tract made no effort to hide its aristocratic leanings, but it required from its nobility above all a special virtue and justice, a "natural nobility," beyond the virtue required of all men. From this type of nobility came a secondary, "political" nobility, a "sovereignty or lordship over others by preeminence or by privilege of the prince who is the first and sovereign noble." The king could ennoble others, but if nobility were lacking in him, "it could indeed default to other nobles." All nobles are intended to dominate (seigneurier) "and consequently they each participate in some portion

[25] Ibid., pp. 181-82.

of the rights of royalty (droit royal) under the sovereign whose right arm they are." Their duty is to protect the people entrusted to their care.[26] The author thus diluted the authority of the "multitude of the people" by adding to the state a paternal aristocracy not unlike that enshrined in Lutheran thought. The Discours did not, unfortunately, fully analyze the status of inferior magistrates in this state. The author did, however, oppose the jurisconsults who flattered the monarch by proclaiming him the fount of all justice and all jurisdictions. Hence, in saying that "the magistrate has . . . the superintendency on which the public rests, and has in his hand the high justice which the jurisconsults call merum imperium, that is, a sovereign power of the sword for punishing corporally and putting to death if required," the author seems to refer not only to the supreme magistrate, but also to the "magistracy" in general which shared the possession of this "sovereign power."[27] If this was indeed his meaning, he was undoubtedly attacking the tendency of some French jurists to limit full possession of merum imperium to the king.[28]

[26] Ibid., pp. 189-90.

[27] Ibid., pp. 166, 204.

[28] Charles Dumoulin was the chief proponent of this monarchist position. See Gilmore, Argument from Roman Law, pp. 62-69, and below, ch. 8, n. 33.

He admitted that in France, where the hereditary royal succession was "an image of eternity," the senate and other inferiors keep silent "when the supreme magistrate speaks," but in cases of injustice against the public the inferiors were obligated to resist the king's edicts to avoid the charge of treason.[29]

In cases of full-fledged tyranny, he maintained, resistance is legal even where the civil law does not provide for it, for when that law does not provide for what "resides in thought," natural law makes good the default. Furthermore, since God and the multitude had elected the king and were his sovereign, they could revoke any rights and privileges they had given.[30] To avoid the anarchy of popular resistance, however, each member of "the public" was to feel that the right belonging to the whole body was for his benefit, even while he abstained from active rebellion. The author warned of the dangers of too much popular power (using primarily the arguments of Plato and Aristotle), and admired the Roman senate for mitigating the differences between the

[29] Discours politiques des diverses puissances, p. 185.

[30] Ibid., pp. 199, 202. For the right to revoke privileges, he cites Gratian, D. LXIII, c. 2, ed. Friedberg, I, 235.

tribunes of the people and the consuls, a balance not achieved in the constitution of Sparta, where the ephors had too much power over the king.[31] Although the author mentioned in passing the right of everyone to resist a tyrant and to defend himself, he emphasized that the removal of princes must be done by the "grands qui sont après des princes." The tyrant was to be treated peacefully as a criminal unless he resisted, in which case the laws allowed the sentence to be carried out violently after a period of three days (he cites Paris de Puteo, Oldradus, Baldus and Andreas of Isernia). Thus the taking of arms "is only a violent execution of justice against the king." Only the estates could proceed against a king, but if the tyrant prevented their meeting, the princes, lords and officers of the realm could resist with arms, as if the king were already condemned and deprived of his title.[32] The author reluctantly allowed tyrannicide as a last resort, but his preference is clearly for the rule of the "honorable compagnie," the natural leaders of the state, organized into colleges and a general assembly "conduité par gens sages, assuiettes

[31] Ibid., pp. 161-62. This author is one of few Huguenots to criticize, rather than revere, the ephors.

[32] Ibid., pp. 168, 200, 205, 209-10.

aux bonnes loix," exercising the sovereign power of the corporate people. They and the magistrates shared in the "right" of the king, even though inferior to him as individuals, part of this "right" being the high justice or merum imperium by which criminals, including tyrants, were put to the sword.

The Politices Christianae of Lambert Daneau represents one of the most thorough Protestant attempts to analyze the legal position of inferior magistrates. Daneau, who taught in Geneva with Beza for a time after 1572, dealt with the source of political authority, the problem of inferior magistrates who were at once appointees of the king and agents of the people, and the nature and extent of magisterial authority both in normal affairs of state and in resisting tyrants. Like the Discours politiques, Daneau assumed that political society had existed even in man's original state of innocence, and had been established for purposes more noble than the governing of man's sinful passions. But unlike the domestic imperium of a father, political imperium was not natural, for kings did not precede their people as fathers did their sons. They were created by the suffrage and consent of the people, and their infringement of the laws and agreements binding them was judged by the "estates of the whole realm," acting for

all the people. The power of changing the form of government, as from a tyranny to an aristocracy or democracy, also remained in the hands of the people. Even a hereditary monarchy, of which Daneau disapproved, ought still to be "elected, or rather confirmed and approved, by the estates of the realm," in which act the whole people gave its approval.[33]

In dealing with the structure of the magistracy, Daneau, in good Renaissance fashion, compared the magistrates of France with those of ancient Rome. The distinctions among the powers of Roman magistrates were, he argued, applicable to France, which had a greater variety of magistrates than any other nation. In Rome, the consuls had power to command (imperare), the praetors had power in all matters of civil jurisdiction (ius dicere), quaestors were authorized to keep records and make legal reports (referre) and augurs were empowered to take auspices. In France, as in Rome, major "magistrates" had imperium, "minor" magistrates had only jurisdiction, while municipal magistrates had only a limited power of coercion (modica coertio).[34] The power

[33] Politices Christianae, pp. 33-34, 39-41, 219, 379, 413-14, 456.

[34] Ibid., pp. 381-82. "Iurisconsulti denique Romani, qui Imperatorum temporibus vixerunt, magis accommodate ad nostra tempora, nostroque mores diversam

(potestas) of the magisterial office included both the cognizance and the execution of legal cases, some magistrates, such as the sergeants of France, having only the execution, others having both functions. Among those with both, the king, or summus magistratus, had power over all subjects and could judge in any matter, while the power of praesides and other magistrates who were despatched (mittuntur) by the king extended neither over all subjects nor all types of cases. Among these "praesides" were marshals, bailiffs, seneschals and members of the parlements.[35]

Up to this point, Daneau followed fairly closely the common juristic observations on the nature and extent of magisterial power.[36] He diverged, however, from traditional legal thought by assigning the title summus magistratus to the highest official in the various branches of the administration (such as military, financial and judicial, both civil and criminal), from whom

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magistratuum potestatem ex diverso illo iurisdictionis gradu distingunt." For his account of the various types of Roman magistrates, Daneau cites one of the many works of the sixteenth century devoted to the description of Roman institutions, Carolus Sigonius, De antiquo jure civium Romanorum (Venice, 1560), bk. 1.

[35] Politices Christianae, pp. 370-71, 381. He adds immediately, however, that all power, "sive summa, sive inferior, est a Deo," citing Romans 13:1.

[36] For a discussion of these juristic observations, see below, pp. 248-57.

appeal was possible only to the king.[37] This surprising distinction between "king" and "summus magistratus" seemingly reflects an attempt to divide the summa potestas among several inferior magistrates while still preserving a monarchical government by regarding the king as the highest court of appeal. Each of the "highest" magistrates was, apparently, supreme in only one area of jurisdiction, while the king judged in all matters.

Combining his legal analysis with observations more common to Huguenot writers, Daneau further distinguished between officers of the realm and those of the king. The former held hereditary and irrevocable tenure, and together they counselled the entire public, having cognition in matters extending over the entire realm. Officers of the king, who performed no public functions but merely administered the royal household, were removable by him. Most of them were more "officials" than "magistrates," having dignity but no power.[38] Since Daneau made this distinction in a section describing how

[37] Politices Christianae, p. 383. "Verum hi omnes fere in unoquoque rerum genere velut armis, pecuniis publicis, civilibus, et criminalibus caussis, habent in eo genere iurisdictionis semper summum aliquem magistratum, a quo ad solum duntaxat Regem fas sit provocare."

[38] Ibid., pp. 387-88.

some magistrates were created by the people and others by the prince, he seems to be limiting the prince's autonomous power of creating and removing magistrates to his own personal officials. He created magistrates only by permission of the people, who gave him the right to delegate power to others (alii concedendae potestas data est a populo). Once again, the medieval problem of providing for magisterial independence in the face of Roman law doctrines of delegation by the prince alone was solved by insisting that the prince's delegation of power to the magistrate was itself done "by public suffrage or public authority."[39] Even if a magistrate were illegally appointed by another who could not, under Roman law, concede power to others, he could remain a magistrate if he were ignorant of his misdeed and had been accepted by the people.[40] The magistrates' dependence on the

[39] Ibid., pp. 376-77, 381. Daneau also, of course, insisted that both summa and inferior potestas are from God, presumably through the community.

[40] Ibid., pp. 376-77. According to D. 2, 1, 5, only a magistrate with a power inherently his own by right of his office could delegate his power to others, an act forbidden to those whose power belonged to another. The law reads: "More maiorum ita comparatum est, ut is demum iurisdictionem mandare possit, qui eam suo jure non alieno beneficio." According to D. 1, 14, 3, cited by Daneau, the acts of a barbarian named Philip, who had been incorrectly made a praetor, were validated on the basis of public utility and consent.

people, however, did not entail frequent elections. Daneau wished for life-long magistracies in order to prevent factions.[41]

In other respects he limited the power of inferior magistrates. They could accept no new authority without the consent of the supreme magistrate, even if offered by the people. Nor could they pardon criminals or relax punishments, this being reserved to the supreme prince of the republic. They could be judged by either the king or the provincial estates under whom they served.[42] On the other hand, magistrates possessed authority to resist tyranny, but in this function also they were limited by their grade of jurisdiction and the boundaries of their territory. Only the estates of the whole realm could "correct and remove" the prince who exceeded the bounds of his office or failed to function as he should. Neither individual citizens nor even several judges or magistrates, but only the _proceres_ of the realm, even one if powerful enough, could lead a conjuration against a tyrannous prince. Though he could not expel the tyrant from the realm, the inferior magistrate could resist in his own territory, and could tax and recruit his subjects

[41] _Ibid._, pp. 434, 467.

[42] _Ibid._, pp. 456-57, 463.

to do so, particularly if refugees from tyranny or persecution in other countries or regions had flown to him for protection.[43]

The theory of resistance by inferior magistrates thus found a more comprehensive political and legal justification in the Politices Christianae and the Discours politiques des diverses puissances than was offered by other lesser Huguenot writings. The crucial legal problem--whether the king, as the fount of jurisdiction, could be resisted by magistrates with only

[43] Ibid., pp. 74, 413, 457-60. Daneau did not go so far as to sanction active interference by magistrates in the affairs of other countries, but did share in the widespread feeling among Protestants that political boundaries were secondary to the unity and safety of the church. The idea of Europe as a respublica Christiana was still strong in the sixteenth century (see Denys Hay, Europe, the Emergence of an Idea (Edinburgh, 1957), pp. 87-88, 109-16), and Huguenot appeals to German princes for aid, as well as their theoretical justifications for such intervention, no doubt reflect this idea. Armed intervention of this nature was possible, however, only for "sovereign" powers; the Huguenots restricted inferior magistrates to activity within the confines of their office. See the Vindiciae, ques. 4, pp. 216-36; Beza, De jure, pp. 38-39; the Reveille-Matin, pp. 140-41; Le tocsin, p. 239; Fabre, Response, pp. 28, 57. See also, for Pierre Viret, Linder, Pierre Viret, pp. 242-43; for Francesco de Vitoria, see Bernice Hamilton, Political Thought in Sixteenth-Century Spain (Oxford, 1963), pp. 140-41. Cf. for Erasmus' internationalism, Ferdinand Geldner, "Die Staatsauffassung und Fürstenlehre des Erasmus von Rotterdam," Historische Studien, CXCI (1930), pp. 95-98, 137; and Bodin, Methodus ad facilem historiarum cognitionem, ch. 6 (Paris, 1572), p. 253. See, for a full discussion, A. Esmein, "La théorie de l'intervention internationale chez quelques publicistes françaises au seizième siècle," Nouvelle revue historique de droit français et ètranger.

delegated judicial authority--was treated differently by the two treatises. The Discours simply denied that the king alone was the source of justice, implying that political and legal authority deriving from the community was dispersed directly throughout the magistracy. He admitted that the prince did confer "political nobility" on others, but these already possessed the "natural nobility" which made them fit to govern. Daneau accepted the juristic doctrine of delegation of power by the king, but nullified its royalist implications by asserting that the king created magistrates and delegated authority only by permission of the people who gave him this power. Thus his own power, like that of the magistrates, was, in a sense, delegated. Magistrates might have inferior grades of imperium and jurisdiction, but their duty to enforce justice was essentially the same as the king's; it was owed to the community. Both writers, of course, upheld God as the ultimate source of authority, but their constitutional ideas were based directly upon the authority of the community.

CHAPTER VII

THE CATHOLIC MONARCHOMACHS

Since William Barclay first applied the name "Monarchomach" to the late sixteenth-century Huguenots and Catholics who justified resistance to tyrannous kings, many historians have treated these writers as ideological brothers.[1] The Catholic writers (among whom we shall discuss Fickler, Boucher, Rossaeus, Molina,

[1] Allen, Political Thought, p. 360, says, for example, "The doctrine that a heretic or idolatrous or infidel Prince, who endeavours to force on his subjects his own religion or irreligion, may rightfully be deposed by force was the doctrine alike of Knox and of Bellarmine and of the Vindiciae. Similar assertions made by Leaguers in France might as well have been derived from one as from another. But in truth all these propositions could all be derived either from the Corpus Juris or from medieval writings." I shall not discuss Bellarmine, in part because his general political ideas are so similar to the other Jesuits, in part because of his scanty treatment of the political power structure within single states. His complete lack of concern for inferior magistrates only strengthens my argument that not in all respects can Knox, the Vindiciae and the Jesuits be placed in the same camp. Sabine, Political Theory, p. 388, states that the Calvinists and Jesuits "both depended upon a common heritage of medieval thought and argued that the community itself creates its own officials and can regulate them for its own purposes." This may be true respecting kings, but is definitely not true of all officials.

Suarez and Mariana) indeed shared with the Huguenots many beliefs concerning the conditional relationship between ruler and ruled, the people's power over the king, and the legality of overthrowing a tyrant. They all favored monarchy limited by the proceres or natural leaders of the realm, usually the estates. Concerning inferior magistrates as such, however, there was less agreement.

After the Huguenots had given inferior magistrates an important role in resisting tyrants, the status of these officials gradually declined in the writings of the Catholic Monarchomachs. Many of Beza's ideas were accepted in some quarters, but just as some Huguenots lost Beza's emphasis on the magistrate as a servant of the community, the Jesuits eventually abandoned this position completely, admitting that magistrates were created by the king and removing them from any important role in resisting tyranny. Fickler in Germany repeated Beza's thought almost verbatim; Boucher and Rossaeus in France preserved much of the Huguenots' emphasis on the authority of the community, but failed to analyze in depth the structure of offices established by the community or how these officials were to act against a tyrant. Molina, Mariana and Suarez also maintained the ultimate power of the community over the king, but

tended to revert to the medieval idea that such community action was an emergency measure, allowing the king great power over the government and the magistracy during normal times. The emphasis returned to resistance by the estates and the nobles of the realm, omitting a role for appointive magistrates who lost much of their direct dependence upon, and responsibility to, the community.

What has been said of the Spanish Catholics, however, does not apply to Johannes Fickler, whose Tractatus de jure magistratuum of 1578 was essentially a quotation of Beza's work with appropriate emendations for a Catholic Germany. He simply applied Beza's principles of resistance for a whole kingdom, with some modification, to the separate territories of Germany.[2] The Lutherans had counted as "inferior magistrates" only the rulers of the territories and cities immediately related to the emperor, but Fickler, by making Beza's "king" read "king or prince," and Beza's "officers of the realm" read "realm or province," enabled magistrates and estates inferior

[2] Historians of political thought have customarily emphasized Fickler's mere repetition of Beza's arguments, without pointing out the modifications. See, for example, Lossen, "Die Vindiciae Contra Tyrannos," pp. 245-46.

to the German princes to resist them.[3] Fickler betrays, however, a willingness to accept the viewpoint of most contemporary jurists that magistrates were the delegates of their superior, a viewpoint for which Beza had little sympathy.[4] Hence, when Fickler described delegated magistrates as "members of the prince, as if of his body," he seems to stress the magistrates' dependence on their head rather than their powers as associates or coadjutors of the king.[5] In this respect, he differed from Beza and from the Lutherans who had used the corporate analogy for different purposes. He seems, however, to have been unaware of any inconsistency between his views and those of Beza. He probably accepted the prin-

[3] Tractatus de jure magistratuum (Ingolstadt, 1578), p. 13, where, for example, he distinguishes between officials of the king or prince and those of the kingdom or province.

[4] Ibid., pp. 5, 11[v], et passim. On p. 5, Fickler distinguishes between "superior magistrates" as delegatus and "inferior magistrates" as subdelegatus, the supreme magistrate standing above both. In general, in places where Beza spoke of "subaltern" or "inferior" magistrates, Fickler added "delegated."

[5] This statement occurs in a short tract bound with his De jure, entitled Utrum delegati seu inferiores magistratus, ob non administratam iustitiam, vel aliud delictum a suis principibus, vel superioribus publice debeant castigari, p. 65. "Princeps autem est caput suorum delegatorum magistratuum, qui Principis sunt membra, tanquam sui corporis." He cites for this Azo's gloss on C. 1, 29, for which see above, ch. 2, n. 71.

ciple that all authority came from the community or from God, but chose to emphasize the importance of the king in transmitting it. His interpretation was to become more pronounced in the treatises of the Spanish Jesuits.

Jean Boucher, writing in 1589 against Henry III, expressed a relationship between the king and inferior authorities which was, in some ways, closer than Fickler's to the usual Huguenot position. The king, he said, had the highest power, but, like a tutor, he was dependent for it on the people who retained the power of life and death over the king, than which "there can be no greater authority." The people, in his view, were the _proceres_, the senate and men of virtue, probity, and judgment.[6] Since _majestas_ belonged to the estates, Henry III, by plundering the treasury of France, was guilty of lese-majesty. The estates, not the king, created the great magistrates, the officers of the crown. As a corporation, these officers were the king's superior, although as individuals they were his inferiors, as the Huguenots had taught. In France, the Estates-General, the peers,

[6] _De iusta Henrici Tertii abdicatione e Francorum regno, libri quatuor_ (Paris, 1589), pp. 12, 20^{v}, 22^{v}. A useful summary of this work appears in Labitte, _La démocratie_, pp. 166-72, and it is discussed briefly by Weill, _Pouvoir royal_, pp. 232-33, and by Allen, _Political Thought_, pp. 349-51.

the officers of the crown and the parlements had customarily acted as checks on royal power, with the regular power of deposition held by the Estates-General.[7] Neither formal deposition by the estates nor the authorization of magistrates was, however, necessary to remove an "enemy of the republic," for anyone could kill a tyrant. Boucher praised God for the assassination of Henry III, which occurred before he had finished writing his book.[8] Although Boucher considered inferior authorities to be creations of the people, he saw no virtue in waiting for them to exercise the people's authority over the king.

In 1590 appeared the De justa reipublicae christianae in reges impios et haereticos autoritate, which again treated inferior magistrates only slightly.[9] Rossaeus

[7] De iusta . . . abdicatione, pp. 27, 153. Boucher, of course, like the other Catholics, gives the Church, or the Pope, an equal right to depose tyrants.

[8] Ibid., p. 170, ". . . private etiam cuivis tyrannum, quem hostem resp. iudicarit, occidere licitum esse. . . ." Cf. pp. 219^{v}-228, 281-82.

[9] This work was published in Paris in 1590, under the name of G. Guilelmus Rossaeus, which has been thought to refer to Guillaume Rose, Bishop of Senlis, or to the Englishman, William Reynolds, or to Boucher. Labitte, La démocratie, pp. 373-77, concludes that none of these wrote it, but rather an unknown Burgundian. I have used the edition of Antwerp, 1592. A summary of its contents appears in Labitte, pp. 377-81, and in Allen, Political Thought, pp. 351-53.

maintained that the people had established governments according to their wills and desires, and that in various places they had elected rectors, called emperors, kings, senates, dukes, margraves or counts. In addition to their similar origin in the people, all these officials were given power by God. Kings ought to be limited as they were in Sparta, where the ephors, selected from among the people, could inflict even capital punishment on an offending ruler. Borrowing a phrase from Cicero, the author proposed that inferior magistrates, along with law, public harmony and mutual love among citizens, were the republic's major means to its end--the solicitude, safety, and private and public good of its people. The king, on the other hand, was at best an illustrious member of the body politic, which could continue to flourish without him.[10]

These theoretical statements, however, are found only in the first chapter of this long polemical work, and are not explained further. The author attributed political action generally to the _proceres_ of the realm with whom the king shared the administration, but said nothing in detail about inferior magistrates. In deposing a tyrant, any private individual who was certain

[10] _De justa reipublicae_, pp. 8-11.

of the "will of the republic" and the sentence of the Church could kill him as an ordinary thief.[11] Rossaeus, like Boucher, preserved the Huguenot belief that magistrates, or at least the estates and nobles, exercised the authority of the community, but neither writer thought systemically about the place of inferior magistrates in the state, nor did they place great faith in constitutional means of removing tyrants.

Molina, Mariana and Suarez, on the other hand, were careful to ensure that the authority of the community be exercised in orderly fashion. This meant, among other things, that inferior magistrates who were dependent on the king could be overlooked when discussing resistance. Molina denied that individuals could resist, for the right of revenge belonged only to the commonwealth which had received it directly from natural law or from God, not from its individual founders. The power of the commonwealth was unitary. It was not the sum of the powers formerly held by its parts, but was a unit imposed from above by nature.[12] Only the commonwealth as a whole

[11] Ibid., pp. 72-73, 88, 394-95, et passim.

[12] Extracts on Politics and Government from "Justice," (trans. of De iure et iustitia [Cuenca, 1593], by George A. Moore) (Chevy Chase, Md., 1951), I, tract 2, pp. 16-18.

could create and depose its kings. When only a majority favored deposition, Molina recommended consulting the Pope, who might then depose the king with the aid of other Christian princes or, presumably, the commonwealth.[13]

Although Molina considered kings to be delegates of the community, he nevertheless esteemed them highly. They were superior not only to individuals, but even to the whole people, at least within the power specifically granted by the commonwealth. In assuming powers not formerly given, however, the king became inferior to the people, as before they crowned him, and could be resisted by the commonwealth.[14] So far as I can ascertain, Molina did not discuss methods of resistance, though presumably he wished only the estates to resist, not other inferior authorities who were dependent on the king. The power of magistrates, like that of the king, derived ultimately from the community, but flowed from the "civil power" established by the community, by which he apparently meant the kings and other "supreme governors" who appointed magistrates.[15] Like Fickler, Molina made

[13] Ibid., pp. 59-60, 62, 68. See also Allen, Political Thought, p. 359.

[14] Extracts on Politics, pp. 22-23.

[15] Ibid., p. 25. Among the inferior magistrates, he lists military officials, viceroys, optimates, judges, marquises and counts.

magistrates dependent upon the immediate source of their authority rather than the ultimate source. His system differed significantly from that of the Huguenots, in requiring the commonwealth always to act as a unit (rather than allowing one or several officials to act for it) and in making inferior magistrates dependent on the king.

Juan de Mariana, whose De rege et regis institutione was published in 1598, likewise considered magistrates to be creations of the king. Influenced, no doubt, by the existence of great inferior powers within the Spanish Empire, his political thought somewhat confusingly combined admiration for monarchy with recognition of lesser princes with "full jurisdiction" in their territories. Unlike the Huguenots, however, Mariana did not associate appointive magistrates with these princes, but placed the magistracy and the administration of justice under the supreme authority of the king alone.

Royal authority, on the other hand, derived from the community. Moreover, the people had retained greater power than they had conceded and when the leading men of the estates who exercised their authority disagreed with

the king, their decision prevailed.[16] Great authority had also been given to the "minor kings," bishops (who were "true princes") and other chief men of towns and fortified places who had "full jurisdiction," and were to preserve the authority of the commonwealth.[17] In addition, the king was to associate himself in council with the greatest citizens, to "associate the best men with the royal dignity" and rule in cooperation with them.[18]

The principles of popular sovereignty and limited monarchy thus enunciated would have elicited favorable responses from the Huguenots. Mariana's description of royal power, however, was another matter. In his view, "the nature of power is such that it cannot be shared," while the sharing of power was at the very heart of the Vindiciae's argument. Mariana opposed the division of power among several princes within a state, a fault which he believed had ruined the Moorish nation.[19]

[16] The King and the Education of the King, (trans. of De rege et regis institutione by G. A. Moore) (Chevy Chase, Md., 1948), pp. 149, 157. He described the estates as "men of the first rank who had been selected out of all the orders," who carried out "public functions."

[17] Ibid., pp. 160, 162.

[18] Ibid., pp. 121-22.

[19] Ibid.

Although he accepted the existence of territories with full jurisdiction in the Spanish Empire, he explained that these authorities could safely exercise great power over their subjects because of the still greater authority of the king (and the Pope) to correct their abuses and hear appeals from their courts. Although the king should rule with his council, this body also benefitted the monarchy by focusing the competitive ambitions of the councillors towards the central authority embodied in the king. Although the king received his authority from the people, he was, within his sphere of authority, superior to the community while they were superior to him only in matters of taxation, the changing of laws, and succession to the throne. His sphere of authority included matters of war and peace, the administration of justice and the appointing of magistrates.[20]

Mariana's emphasis on the supremacy of the royal sphere of authority was completely lacking in Huguenot literature, and in spite of the unitary source of authority he found in the community, his state was partly dualistic in nature. Inferior magistrates, in the major Huguenot writings, had been destroyers of dualism, acting as agents of the people in the royal administration.

[20] Ibid., pp. 121, 159-60.

For Mariana they were royal appointees, functioning within the king's area of supremacy.[21] Should the king become a tyrant, he should first be warned by an assembly of the people, then, if necessary, deposed forcefully by the "community" or by any individual who had first learned the community's wishes through deliberation with "learned and serious men."[22] The lack of participation by inferior magistrates in these proceedings indicates that this government had to be limited by the community acting upon it from "outside," through the estates, rather than through popular officials within the government itself.

The essence of Mariana's thought concerning the source of political authority, the power of the king over his magistrates and the right of resistance reappeared in the works of Francisco Suarez. Suarez added only a more detailed treatment of the relationship between inferior magistrates and the sovereign. He believed that the supreme civil power, conferred by God

[21] A problem arises out of Mariana's attribution to some "chief men" of towns and castles a "full jurisdiction." He neither affirms nor denies that this jurisdiction had been given by the king, leaving the possibility that it had come from the community. The possibility, however, is slight.

[22] Ibid., p. 148.

upon "perfect communities" (complete political communities, as opposed to segments of a community or mere aggregations), had been conferred by the people on their king. The people's surrender of authority, like the sale of a man into slavery, was total except for a "potential" supremacy they retained. The king depended on them only for his creation, not for the maintenance of his power thereafter.[23]

Bartolus, he admitted, had taught that the highest jurisdiction (which Suarez identified with legislative power)[24] could not be delegated by the king, because powers held by the grant of another (in this case, the people) could not be re-delegated. This did not apply to monarchies, Suarez argued, for the people had given kings a perpetual ordinary power by virtue of their office, a power which they could freely delegate to others. The opinion of Bartolus applied only to magistrates and judges who could not transfer to others

[23] Francisco Suarez, Extracts on Politics and Government (trans. of Defensio fidei Catholicae [Coimbra, 1613], by G. A. Moore) (Chevy Chase, Md., 1950), III, ch. 3, pp. 21-23. De legibus ac Deo legislatore, in "The Classics of International Law," no. 20 (London, 1944) (facs. repr. of ed. of Coimbra, 1612), VII, ch. 13, par. 5, p. 825.

[24] De legibus, III, ch. 1, par. 6-10, pp. 199-200.

the powers delegated to them by the king.[25] The magistrate had no independent right to his legislative or jurisdictional powers, but was dependent upon the king. Even more than the power to make or formulate laws the power to enforce them was centralized in the king. The operation of all law, even customary law, had force only because it reflected the royal will or consent.[26]

In spite of the king's superiority to the commonwealth and its inferior authorities, Suarez recognized the people's right to depose a tyrant. The community's power, although surrendered to the king, could be recalled according to the conditions of their contract with the king or to the provisions of natural justice. Anyone, he allowed, could kill a tyrant absque titulo, and do so as if with public authorization, for the community always gives its tacit consent to any act in its defense. Any man also had the right of self-defense against an assailant, although if the attacker were the king, he should not be killed if this would endanger the state. Except in self-defense, however, private persons

[25] Ibid., III, ch. 4, par. 9-12, pp. 209-10. He cites Bartolus on D. 1, 1, 9, omnes populi, as well as Panormitanus on the Decretals of Gregory IX, 5, 39, 53, who discuss the question of delegation. On Bartolus, see also Gilmore, Argument, pp. 40-41.

[26] Ibid., VII, ch. 13, pp. 823-27.

leave the punishment of a tyrant to the commonwealth as a whole, acting "in accordance with the public and general deliberations of its leading men."[27]

No one part of the realm could act against a tyrant without the consent of the whole, for only the "perfect commonwealth" possessed the necessary supreme power from which there was no appeal in law. Looking, no doubt, at the Spanish Empire, Suarez admitted that the king might rule several such perfect commonwealths, for even many dukes claimed the power to judge without appeal. To these he attributed power to act independently against their tyrannous king. "Imperfect" commonwealths, however, within the same realm and under the same royal jurisdiction, could act only as a part of the whole realm.[28]

These independent inferior powers appear to be analogous to the territories with "full jurisdiction" described by Mariana. Although Suarez allowed them to

[27] Defensio fidei, in "The Classics of International Law," no. 20 (London, 1944, facs. repr. of ed. of Coimbra, 1613), VI, ch. 4, pp. 715-24, esp. par. 15, p. 721. De triplici virtute theologica, fide, spe, et charitate (London, 1944, facs. repr. of ed. of Coimbra, 1621), De charitate, disp. 13, sect. 8, pp. 820-21. See also Hamilton, Political Thought, pp. 60-64.

[28] De charitate, disp. 13, sect. 2, in Extracts, ed. Moore, p. 73. Defensio fidei, III, ch. 1, ed. Moore, p. 5.

act independently against a tyrant, no true parallel can be drawn with those single authorities of the Vindiciae which acted for the whole realm. Suarez spoke of provinces which could act independently of other segments of the total realm, by virtue of their own "perfection," rather than of inferior magistrates who acted only for the whole community to which they were bound mutually with all other magistrates. For Suarez, as for Mariana and Molina, inferior magistrates owed their obligations to the king from whom they received power. The community, either through its estates and magnates or its individual members acting in self-defense, might depose the king, but the king's magistrates played no part in these proceedings. Their place was taken, in a sense, by the Pope, who could depose kings in cooperation (in some unspecified sense) with the commonwealth as a whole. The Jesuits had no reason to desire resistance under one or a few magistrates, for they, unlike the Huguenots, had no problem of local religious independence. While the Huguenots eagerly made use of doctrines allowing a sanior pars of a corporation to act

for the whole, the Jesuits hoped for unanimity.[29] Their theory was organic, but not, in this legal sense, corporational. Their theory was not totally dualistic, for they viewed the king as the creation of the community, but their strong emphasis on the royal prerogatives, particularly the power over the magistracy, was an emphasis not to be found in the writings of the Protestant Monarchomachs.

[29] The Jesuits' and Catholic Monarchomachs' basic lack of sympathy for conciliarist doctrines, which taught, _inter alia_, resistance to higher authorities by a _maior pars_ of the body politic, has been noticed by Oakley, _Pierre d'Ailly_, pp. 225-26.

CHAPTER VIII

INFERIOR MAGISTRATES IN FRENCH JURISTIC THOUGHT

Most sixteenth-century French jurists found resistance to established authority repugnant. In this respect, they had little in common with those staunchly religious contemporaries who sought to permeate society with the laws of God rather than the laws of men. Nevertheless, the two groups shared some basic political problems, developing solutions to them which were in some ways parallel. The jurists generally detested the seigneurial jurisdictions and local privileges which interfered with the unity and efficiency of the "New Monarchy," but Protestant and Catholic apologists themselves based their political ideals upon conceptions of unified public power, both in their appeal to the authority of the corporate political community and in their emphasis on the corporate unity of king and inferior magistrates. On the other hand, the Protestants' earnest declarations in favor of magisterial independence from royal control had their counterparts in the

jurists' struggles to describe a position for inferior magistrates which protected them at least from the arbitrary actions of a king on whom they otherwise depended. Neither group wished to resurrect the troubled governments of the fifteenth century, but both revered, albeit to different degrees, the medieval ideals of limited government.

Some similarity of outlook between jurists and religious writers might, of course, be expected, since many of the latter either were lawyers, had received legal training or had personal contact with lawyers. Protestant attempts to provide for magisterial independence within a unitary government reflected awareness of problems confronting the jurists. Bucer, Wicks, Daneau, Beza and the author of the Vindiciae were among the writers who faced the issue of royal delegation of magisterial authority, attempting to explain away its implications for the independence of magistrates. Bucer and, perhaps, the author of the Discours politiques, saw the relevance of the Roman legal concept of merum imperium for the status of magistrates, arguing that its powers of "full jurisdiction" or "self-government" imparted a right of resistance to its possessor (an argument similar to that of Mariana and Suarez). Related to this was Ursinus' dictum that the power to create

magistrates (or to delegate jurisdiction--one aspect of the full possession of merum imperium) carried with it a power to punish offenders, even kings. Some writers, like Ponet, Buchanan, Martyr and Ursinus, argued that even ordinary jurisdiction conferred the right to bring a tyrant to justice, and the right of judges to review royal edicts was widely accepted. All these arguments assumed the existence of a unified jurisdictional structure, a unity bolstered, in the minds of Lutheran and Calvinist writers, by the corporation theory of Roman and canon law which allowed government to be viewed as a corporation in which magistrates could be considered colleagues of the king, sharing the sovereign authority. These and other legal matters found in their writings attest the Protestants' close relationship to the field of law and to juristic ideals of unified sovereignty. Many legal concepts which they used to argue for the independence and power of inferior authorities were concepts which occupied the attention of contemporary jurists.

Apart from what juristic thought concerning inferior magistrates may have taught the Protestant and Catholic writers, it is important in itself as a reflection of a basic political problem of the period--the status of inferior authorities before growing royal power.

Professor Church has observed that "in the broad outlines of sixteenth-century political thought, the Huguenot writers were the only major group who seriously challenged the doctrine that the king held all authority of rulership."[1] Church admits, however, that Beza, although breaking with the current theory of royal sovereignty, utilized several legal tenets concerning the theory of office. There can be no question that absolutist tendencies were prevalent in French legal thought of this century, but, just as the Protestants sought to create a political system combining unity and independence for inferior officials, many jurists modified their pro-royalist sympathies enough to preserve some degree of independence for magistrates. This is clearly reflected in the juristic discussions of jurisdiction and *imperium* which we shall analyze in this chapter. In spite of widespread juristic approval of centralized jurisdiction under royal control, means were found, deriving largely from Roman law, to guarantee magistrates a theoretically secure and important position within the royal public administration, possessing jurisdiction and *imperium* in their own right, not merely exercising an

[1] William F. Church, *Constitutional Thought in Sixteenth-Century France* (Cambridge, Mass., 1941), p. 123.

authority belonging solely to the king. Nor was this a theory of office divorced from actual politics, for, as we shall note at the end of the chapter, juristic thought generally favored a certain degree of independence for the magistrates of France, including the right to interfere with royal maladministration of justice. In order to place this theory of office in the broader context of sixteenth-century legal thought, however, it is necessary first to discuss the difficulties presented by the trend toward limiting full possession of jurisdiction to the king alone which lessened the independence of inferior officials.

In maintaining that inferior magistrates were created by the community rather than by the king, Calvinist writers took exception to the common juristic opinion, expressed by Baldus in the fourteenth century, that "all magistrates and dignities flow and are derived from the prince as from a fountain,"[2] a statement equivalent to upholding him as the source of all jurisdiction.

[2] Barthélemi de Chasseneuz, Catalogus gloriae mundi, pt. 5, consid. 24, no 15 (Frankfurt, 1586; 1st pub. 1529), p. 125, who quotes Baldus, saying that "omnes magistratus et dignitates a principe profluunt et derivantur tanquam a fonte; quia in eo sunt omnes dignitatum thesauri reconditi."

French jurists of the sixteenth century generally supported this position. When treating matters related to the jurisdictional structure of the realm, they were often forced to deal with the centuries-old debate over the ownership and delegation of merum imperium, a question related directly to the jurisdictional dependence of inferior magistrates on the king, expressed in terms of Roman law.[3] The jurists' answer to this question

[3] The relevance of Roman law for French institutions was frequently questioned, but many jurists continued to see some relationship between the merum imperium, mixtum imperium and jurisdictio of Roman law and the haute, moyen and basse justice of France. See Chasseneuz, Consuetudines Ducatus Burgundiae, rub. 1, "De iustitiis seu iurisdictionibus" (Coloniae Allobrogum, 1616; 1st pub. 1517), pp. 54-90; Pierre Cotereau, Schedulare magistratuum (Paris, 1525), pp. 57-80; Johannes Longovallius (Longueval), Declaratio legis imperium (Paris, 1539) pp. 175-76, par. 23; Eguinarius Baro, Variorum quaestionum . . . ad Digesta (Lyons, 1548), bk. 1, esp. pp. 161-65, and his Commentarii ad"ta prota" Digestorum (1548), "Ius Gallicum" (on D. 1, 21, and D. 2, 1), Opera omnia (Paris, 1562), I, 177-78, 193-96, where he noted that, in spite of similarities between the two systems, high justice in France included both merum and mixtum imperium; Andreas ab Exea, Praelectiones in rubricum et Ll. i et iii (D. 2, 1) (Lyons, 1560), pp. 129-30. Jean Gillot, De iurisdictio et imperio (Paris, 1570; 1st pub. 1538), II, 21, p. 78^{v}, and Louis le Caron, Pandectes ou Digestes du droict francois (1593), I, ch. 3, in Oeuvres (Paris, 1637), I, 493, pointed out that high, median and low justice existed in French customary law, but whereas Gillot, like Baro, found merum and mixtum imperium in the civil law also, Le Caron argued that "all royal justice," unlike that of seigneurs, "is high justice" and in general saw little relationship between Roman and French law (see also I, 23, pp. 137, 149). Guy Coquille, Institution au droict des Francois, "Des droicts de justice" (Paris, 1623; 1st pub. 1607), p. 38, saw similarities between the two laws, but denied

explains, in part, their belief that the king was the source of all jurisdiction and that magistrates owed their authority solely to royal mandate.

The debate over merum imperium was important in large measure because medieval jurists had so greatly expanded its meaning beyond what it had been in Roman times. Without attempting to examine this expansion in detail, a task already well-performed by Professor Gilmore,[4] we may illustrate it by comparing Ulpian's definition in D. 2, 1, 3 ("to have the power of the sword for punishing criminals, which is also called power")[5] with that of Bartolus ("jurisdiction which is expedited by the noble office of the judge, principally respecting public utility"). Within this jurisdiction, Bartolus included the power to found general laws, punish with death or loss of members, take away citizenship, banish without loss of civil rights, to exercise

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Roman law any authority in "France coustumiere." Charles Loyseau, Cinq livres du droict des offices (1610), I, 6, 67, in Les Oeuvres (Paris, 1666), p. 57, compared merum imperium to the French "commandement de la force" or military justice, and to the "commandement de la iustice," the "high justice held by all magistrates." Cf. B. Automne, La conférence du droit français avec le droit romain, "In titulum I. De iurisdictione" (D. 2, 1, 3), 3rd ed., (Paris, 1629; 1st pub. 1610), I, 37.

[4] Gilmore, Argument, pp. 19-44.

[5] "Merum imperium est, habere gladii potestatem, ad animadvertendum in facinorosos homines: quod etiam potestas appellatur."

"moderate coercion" to enforce one's authority, and the right to levy small fines.[6] Since the political thinkers of the Middle Ages did not clearly distinguish between political and legal authority (or jurisdiction), merum imperium became a term which could be used to designate the highest form of political authority, including the power over life and death and the use of the sword in general, as well as the power to make law (considered as a function of jurisdiction). At times it was confused with the more general notion of the "temporal sword," signifying temporal governance, as distinguished from the "spiritual sword" wielded by the Church.

The cause célèbre around which the controversy often raged was the question allegedly posed by the emperor Henry VI to the jurists Azo and Lothair, "Cui competit merum imperium?" Lothair answered that it belonged only to the emperor, while Azo, aware that the Roman provincial praesides had had criminal jurisdiction, replied that the emperor had it per excellentiam, but that it belonged to other magistrates also. The emperor favored Lothair by presenting him with a horse, but most

[6] In primam Digesti veteris partem (on D. 2, 1, 3) (Venice, 1567), pp. 56-57, esp. 56^{V}, "Merum imperium est iurisdictio quae officio iudicis nobili expeditur, vel per accusationem, publicam utilitatem respiciens principaliter."

medieval jurists strongly favored Azo's opinion; hence the saying that Lothair had the equum, but Azo the aequum.[7] Bartolus, by assigning the last two grades of merum imperium to the heads of corporations, such as provinces and many cities, typified the late medieval attempt to make this aspect of Roman law fit the decentralized nature of medieval political power.

A major problem confronted the view which attributed merum imperium to magistrates by right of office. Roman law had forbidden any power held by virtue of a special law or commission, and not by right of office, to be transferred in a general delegation of jurisdiction, and had stated that merum imperium belonged to no magistrate in propriety, but only to the people or, after Augustus, to the emperor, who alone could delegate it.[8] The gloss

[7] The Azo-Lothair dispute and modern literature concerning it are discussed by Gilmore, pp. 17-20.

[8] D. 1, 21, 1, "Quaecumque specialiter lege, vel senatusconsulto, vel constitutione principum tribuuntur, mandata iurisdictione non transferuntur: quae vero iure magistratus competunt, mandari possunt." ". . . sed merum imperium, quod lege datur, non posse transire." Simple jurisdiction in minor civil matters, however, plus whatever imperium was necessary for its exercise (called mixtum imperium because "mixed" with jurisdiction, unlike merum or "pure" imperium), was transferable and could be held iure magistratus.

of Accursius on D. 1, 21, 1 accepted the rule against delegating imperium, but proceeded nevertheless to award the possession of merum imperium to illustres, spectabiles and clarissimi, the three highest grades of magistrates. The gloss on the Liber de pace Constantiae, however, mentioned Azo's position only briefly, and emphasized the opposing view that "merum imperium belongs only to the prince."[9] Later jurists can hardly be blamed for being perplexed when facing this issue. During the sixteenth century, humanistic jurisprudence attacked the Bartolist interpretations of the law on imperium and began to favor the position of Lothair, arguing that merum imperium belonged properly only to the prince, and that all inferiors held only the exercise of it. Hence, the power to create magistrates with the power of the sword could belong only to the prince. Inferior officials could not do this because they could not delegate merum imperium.

The jurists of France especially restricted full possession of merum imperium to the king.[10] They did so

[9] Gilmore, Argument, pp. 28-29. The gloss on Liber de pace Constantiae, par. 2, verb. criminalibus, in Corpus juris civilis (Venice, Juntas, 1592), V, following after the Consuetudines Feudorum and the Extravagantes, 502-3.

[10] Charles Du Moulin, Commentarii in consuetudines Parisienses (1539), "Tit. 1, De fiefs," par. I, glo. 5,

partly because, in spite of the paring down of the content of merum imperium by humanistic jurisprudence, it still retained for many jurists its connotations of a power too broad to be attributed freely to magistrates. Jean Juvenal des Ursins, in the fifteenth century, regarded it as legibus solutus and "circumscribed by no limits," and therefore limited possession of it to the "emperor" or those to whom he conceded it by special law.[11] In the sixteenth century, it was still sometimes associated with the temporal sword in general, or with the summum imperium, including the power to wage war, to make laws and to create magistrates, and was thus limited

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in Opera (Paris, 1624), I, 157, no. 57. Chasseneuz, Consuetudines (1517), rub. 1, p. 91. Nicolaus Boerius, De authoritate magni consilii, et parlamentorum Galliae (1512), bound with his Decisiones Burdegalenses (Lyons, 1612), p. 878, par. 128. Andreas Alciati, Decretalium titulorum aliquot, Commentaria (on X, 1, 31, 19), in Opera (Lyons, 1560), V, 1, par. 57, p. 23.

[11] Repetitio . . . in 1. Imperium. ff. de iurisdictio. omnium iudicum, in Anonymous, Repetitionum seu Commentariorum in varia iurisconsultorum responsa (Lyons, 1553), p. 308. The notion of merum imperium as being legibus solutus derives from the common view of it as a power not restricted by the formal procedures of the action of law, but allowing the magistrate to use his discretion in investigating and judging a case. This view derives from Bartolus, for which see Gilmore, Argument, p. 39.

to the king.[12] Even in the early seventeenth century, Charles Loyseau identified merum imperium with the use of force and arms properly belonging only to the king, since only he was free of the necessity of following "the order and forms of justice."[13]

Humanistic jurists of the sixteenth century, however, applied their critical analysis to the problem of merum imperium, attempting to discover exactly what it had meant for the Romans, but offering conclusions which could have meaning for sixteenth-century magistrates.[14] Their conclusions narrowed its scope to a great extent, but did not thereby automatically allow inferior

[12] See, for example, Gregory of Toulouse, De republica libri XXVI, IX, 1, pars. 15, 24, ([Frankfurt?], 1597; 1st pub. 1578), pp. 591, 595, and his Syntagma iuris universi, II, bk. 47, ch. 13, par. 2, (Lyons, 1582), p. 1206; Joannes Quintinus Heduus, Christiani civitatis Aristocratia (date uncertain), in Tractatus ex variis juris interpretibus (n. p., 1549), XIV, 290-290^{v}, 294^{v}-95; Pierre Fabre, Semestrium liber primus (Paris, 1570; 1st pub. 1560?), ch. 3, pp. 30-32.

[13] Des offices (1610), IV, 4, 39, in Oeuvres, p. 346. Imperium had referred also, in ancient Rome, to the command of the military. See Gilmore, Argument, p. 21.

[14] The only intensive analysis of this juristic problem in the sixteenth century is that of Gilmore, Argument, pp. 45-92. Although many humanists had little apparent interest in applying Roman law to the sixteenth century, their labors, as Gilmore points out, did have contemporary significance. Gilmore, it should be noted, touches only the major points of the dispute; much research remains to be done into the sixteenth-century treatises on jurisdiction and imperium.

magistrates fuller possession of it. Legislative power, which Bartolus had made the highest grade of merum imperium, was decisively removed from its sphere of competence.[15] Increasingly, jurists refused to identify it with public power in general, limiting it to criminal jurisdiction, separating it, as in Roman law, from ordinary civil jurisdiction. Jean Gillot advanced even beyond this by insisting upon the "pure" nature of "merum" imperium and portraying it as pure potestas severed from all forms of jurisdiction whatsoever, and consisting solely of the power of a magistrate to execute a judgment already made.[16] Another jurist went

[15] See, for a fifteenth-century example, Jean Juvenal des Ursins, Repetitio, p. 308. Cf. Alciati, Digestorum titulos aliquot . . . Commentaria (on D. 2, 1, 3), in Opera, I, p. 39; par. 77; Charles Grassaille, Regalium Franciae iura omnia, I, ius 11 (Lyons, 1538), p. 149; Jean Tavard, De iurisdictione et imperio (Toulouse, 1557), ch. 1, pp. 12-14. Bodin, République, I, ch. 10, p. 217, argued that, although magistrates often made laws within their jurisdiction, they were only edicts, and needed the prince's confirmation. In general, jurists recognized that legislative power in Rome had belonged to the people, the senate or the emperor, not to magistrates exercising imperium.

[16] De iurisdictio et imperio, pp. 43-45, et passim. See also Gilmore, Argument, pp. 72-75. Cf. François Duaren, Disputationes anniversariorum (1547), ch. 53, in Omnia . . . Opera (Lyons, 1579), II, 286. Medieval jurists, confronting the problem of how criminal jurisdiction (merum imperium) could be separated from jurisdiction, distinguished between jurisdiction as a genus, in which merum imperium was included, and as a species ("simple jurisdiction") from which it was excluded. Gillot rejected this solution.

a step further, arguing that even execution was a part of jurisdiction and that merum imperium must be limited to the power to command that a sentence be executed.[17] Most writers, however, felt that merum imperium included all the functions necessary to decide criminal cases--coercing, examining, judging, sentencing and executing. Although it was separated from jurisdiction, it nevertheless used it, for a higher power, they argued, includes lesser powers necessary for its execution.[18] In

[17] De iurisdictione et imperio. De factorum distinctione et natura . . . adversus omnes interpretes (Lyons, 1552), pp. 6-7. On p. 9, referring to D. 1, 18, 6, he said that "Quibus verbis significat hoc ipsum imperium non coercitionem, non animadversionem, non gladium esse: verum potestatem ipsam, ac speciale quoddam ius, cuius vi possit iubere magistratus, gladio in facinorosum animadverti, vel in metallum damnari, vel alio atrociori supplicio coerceri." Louis le Caron, De iurisdictione et de imperio (Paris, 1554), p. 22, appears to have read the above tract very closely. In his words, ius gladii meant "hoc ipsum imperium non coercitionem, non animadversionem, non gladium esse, verum potestatem ipsam et iussum, cuius vi potest graviori coercitione in facinorosum animadverti."

[18] Pierre Rebuffi, Explicatio ad quatuor primos pandectarum libros (on D. 2, 1, 3) (Lyons, 1589), p. 206, argued that one with merum imperium "used" jurisdiction, that is, he "ius dicit in his, quae concernunt imperium." Cf. Pierre Loriot, De iurisdictione, et imperio, axiom 26, in his De iuris apicibus (Lyons, 1555), col. 37; Longovallius, Declaratio, pp. 226-31, which is a direct reply to Gillot (see Gilmore, Argument, p. 72, n. 34); Andreas ab Exea, Praelectiones (1560), pp. 87-95, who favored Loriot, "collega noster," to Gillot; Automne, La conférence (on D. 2, 1, 3), I, 37; Bodin, République, III, ch. 5, pp. 435-36.

any case, it no longer connoted such wide governmental authority as it had in the Middle Ages. The merum imperium of magistrates thus became clearly distinguished from the summum or absolutum imperium of the prince. Contrary to the Bartolist view that merum imperium was free from the confines of legal procedure (hence allowing the magistrate, like the prince, some freedom with respect to the law), many jurists argued that, while the prince's imperium was truly free of law, magisterial imperium was bound by the strictures of proper legal form and procedure.[19]

In spite of the reduced content of merum imperium, many jurists continued to hold the Roman law doctrine that magistrates held it only by special concession and could not delegate it to others.[20] Rejecting the Bartolist tradition which allowed magistrates to delegate certain grades of merum imperium which they held by right of

[19] See, for example, Cotereau, Schedulare magistratuum, "De mero imperio" (1525), pp. 59-60; Longovallius, Declaratio, p. 146, pars. 4-5; Gillot, De iurisdictio, p. 8[v]; Eguinarius Baro, Commentarii ad . . . Digestorum (on D. 2, 1, 3), Opera, I, 186, and his Variorum quaestionum (1548), bk. 1, p. 110; Gregory of Toulouse, Syntagma, II, bk. 47, ch. 21, par. 2, p. 1231; Andreas ab Exea, Praelectiones, p. 89, 100-1.

[20] Le Caron, Pandectes (1593), I, chs. 15, 23; bk. 4, ch. 3, Oeuvres, I, 65, 149, 492. Du Moulin, Commentarii (1539), "Tit. 1, De fiefs," par. I, glo. 5, Opera, I, 157, no. 57. Cotereau, Schedulare magistratuum, p. 61. Longovallius, Declaratio, p. 176, par. 1.

office, nearly all jurists agreed that criminal jurisdiction in Roman law was delegable by no one but the prince.[21] Thus, it remained under his direct control.

The jurists also took care to ensure that the prince's delegations of power were not misinterpreted. Supporters of inferior lords in the Middle Ages had sometimes argued that royal concessions were to be taken broadly, so that a grant of simple jurisdiction could be assumed to transfer the right of the sword as well. Increasingly, French jurists adopted the opposing view, interpreting princely grants narrowly. Merum imperium was not transferred unless mentioned specifically or unless the jurisdiction given was "omnimodam" or "plenissima."[22] Moreover, the king's grants, whether

[21] Rebuffi, Explicatio (on D. 1, 21, 4) p. 180. Loyseau, Des offices, I, 5, 48, Oeuvres, p. 47, argued that "merum imperium (lequel consiste en la puissance du glaive, et toute autre grande punition, que nous appellons en France acte de haute Iustice, et inde l'executeur de haute Iustice) ne pouvoit estre aucunement commis ny delegué par le Magistrat, parce qu'il ne loy appartenoit pas du propre droict de son Office, mais seulement luy estoit deferé par concession special et particuliere. . . ."

[22] Rebuffi, Explicatio (on D. 2, 1, 3), pp. 204, 211. Du Moulin, Commentarii, "Tit. 1, De fiefs," par. I, glo. 5, Opera, I, 145-57, nos. 48-55. Seyssel, Commentaria in sex partes Digestorum et Codicis . . . (Milan, 1508) on D. 2, 1, 3. A similar problem was that connected with a prince's grant of a territory, a town or a castellany, a medieval problem which sixteenth-century jurists still debated. Did jurisdiction accompany the grant or not? In part this was related to the question of whether a

of jurisdiction or of other powers, such as regalian rights, were given "cumulatively," never "privatively," the king always retaining a certain right of superiority in what was granted.[23] In the case of jurisdiction, he retained the right to hear appeals; when he conceded regalian privileges, he retained the "major" regalia, or rights "reserved to the prince in sign of supreme power," which could never be conceded even though the grant included "all rights" or "all imperium."[24] The king, said

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fief and jurisdiction had "anything in common," although no less an opponent of seigneurial jurisdiction than Du Moulin, in his Commentarii, p. 154, no. 48, allowed that merum and mixtum imperium were conceded with a territory if they belonged to it (and if the prince made the concession). Cf. Longovallius, Declaratio, p. 237, par. 2, who argued against "common opinion" that the prince's concession of jurisdiction did not ordinarily include merum imperium.

[23] Grassaille, Regalium Franciae, I, ius 2, pp. 36-37.

[24] Grassaille, Regalium Franciae, IV, ius 2, p. 35. Du Moulin, Commentarii, Opera, I, 154-56. Bodin, République, I, ch. 10, pp. 211-51. Seyssel, Commentaria (on D. 2, 1, 3), and Rebuffi, Explicatio (on D. 2, 1, 3), pp. 204, 211, shared this common opinion, but they also repeated medieval statements to the contrary, Seyssel citing D. 1, 4. 3 to argue that powers reserved to the prince "venirent si continerentur maxime in beneficio principis," and Rebuffi pointing out that if a town were conceded "sicut illam teneo," or if "summum imperium" were expressly mentioned, then this highest imperium was transferred. See also Rebuffi, De regum et principum muneribus ac praerogativis, in his Tractatus varii (Lyons, 1619), p. 8, par. 118; p. 27, par. 24. In general it can be said that, although sixteenth-century jurists tended towards a centralized view in this matter, many of them retained more medieval concepts.

Du Moulin, had two rights in everything he conceded, one as the proprietary lord with *dominium utile*, which right was transferable, and one as king with *dominium directum* over the whole realm, which could never be conceded, for as a regalian right it belonged to the crown and was inalienable.[25] Such rights could not be prescribed, said Rebuffi, for this would divide the realm.[26] These powers reserved to the prince (including many besides those commonly accepted today as marks of sovereignty)[27] ultimately distinguished the king from the magistracy. No matter how much *imperium* and jurisdiction the latter might possess, the king could always be separated from

[25] Du Moulin, *Commentarii*, *Opera*, I, 145, no. 53. See also Gilmore, *Argument*, p. 66.

[26] Rebuffi, *Explicatio* (on *D.* 2, 1, 3), p. 212. Among many others who opposed the prescription of such rights were Du Moulin, *Commentarii*, *Opera*, I, 157, no. 56, and Bodin, *République*, I, ch. 10, p. 250.

[27] The major rights reserved to the king are discussed by A. Esmein, *Cours élémentaire d'histoire du droit français*, 4th ed. (Paris, 1901), pp. 430-39. Sixteenth-century jurists mentioned them frequently. See Bernard de Gèrard du Haillan, *De l'estat et succez des affaires de France* (Paris, 1570), bk. 2, pp. 82^{v}-83; Coquille, *Droict des Francois*, "Du droict de royaute," pp. 5-23; Bodin, *République*, I, ch. 10, pp. 211-51; Chasseneuz, *Catalogus*, pt. 5, consid. 24, pp. 124^{v}-132^{v}, who listed no fewer than 208 rights "reservata in vim regaliae et superioritatis."

them by "a special title in which they are not participants."[28] Seyssel expressed the most extreme view, that the king, contrary to Bartolus who placed him "among the dignities," was not a magistrate but rather the "summit of dignities" from which all others flowed.[29]

Lothair's opinion, then, was in the ascendancy among many French jurists. Whether they considered it a broad political authority or criminal jurisdiction they believed that, according to Roman law, only the princes possessed it by right of office. Magistrates held it only as a delegated power which they exercised in the name of the king. The magistrate's imperium was clearly distinguished from the royal summum imperium and the powers reserved to the prince, to which no inferior could lay claim.

In view of this juristic treatment of merum imperium and delegation of jurisdiction, it is not surprising that the lawyers warmly supported the expansion of royal jurisdiction during this century. Still considered relevant were the medieval maxims, "when the king is

[28] Le Caron, Pandectes, I, ch. 23, Oeuvres, I, 133, ". . . on a tousiours separé le Roy et autre souverain, des Magistrats, et luy a esté baillé tiltre special, duquel ils ne sont participans."

[29] Commentaria (on D. 2, 1, 3), ". . . quia cum ab eo omnes dignitates profluunt non dicitur esse magistratus sed culmen dignitatum . . .

present, all power of the magistrates ceases,"[30] and, "When the prince undertakes the judgment of any case, silence is imposed on all inferiors."[31] Even when the king was not present, however, his jurisdiction was thought to infuse all lesser courts. Le Caron, in arguing that merum imperium emanated from the king, cited an Arrest of the Parlement of Paris in 1498 which ordered high justiciers to acknowledge that their executions and other punishments were done by royal authority.[32] Perhaps the strongest justification for what was happening in French government was offered by Du Moulin, who insisted that the king was not only the apex of the jurisdictional structure, receiving appeals in the last instance, but that he pervaded "every grade and species of jurisdiction."[33] Royal efforts to reserve "royal

[30] Bodin, République, III, ch. 5, p. 453, observed that only the power, not the office, was suspended. La Roche-Flavin, Treize livres des parlemens de France, XIII, ch. 9, cited by Marcel Rousselet, Histoire de la magistrature française (Paris, 1957), I, 32.

[31] Chasseneuz, Consuetudines, rub. 1, p. 94, who quoted this from Baldus' commentary on the Consuetudines feudorum, II, title 53, De pace tenenda.

[32] Le Caron, Pandectes, I, [illegible] ch. 15, Oeuvres, I, 65.

[33] Commentarii, "Tit. 1, De fiefs," par. III, glo. 3, Opera, I, 253, no. 10. "Quia imo in omni gradu et specie iurisdictionis est fundatus in toto regno et in qualibet eius parte, . . . ita iure communi, et gentium

cases" to judgment by royal courts,[34] and to limit the jurisdiction of seigneurial courts to hearing cases only in the first instance,[35] were supported by jurists like Seyssel, who in 1519 urged the king to preserve direct sovereignty over all his subjects by requiring that his bailiffs, seneschals and other royal officials be given preference to the princes, barons and lords of the realm.[36]

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omnis iurisdictio regni est Regis, quod nec minima iurisdictio potest exerceri, nisi ab eo, vel eius nomine et auctoritate." For a full discussion of Du Moulin's "devitalizing" of the feudal system, see Church, Constitutional Thought, pp. 180-94.

[34] See Esmein, Histoire du droit français, pp. 420-24. The crime of carrying arms, so important a matter in the latter sixteenth century, was strictly the king's business, according to Jean Duret, L'harmonie et conference des magistrats romains avec les officiers francois (Lyons, 1574), p. 65, and could not be judged by "Seigneurs iusticiers."

[35] Du Moulin, Commentarii, Opera, I, 253, no. 10, desired that no one in France have omnimodam jurisdiction, but rather one degree only. Cf. p. 155, no. 50. Le Caron, Pandectes, IV, ch. 3, Oeuvres, I, 493, and Coquille, Droict des Francois, "Des ducs, comtes, barons, . . ." p. 37, supported the Edict of Roussillon of 1564 by which no lord was allowed more than one degree of jurisdiction in any one town or territory.

[36] Monarchie, II, 18-19, ed. Poujol, pp. 155-58. The royal power to judge matters of subjects immediately under feudal lords was "le principal floron de la Couronne" (p. 157). Chasseneuz, Consuetudines, rub. 1, p. 93, asserting parlement's direct jurisdiction over all subjects, forbade lords with "high justice" the rights to execute letters of parlement. Automne, La conférence, "Ad. L. non videtur" (D. 5, 1, 33), I, 90, cited an Arrest of the Parlement of Paris, January, 1584, that "en debat de iurisdiction l'on iuge pour la Royale."

Du Moulin insisted that jurisdiction had not been owned, bought and sold when France was founded, and argued that whenever patrimonial jurisdictions were misused, they should revert to ordinary justice, not as a transfer from one power to another, but as a reversion to the "pristinam naturam et statum."[37]

To jurists who limited the delegation of merum imperium to the king and who regarded with satisfaction the increasing sway of royal jurisdiction, it was a foregone conclusion that only the king could create magistrates, even those who stood under seigneurs and royal officials. No one, thought Hotman, was ignorant of the fact that the Roman people had transferred to the prince their power to create magistrates.[38] The king could appoint such magistrates as he pleased,[39]

[37] Commentarii, "Tit. 1, De fiefs," par. I, glo. 5, Opera, I, p. 152, no. 44; pp. 159-60, nos. 62-64; par. III, glo. 3, pp. 253-54, nos. 11-12.

[38] Quaestionum illustrium liber ([Geneva], 1598; 1st pub. 1573), q. 17, p. 116. Cf. Alciati, Digestorum . . . Commentaria (on D. 2, 1, 3) in Opera, I, 40, par. 88; Le Caron, Pandectes, I, ch. 15, Oeuvres, I, 67; Gregory of Toulouse, Syntagma, II, bk. 47, ch. 20, pars. 5, 7, p. 1228, and his De republica, IV, 5, par. 24, p. 175.

[39] Vincent de la Loupe, Premier et second livre des Dignites (Paris, 1560), p. 4, cited by Weill, Pouvoir royal, p. 20, n. 2. De Figon, Discours des estats et offices . . . de France (Paris, 1579), pref. epistle, p. Avi.

dismiss the officials appointed by his predecessor,[40] and even remove at will those whose office he had confirmed himself.[41] Inferior magistrates and seigneurs could not create other officials except by royal permission.[42] Bailiffs and seneschals, who had once

[40] Gregory of Toulouse, Syntagma (1582), II, bk. 47, ch. 20, par. 5, p. 1228, citing Baldus (Consilia 161, vol. III).

[41] Le Caron, Pandectes, I, , chs. 15, 23, Oeuvres, I, 67, 135. Gregory of Toulouse, De republica (1597), IX, 1, par. 33, p. 599, and IV, 5, par. 38, p. 185, where he cited a constitution of Louis XII which stated that the king invested men with offices "pour en iouyr tant que nous plaire;" Grassaille, Regalium Franciae, I, ius 11, pp. 148; Chasseneuz, Catalogus, pt. 5, consid. 24, no. 56, p. 126, and Consuetudines, rub. 1, par. 5, p. 261, where he refers to D. 1, 2, 2 for the principle that the "princeps potest moderare et limitare iurisdictionem suorum magistratuum," and rub. 10, "De retractibus," par. 1, p. 1536, where, on the basis of an opinion of Jason Maynus on C. 1, 25, 6, he says that the "princeps possit tollere dominium alteri ex plenitudine potestatis." It was a common though not universal opinion that a prince could remove magistrates by his "fullness of power" when by his ordinary power he could not.

[42] Jean Tavard, De iurisdictione (1557), ch. 3, p. 16. Le Caron, Pandectes, I, , ch. 15, Oeuvres, I, 67, ". . . le Prince souverain a droict et puissance de faire tout ce qu'il estime estre pour l'utilité de la Republique, et conservation de son Estat, et de sa Maiesté: en quoy consiste principalement l'institution et destitution des Officiers. . . . Ie scay bien que les autres seigneurs peuvent aussi avoir quelques officiers en leurs terres, et que les Rois de France ont autrefois permis et ordonné l'eslection des plus grands estats du Royaume: mais les officiers des seigneurs vassaux et inferieurs de Roy, ne sont officiers du Royaume, et la puissance qu'ont lesdits seigneurs d'establir officiers, leur a esté baillee par le Roy, et la tiennent sous son auctorité." Cf. Gregory of Toulouse, De republica, IV,

possessed the power to appoint their own lieutenants-general, could no longer do so, since, according to Jean Chenu, the lieutenants exercised merum imperium which they could receive only from the king. Bailiffs could appoint only "particular" lieutenants with the limited powers they held by right of office.[43] Cities, too,

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5, par. 24, p. 175; Jean du Tillet, Commentariorum et disquisitionum de rebus Gallicis, bk. 2, tit. "De connestabili; mareschallis . . . Galliae" (Frankfurt, 1579) (trans. of his Receuil des roys . . . ensemble le rang des grands de France [Paris, 1566]), p. 158, who argued that the constables and marshals must swear their oath to the king, to whom all officials owed faith, not to the Parlement of Paris; Hugues Doneau, Commentariorum de jure civili, XVII (1596), ch. 7, in Opera Omnia (Rome, 1828-33), IV, 1107; and, for the inability of seigneurs to confer public power on others, Automne, La conference (on D. 58, 4, 3), I, 702.

[43] Livre des offices de France (Paris, 1620), pp. 156-57, gives a useful historical summary of the documents involved in the increasing royal control over these lieutenants, and cites the opinions of several jurists on the subject. "Il faut donc plustost estimer," he says, "que ces Rois ont voulu se reserver ceste authorité de creer et pourvoir seuls à ces offices de Lieutenans, pour conserver l'une des marques de leur souveraineté." Chenu cites Du Moulin (Commentarii, "Tit. 1, De fiefs," par. I, glo. 5, Opera, I, 158, no. 58) who forbade ordinary judges, as mere "usagers," to create other magistrates, and Alciatus, whom Du Moulin followed in this opinion. Chasseneuz, Catalogus, pt. 7, consid. 25, p. 170^{v}, Rebuffi, Explicatio (on D. 1, 21, 4), p. 181, and Loyseau, Des offices, I, 5, pars. 52-58, Oeuvres, pp. 47-48, also deal with the Roman law principles involved in this matter. Cf. Le Caron, Pandectes, I, , ch. 23, Oeuvres, I, 152, and Gregory of Toulouse, Syntagma, II, bk. 47, ch. 33, par. 2, p. 1285. For general accounts of the lieutenants-general, see Roger Doucet, Les institutions de la France au XVI^{e} siècle (Paris, 1948), pp. 254-57, and Esmein, Histoire du droit, pp. 358-61.

faced increasing royal interference in the appointment of their magistrates and the operation of their courts, a fact which, to the juristic mind, might appear as but another corroboration of Roman law which had attributed to Roman civic officials very limited powers.[44] The power of all inferior authorities, as well as their very existence, was to rest, according to juristic opinion, upon their association with the king, not upon their independence of him.

The increasingly close identification of royal and magisterial authority in the sixteenth century had a double effect. The primary thrust was towards the growth of the monarchy over all lesser powers in the realm. On the other hand, if it could be maintained that these inferior officials were not mere "officers of the king" but "officers of the crown" with some degree of

[44] Doucet, Institutions, pp. 366-70. Esmein, Histoire du droit, pp. 609-13. Chasseneuz, Consuetudines, rub. 1, p. 86, said that cities in France did not have merum and mixtum imperium. Cf. Le Caron, Pandectes, I, ch. 23, Oeuvres, I, 135, who denied that municipal magistrates were truly magistrates since they had no jurisdiction, except for a few with jurisdiction and commandement "qu'ils tiennent du Roy;" Chenu, Livre des offices, pp. 341-42; Loyseau, Des offices, V, ch. 7, Oeuvres, pp. 467-74; Gregory of Toulouse, De republica, IV, 5, par. 24, p. 175; Automne, La conference (on D. 1, 15, 3, and D. 1, 56), I, 28, II, 47; Duret, L'harmonie et conference, pp. 166-67.

independence from the royal will, their association with the sovereign power might turn to their benefit, giving them a secure position within a unified public power. Legal thought in this century did contain elements of such a view. Although all jurisdiction was thought to flow from the prince, magistrates were often considered irremovable without good cause, and, although they might have only the exercise of criminal jurisdiction, Roman law allowed them fuller right to lesser grades of jurisdiction. Moreover, the imperium which characterized the very essence of magisterial office was commonly thought to be the "power to command." This power entailed a certain degree of freedom from the confines of legal procedure, a freedom which Bartolus and others had associated with merum imperium and which was comparable to the royal power itself. The conclusion that magistrates in some sense possessed merum imperium apart from a special royal concession was not altogether avoidable. Although this was not an imperium of broad governmental powers, it did represent the highest form of jurisdiction short of sovereignty itself, and some jurists, most notably Bodin and, in the early seventeenth century, Loyseau, attributed it to magistrates as an inherent part of their office. Along with increasing royal power grew the conception of a public system of offices which

shared the king's increasing authority over the whole realm, but which also enjoyed freedom from arbitrary royal manipulation.

An indispensible element of magisterial independence was freedom from arbitrary removal from office by the king. If royal power to create magistrates was universally accepted in this century, power to remove them at will was not. This was true, in part, because jurists had to reckon with venality and inheritance of office, but many lawyers opposed arbitrary removal of magistrates in order to secure better justice, prevent corruption, or to provide magistrates with perpetual tenure of office free from the uncertainty of being continuously at the king's mercy.[45] Perhaps the fullest defense of this position was that offered by Pierre Rebuffi (d. 1557). On the assumption that jurisdiction and the office of magistrate were equivalent to *dominium*, uniting fief and

[45] Seyssel, *Monarchie*, I, 10, p. 118. Grassaille, *Regalium Franciae*, pp. 301-2. La Loupe, *De magistratibus . . . Francorum* (Frankfurt, 1579; bound with du Tillet, *De rebus Gallicis*) (1st pub. 1551), "Prolegomena," p. 189. Bodin, *République*, III, ch. 2, pp. 379-80, 386-87, where he distinguished between a "commission," which could be revoked at will, and a true office. Du Moulin, *Commentarii*, "Tit. 1, De fiefs," par. I, glo. 5, *Opera*, I, 155, no. 49. Gregory of Toulouse, *De republica*, IX, 1, par. 36, p. 600. Automne, *La conference* (on *D.* 1, 53), II, 45.

justice, he argued that magistrates, having jurisdiction as their own (tanquam suam) and in their own right (iure proprio), could not be arbitrarily removed, because dominium was guaranteed by natural law and the law of nations. Property law (D. 39, 2, 24) also prevented the king, the "lord of offices and jurisdictions," from disposing freely of his property if doing so caused injury to another.[46] He could not dismiss at will the magistrates of his predecessor, for heirs were not allowed to alter the condition of their inheritance. Furthermore, since the successor of a dead king took his place and represented him immediately, it was said that dignities never die; hence, by the same token, magistracy and office never die (Cum ut dignitates [fictione juris] nunquam moriuntur, ita nec magistratus et officia).[47]

[46] De Christianissimi atque invictissimi regis Franciae muneribus, et eius praerogativis tractatus, in his Tractatus varii (Lyons, 1619), p. 23. Rebuffi explained how both king and magistrates could possess jurisdiction iure proprio by the following argument: "Nam licet nudo iure dicatur Rex ipsorum officiorum, et iurisdictionum dominus, et supremus, tamen inquantum iam eorum exercitium est penes has personas, libere non dicitur dominus, sed tantummodo per mortem eorum, qui talia officia habebant. Et propter ea voluit [D. 1, 21, 1] quod iudices et magistratus ordinarii dicuntur habere propriam iurisdictionem, et ea uti iure proprio. et pro illo tempore sunt quodammodo (ut ita dicam) domini: cum id dicatur proprium, quod uni soli convenit, ut volunt moderni."

[47] Ibid., p. 22. Among the practical reasons he offered for irremovability of magistrates (pp. 18-21)

Rebuffi's arguments from laws of property were largely anachronistic, but his emphasis on the undying dignity of magisterial office, itself traceable to medieval origins, was clearly an attempt to associate magistrates with the royal *dignitas* which never died, reflecting the developing notion of inferior public office as an integral element of a sovereign structure of public power.[48]

Shorn of its association with the ownership of property and the implicit possession of criminal jurisdiction, Rebuffi's idea that magistrates had jurisdiction by right of their office was in accord with most analyses of Roman law. In Rome, even "minor magistrates" had "simple jurisdiction," if not *imperium*, by right of office; Du Moulin broke decidedly from tradition when

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were that changing judges impedes justice, and that a precarious office will have few candidates and provides a temptation for its holder to use it lucratively.

[48] See Kantorowicz, *King's Two Bodies*, pp. 383-450, for the history of the notion that *dignitas non moritur*. On pp. 415-19, he discusses the four presidents of parlement who, in the royal funeral ceremony, wore red robes signifying the undying crown and justice. Cf. Ralph E. Giesey, *The Royal Funeral Ceremony in Renaissance France* (Geneva, 1960), pp. 56-61. Rebuffi's remarks may perhaps be interpreted as an extension to all magistrates of the principle represented by the four presidents. Cf., for the inclusion of magistrates in the "corpus" of the king and the "status" of the realm in the Middle Ages, Post, *Medieval Legal Thought*, pp. 343-44, n. 30, pp. 356, 364.

he argued that magistrates had only its exercise.[49] Moreover, since jurisdiction (according to D. 2, 1, 2) was never conceded without that which was necessary to enforce it, that is, a moderate power of coercion or mixtum imperium, it could be argued that civil jurisdiction could never exist apart from mixtum imperium, and that for this reason magistrates could have both by right of office and could freely mandate such powers to others.[50] Hence, some jurists recognized a limited right of magistrates to create other officers inferior to themselves. Du Moulin allowed that jurisdiction transferred to someone in his own name included the power to create magistrates for administering it, and Baro recognized that lords with seigneurial jurisdiction

[49] Commentarii, "Tit. 1, De fiefs," par. I, glo.5, Opera, I, 157, no. 57. Referring to the Azo-Lothair dispute, he argues, "Nec magistratus habent aliquod ius aut dominium in iurisdictione, cuius omne ius, dominium et possessio, residet, penes principem, vel alium dominum: sed habent exercitium et administrationem tantum." He admits one significant exception (p. 158, no. 59), that of hereditary offices.

[50] Rebuffi, Explicatio (on D. 1, 21, 4), p. 183. Baro, Commentaria (on D. 2, 1, 1), Opera, I, 183. Jacques Cujas, Observationes et emendationes, XXI, ch. 30 (1585), in Operum, quae de iure fecit (Paris, 1637), II, 625, "Mixtum est potestas quae iure proprio magistratus competit . . . vel, cui iurisdictio cohaeret, adhaeret, inest." Doneau, Commentariorum, XVII, 7, in Opera omnia, IV, 1096-1100, 1134-36.

could create magistrates *exemplo regum*.[51] Bodin realized that in ancient Rome many magistrates had created lesser officers, and that in every commonwealth, the great officials as well as many corporations were allowed to set up officers under them, although all authority came ultimately from the king.[52]

In accordance with Roman law, most jurists thus recognized that magistrates had powers roughly equivalent to *mixtum imperium* by right of office. This meant, in general, that, in addition to the civil jurisdiction by virtue of which he could either judge or appoint judges, the magistrate also had a certain power to command. This power, in fact, distinguished magistrates from officers and judges. Jurists usually defined a "magistrate" as a publis official with *imperium*, or, as it was

[51] Du Moulin, *Commentarii*, *Opera*, I, 157, no. 57. In view of his statement about the jurisdiction of magistrates, however, he must have meant that only hereditary officials could create other magistrates, since only they were not mere administrators of jurisdiction. See above, n. 49. Baro, *Commentaria*, "Ius Gallicum" (on *D.* 2, 1), p. 196.

[52] *République*, I, ch. 10, p. 230. What made it possible to combine the idea that all authority derived from the king with the belief that magistrates could have jurisdiction in their own right was the juristic notion that the prince's grant of jurisdiction could be an actual transfer, not merely a revocable mandate. See Doneau, *Commentariorum*, XVII, ch. 8, *Opera*, IV, 1155. "Princeps si dixit se alicui . . . jurisdictionem dare, jurisdictionem propriam fecit ejus cui dedit, non mandatam."

called by Ulpian, potestas, and, translated into French, commandement.[53] With this power, the magistrate could enforce compliance with whatever jurisdictional authority he had.

The power to command was commonly thought to be free from the obligation to follow legal formality to which jurisdiction alone was subject.[54] Bartolus had taught that imperium, the possession of which distinguished the "noble office of judge" from the "mercenary office" which held only jurisdiction, was free from the prescriptions of law, while jurisdiction was not. Among Bartolus' sixteenth-century followers, Baro distinguished between the officium judicis, which included imperium and freedom from the "action of law," and the officium

[53] Among the many jurists who spoke of magistrates in these terms, separating them from lesser officers, were Bodin, République, III, ch. 2, p. 372, and Methodus (ed. of 1572), ch. 6, pp. 254-55, 257; Jean de Coras, Commentarii . . . in pandectarum (1558) (on D. 2, 1, 3), in Opera . . . omnia (Witebergae, 1603), I, 415, par. 21; Le Caron, Pandectes, I, ch. 23, Oeuvres, I, 136, who, dissatisfied with the simple definition which gives the magistrate the power to command, added the power to govern, moderate and rule; Doneau, Commentariorum, XVII, 8, Opera, IV, 1131, "Est igitur nostri hoc imperium jubendi imperandive potestas efficiendique ut ratum si quod jusseris"; Loyseau, Des offices, I, 6, pars. 3-10, Oeuvres, pp. 50-51.

[54] This contradicted the opinion of those jurists who argued that magisterial imperium, even if merum, was bound by the law. See above, n. 19.

jurisdictionis which was bound by it.[55] Bartolus' "noble office of judge" became, in the sixteenth century, the true office of magistrate. Freedom from the action of law was recognized as a chief characteristic of magisterial *imperium*. Early in the century, Vincent Cigauld allowed magistrates, when recourse to a superior was impossible, to transcend laws and statutes.[56] Cotereau, in 1525, defined magisterial *imperium* as what was more of strength (*virtus*) that of necessity, more of power or condition than of execution and performance.[57] A judge, said Longovallius in the 1530's, acted *ex officio suo* when he judged according to equity without awaiting an accusation and legal action.[58] According to Bodin, to

[55] Baro, *Commentarii* (on *D.* 2, 1, 1), *Opera*, I, 183-84. See also Gilmore, *Argument*, p. 78. Rebuffi, *Explicatio* (on *D.* 2, 1, 1), p. 198, had made a similar distinction between the "pure" office of judge and the "mixed" office.

[56] *Consilium . . . super alienatione iusticiae facta iurisdictionum iudicum*, bound with his *Opus laudabile . . . facta principum, praelatorum et baronum* (Lyons, 1516), p. Bv^{V}.

[57] *Schedulare magistratuum*, "De mero imperio," p. 58. "Potestas legis autem dicitur in magistratibus imperium, sive merum, sive mixtum sit iuris: ergo dispositio necessitas magis quam virtus, seu effectus et actus magis quam potentia vel habitus non imperium: sed iurisdictio simpliciter dicitur, ut sunt omnes partes iuris."

[58] *Declaratio*, pp. 161-65, esp. p. 161, par. 2, "Ubicunque enim iudex aequitate aut aliqua probi religione motus non autem virtute actionis aut accusationis summaque iuris necessitate aliquid fuit, idipsum dicitur

whom magistrates were "living law," judges could judge according to their conscience when no law covered the case (although only the prince was able to contradict received laws and customs).[59] Magisterial *imperium*, he thought, which was possessed by right of office, was manifested by edicts, whereas jurisdiction was based only on laws. In following the "action of law" (*legis actio*), the magistrate only partially fulfilled his office, for the true function of magistrate (*officium judicis*), like the "noble office" of Bartolus, was free from that process.[60] Jean Tavard defined the authority of magistrates as a "free power" of ordering, coercing and executing in civil affairs. On the basis of Aristotle (*Politics*, IV, 15), he argued that a magistrate was a person allowed to consult, judge and command--"and especially to command." Tavard, furthermore, saw the

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officio suo exercere." Cf. Doneau, *Commentariorum*, XVII, ch. 8, *Opera*, IV, 1124-30.

[59] *République*, I, ch. 10, p. 249; III, ch. 5, p. 429. For magistrates as "living law" in the *Vindiciae*, see above, ch. 5, n. 38.

[60] *Methodus*, ch. 6, pp. 171-79, 255, 263-65. On p. 263, ". . . esse duo capita juris universi, legem et aequitatem, a quibus pendet legis actio, et magistratus officium: et quae ratio legis est ad ejus actionem, eadem est aequitatis ad officium magistratus." On p. 265, he adds, "non quod magistratus, qui iussa legum exequitur, officio non fungatur; sed minus vere ac proprie sic usurpatur, . . . et qui suo jure imperium, aut iurisdictionem, aut quid aliud ejusmodi habet, ejus omnino proprium est: idque alteri mandare potest."

implication of this doctrine for questions of wider political import, suggesting that the magistrate was, to a certain extent, legibus solutus, and that his mixtum imperium bore some resemblance to the supreme power.[61] The magistrate's power to command extended beyond the mere enforcement of existing law to a share in the royal power to interpret the law, to fill its gaps by judgments from equity, and to dispense, if necessary, with ordinary legal procedure.[62]

[61] De iurisdictione (1557), ch. 8, pp. 31-32, ch. 17, pp. 52-53. In ch. 10, p. 41, he says "Quoties magistratus, aut eius qui litibus finiendis praeest potestas, legibus quadam ex parte soluta est, ita ut licentiam suam pro lege habeat: . . . Quare verisimile est, mistum imperium huic summae potestati liberae ac solutae propemodum simile."

[62] Loyseau also compared magisterial and royal power to command, but with two significant differences. In his commentary on the Ordinance of Moulins (1566) he, like Tavard, cited Aristotle's statement concerning the power to command, "which is the perfect mark of the magistrate," arguing that "ce commandement rend les magistrats participans de la haute puissance du Prince," but making the important distinction that the prince had such imperium "en propriete," while the magistrate had it "par exercice seulement" (cited by W. S. Johnson, introduction to Jean de Coras, The Qualifications . . . of a Good and Complete Judge [Montreal, 1934], p. xlvi). Later, in Des offices (1610), I, 6, par. 38, Oeuvres, p. 53, he argued that the "true command" of the magistrate "estoit habere legis actionem, c'est a dire avoir le mesme Office et pouvoir que la loy, quoy que ce soit, avoir l'execution de la loy." Although this seems to have limited magistrates to following the action of law, Loyseau soon pointed out (par. 72, p. 58) that they might exercise their "pur commandement . . . sans observer les formes de Iustice" in matters of "legere coercion et punition."

Since the public power of the magistrate, or his distinctive "power to command," was associated with the Roman legal concept of imperium, it was affected by Roman legal questions respecting the possession and delegation of this power. Specifically, did it include merum imperium, or only mixtum imperium? Did the magistrate possess it by right of office or only "by right of another"? Or were French conditions such that Roman legal terminology was not adequate to describe them? In answer to the first question, some jurists, such as Tavard, Doneau and Loyseau, identified the magistrate's power to command with mixtum imperium or civil jurisdiction, reserving criminal jurisdiction to the prince.[63] Other jurists, however, such as Longovallius, Baro and Bodin, allowed magistrates to use their power of discretion even in cases of merum imperium.[64] This need

[63] Tavard, De iurisdictione, ch. 8, pp. 31-32. Doneau, Commentariorum, XVII, ch. 8. Opera, IV, 1123-36. Loyseau, Des offices, I, 6, par. 38, Oeuvres, p. 53. In par. 72, p. 58, Loyseau observed that "high justice" and the right of the sword were never exercised beyond the "forms of justice," a view expressed earlier by Jean du Tillet, De rebus Gallicis, bk. 2, tit. "De gubernatoribus provinciarum," p. 177, ". . . nam profecto in reis damnandis minimum est delectationis, ut ex officio facias." Even the king must act in such matters "ex ritu et consuetudine."

[64] Longovallius, Declaratio, p. 164, par. 6. Bodin, Methodus, ch. 6, p. 255. Baro, Commentarii (on D. 2, 1, 3), Opera, I, 184.

not imply, of course, that the magistrate possessed merum imperium by right of his office.[65] Many jurists, in fact, identified the inherent power of magisterial office with imperium by limiting it to mixtum imperium. This represented no mean power, of course, for it included full civil jurisdiction with the coercion necessary to enforce it, but it meant that criminal jurisdiction must be acquired by special concession from the prince. It was evident to several jurists, however, that the criminal jurisdiction of many magistrates of their own day was (or should be) beyond the arbitrary control of the king, and they continued to possess it, along with their magistracy, when the king died, which would not be the case if it were merely a delegated power. The tradition of Azo had not died. Several jurists still attributed merum imperium to magistrates by right of office, and this represented, as Bodin said, the greatest power short of sovereignty available to any magistrate, the power of life and death.[66]

[65] Longovallius, in fact, seems strictly to follow Roman law, allowing merum imperium to be held only by special concession. See his Declaratio, p. 176, par. 1. He also indicated, p. 146, pars. 4-5, that merum imperium was itself not free of the action of law, although he later (p. 164, par. 6) allowed judges to exercise their "pure office" (free of such action) in cases of merum imperium.

[66] Methodus, ch. 6, p. 256.

A difficulty, however, had to be erased. Roman law taught that merum imperium, as a power given "by law" or by special concession, did not belong to magistrates as a normal part of their office, and this doctrine was, as we have seen, upheld by many French jurists. Two solutions were offered to this problem. Either Roman law must be interpreted so as to yield the desired result, and corresponding distinctions found to explain the status of contemporary magistrates, or else Roman law might be simply overlooked (a feat facilitated by humanistic jurisprudence), and different terminology employed to explain the possession of merum imperium by magistrates. The outstanding exemplar of the former solution was Bodin; Loyseau best represented the latter. Both, however, had predecessors.

Early in the sixteenth century, Rebuffi attempted to secure the support of Roman law by suggesting that the law (D. 1, 21, 1) which prevented the delegation of merum imperium referred only to types of cases, not to persons, and that whatever was conceded "generally" to any major magistrate (as opposed to things conceded "specially" or by name) was given to him by right of office. The powers conceded to an office at the time of its institution were conceded generally; those added later were special powers not properly belonging to the

office.[67] Roman law (C. 1, 50) called magistrates "administrators," but only because they were to "administer and render law in all things." They were in reality "true magistrates" whose ordinary jurisdiction by right of office included merum and mixtum imperium as well as simple jurisdiction. They did not, of course, possess the summum imperium of the prince. Thus, Rebuffi announced, the dispute between Lothair and Azo was at an end. Lothair had simply confused summum imperium with magisterial imperium, while Azo referred only to the merum imperium conceded to magistrates by the prince, but which they nevertheless held by right of office. On this basis, he argued that seneschals in France had

[67] Explicatio (on D. 1, 21, 1), pp. 162-64. A similar interpretation of the imperial "concession" of jurisdiction was offered later by Jean de Coras, Commentarii (on D. 2, 1, 3), Opera, I, 413, par. 11, and Miscellaneorum juris civilis, III, ch. 17, Opera, II, 661, who argued that "to have" or "to be given" implied proprietary possession or transfer. Thus all major magistrates in Rome "had" merum imperium, like all high and middle ranking magistrates of France. Hotman, in his Novus commentarius verborum iuris (Venice, 1564), p. 128, v. "Imperium," spoke of merum imperium being proprium to some Roman judges, and in his Observationum in ius civile (Geneva, 1589), III, ch. 4, pp. 21-23, he observed that provincial officials had mandated it to their legates, at least during the Republic before the laws were accommodated to the "arbitrary will" of the emperors. He makes no overt reference, however, to sixteenth-century magistrates.

merum imperium as a normal element of their office.[68]

Bodin also claimed to have settled the Azo-Lothair controversy. His interpretation of Roman law was based upon his distinction between the legis actio and the officium judicis (see above, n. 60). A magistrate, whether Roman or French, with the latter type of office possessed the right to decide affairs by his own discretion, including even matters of merum imperium. This was certainly true of military magistrates who could commit their power of the sword, or part of it, to others, and, contrary to Lothair, Alciati and Du Moulin, it was true also of bailiffs and seneschals who could create deputies. Magistrates were stronger and had more freedom, Bodin argued, in modern monarchical states than in ancient aristocracies and democracies, partly because they were perpetual, partly because of their power of discretion. If Papinian allowed some Roman magistrates to create deputies, how much more was this true of

[68] Explicatio (on D. 2, 1, 3), pp. 207-10. Against Bartolus' division of office into "noble" and "mercenary," Rebuffi argued (p. 210) that "omnia, quae sunt meri, misti imperii, et iurisdictionis, uno eodemque officio expediuntur, et non diverso . . . . Et ideo omnia expediri dicuntur ab eo, iure sui officii, et magistratus." As administrators, he argued (p. 208), magistrates "ius obtinent, sicut alii qui administratores in iure canonico habent." Although they possessed merum imperium, seneschals could not mandate it to lieutenants, for the latter (p. 181, on D. 1, 21, 4) were created by the king.

French officials whose offices were even more "proper" to them? Still, Bodin could not admit that magistrates owned, or had any inherent right to, their office, for this would have been incompatible both with his (and Lothair's) view of sovereignty and centralized public power, and with the Roman idea that magistrates merely administered merum imperium in the name of the king. He made a second distinction, therefore, between the power which belonged inherently to an office and the office itself, of which the magistrate was only an administrator.[69]

[69] Methodus, ch. 6, pp. 262-67. République, III, ch. 5, pp. 436-42. On p. 438, ". . . la puissance ottroyee aux Magistrats en vertu de l'erection qui est faicte de leur office est propre a l'office, ores que l'office ne soit pas propre à la personne." Gilmore, Argument, p. 109, argues that Bodin first made this second distinction in the République, but on p. 267 of Methodus, Bodin had already said, "Ac tametsi proprium est imperium magistratus, nihilominus tamen, nec magistratus nec honores quisquam habet suo iure." Bodin's distinction between the legis actio and the officium iudicis was similar to Baro's officium iurisdictionis and officium iudicis, both of which allowed the office of judge to include merum imperium. In France, said Baro, Commentarii, "Ius Gallicum" (on D. 2, 1), Opera, I, 194, it was not necessary to distinguish between merum and mixtum imperium, since both could be mandated by royal judges and, by implication, be possessed by right of office. Bodin's distinction between the power inherent in the office (which made the power independent of the king) and the office itself was essentially the same as that proposed earlier by Alciati, Commentaria (on D. 2, 1, 3), Opera, I, 41-42, pars. 91-98, where he explained that magistrates, even though mere administrators of their offices, remained in office at the king's death because the power inherent in the office was given by "the law," not by the king. Although delegation "a lege" was a Roman legal concept, here, as suggested by

In this way it could be said that the magistrate had merum imperium by virtue of his office. Hence, both Azo and Lothair were awarded the aequum, although Bodin generally favored Azo.

Jacques Cujas, on the other hand, accepted the fact that in Roman law magistrates did not have merum imperium except by special concession. Faced with the fact that some French magistrates had criminal jurisdiction, he simply included this in their mixtum imperium which they held by right of office, implying that merum imperium no longer existed under that name.[70] This willingness to explain the contemporary situation without regard for the technical niceties of Roman law, relying rather on terminology applicable only to the present, was shared by Loyseau. Arguing against Bodin, Loyseau maintained that Roman magistrates had merum imperium only by special concession, and that failure

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Gilmore, pp. 42-54, the "law" was beginning to refer to "the regulated organization of the public power," losing its medieval identification with the prince. For a fuller discussion of Bodin, see Gilmore, pp. 93-112, and above, pp. 271-72.

[70] "De origine iuris . . . Pomponii cum commentario" (on D. 1, 2, 2, par. Diende cum aerarium), Operum, I, 597, ". . . recte dices magistratus hodiernos, qui de rebus capitalibus cognoscunt non habere merum imperium. quia mixto quod habent suo jure, insunt omnia quae olim meri imperii erant." Cf. his Observationes et emendationes, XXI, ch. 30, Operum, II, 624-25, and Gilmore, Argument, p. 86.

to understand this had led Frenchmen to think that not only royal magistrates but also even simple judges of seigneurial justiciars had the right of the sword by virtue of their office. In reality, he said, all propriety of command is in the king who transfers only its exercise, as indicated by the use of the king's seal on the sentences of judges. The seigneurs of medieval France had followed the "false practice of Roman law" when they usurped the propriety of their charges and converted them into seigneuries. Loyseau nevertheless accepted seigneurial jurisdiction as a fait accompli, admitting also that many officers had a proprietary right since the Ordinance of Louis XI (1467) had made them irremovable. To combine seigneurial jurisdiction and possession of merum imperium with the belief that all imperium resided properly in the king, he forsook Roman law and, like Bodin, distinguished between the power and the office. But where Bodin had made the imperium a property of the office which was exercised by the magistrate, Loyseau considered the office a property of the magistrate who exercised an imperium and jurisdiction belonging to the king.[71]

[71] Des offices, II, 1, pars. 1-41, Oeuvres, pp. 141-45. See also Gilmore, Argument, pp. 113-24. For the Ordinance of 1467, see Doucet, Institutions, I, 404. Against Du Moulin's belief that the officer had only the

Loyseau, like Bodin and Rebuffi, believed he had solved the problem of Azo and Lothair, combining magisterial and royal possession of merum imperium, leaving the king the sole true possessor, but allowing magistrates security of tenure. Rebuffi's solution had been too simple; his distinction between merum and summum imperium had not answered the argument that the king was the source of all imperium. Bodin avoided this error by placing the magistrate's office in dependence on the sovereign power while giving him an imperium inherent in his office; Loyseau escaped it by preserving royal control over jurisdiction while allowing magistrates to own their offices. The solutions of both Bodin and Loyseau, however, would seem contrived if all jurisdiction and dignities, as it was said, truly flowed from the king alone. Both writers avoided this impasse by removing from the king all arbitrary power over offices, even over his own. They argued that offices belonged in propriety to neither magistrates nor kings, but to the

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"usage" of his office, Loyseau observed that this applied only to jurisdiction; otherwise "toutesfois il est proprietaire et Seigneur de son Office" (par. 31, p. 144).

commonwealth, the public, or to public law.[72] Like the crown, the magistracies formed part of the "state," and were managed, but not owned, by the king in accordance with the laws. The king was the only source of unity in the state, for public offices were unified in an abstract structure of public power. Nevertheless, the magistrates, even though considerably independent of the king and possessors of a "power to command" very similar to his, were closely bound to him, for he was still the apex of all jurisdiction.

In 1596, Gregory of Toulouse had compared the unity of king and magistrates to that of the hand with its fingers, and to the unity of all numbers in the number "one." Magistrates had not the supreme power which could not, as a unity, be communicated, but shared in the "performance" (effectus) of it.[73] Jurists of the

[72] Bodin, République, III, ch. 5, p. 436, ". . . tous les estats, Magistrats et offices appartiennent à la République en proprieté (horsmis en la Monarchie seigneurial) demeurant la provision à ceux qui ont la souveraineté." Loyseau, Des offices, II, 1, par. 39, pp. 144-45, ". . . tant s'en faut que la proprieté de l'Office appartienne à l'Officier, que même elle n'appartient pas au Prince et Monarque souverain, mais il n'en a que la collation . . . mais la vraye proprieté des Offices et Benefices est publique, et de droict publique." Gilmore, Argument, pp. 106-7, 121. The position of Bodin and Loyseau is quite similar to that of Alciati, who had attributed the independence of magistracies to their being delegates of the law, rather than of the prince. See above, n. 69.

[73] De republica, I, 1, par. 9, p. 5.

sixteenth century, attributing to magistrates a certain independence within a government centralized under the king, had made it possible for their close association with the king and his power to elevate their position. "What is more elevated and important," asked Loyseau, "than to represent the person of the monarch and speak for him, to participate in this public power which is derived originally from God?"[74] Injury to such officials was, to some jurists, tantamount to lese majesty.[75] Moreover, participation in public power separated the officials who were coming to be known in the late sixteenth century as "officers of the crown" from officers of the royal domain and lesser delegates of the king.[76]

[74] Des offices, I, 6, par. 10, Oeuvres, p. 51.

[75] Most notably, this was the opinion of Loyseau, Des offices, I, 6, par. 12, Oeuvres, p. 52, and is based partly on C. 9, 9, 5, which made it a crime of lese majesty to injure any member of the imperial consistory or senate, "nam et ipse pars corporis nostri sunt." Cf. Rebuffi, Explicatio (on D, 1, 21, 3), p. 175; and Franciscus Marcus, Decisiones aureae, in sacro Delphinatus Senatu (Lyons, 1585; 1st pub. 1531?), I, Decis. 292, par. 1, p. 93, who, however, limited this crime to injury done to the major officials who stood "beside" (ad latus) the prince. Bodin, République, I, ch. 10, p. 218, flatly opposed this view, insisting that the crime pertained only to injury to the king's person, for no one else had "majesty."

[76] The concept of "officers of the crown," while implicit in the late medieval development of "public" institutions, did not receive theoretical clarification until the late sixteenth and early seventeenth centuries, and even then there was disagreement as to definition

The jurists, who had struggled with legal doctrines of the king as the source of all jurisdiction and offices, were slower in developing a conception of "officers of the crown" than were the Huguenots, who had simply disdained the royal claims and erected their structure of public authority directly upon the authority of the community. The juristic conception of a structure of public offices with a "power to command," analogous to the crown and participating in the sovereign power of the king, was not, of course, intended to justify resistance as was Huguenot thought, but it did imply that the king was limited by the very existence of the magistrates, whose imperium and jurisdiction he could not arbitrarily remove.

Corresponding to the juristic theory of office outlined above was the lawyers' view of the role of French inferior officials as checks on the king. So far were jurists from conceding absolute powers to the king that they attempted to preserve the traditional limits on his power by nobles, estates and inferior magistrates, whose authority, to the juristic mind, derived from their jurisdictional powers.

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and the officials to be included. See Doucet, Institutions, I, 102-4, 403-5; and Giesey, Funeral Ceremony, pp. 66-67.

The role of the nobles in governing the realm, if not always beneficial, was still highly revered,[77] and a few jurists expressed dismay at the envelopment of seigneurial justice by an expanding royal jurisdiction. Most notable of these jurists was Guy Coquille,[78] but several others repeated familiar principles of medieval seigneurial jurisdiction, implying their approval of its existence by their failure to offer rejoinders.[79] Even

[77] Among the works devoted wholly or in part to discussing the origins, ranks and powers of the nobility are Symphorien Champier, Le fondement et origine des tiltres de noblesse (Paris, 1535); Chasseneuz, Catalogus, pt. 5, consid. 43-56, pp. 148^{v}-151^{v}; Claude Fauchet, Origines des dignitez et magistrats de France (1600), bk. 2, in Les Oeuvres (Paris, 1610), pp. 471-505^{v}; Du Tillet, De rebus Gallicis (1566).

[78] See Church, Constitutional Thought, pp. 295-300, and Coquille, Droict des Francois, "Des ducs, contes, barons, . . ." pp. 33-35.

[79] See Rebuffi, De regum et principum muneribus, in Tractatus varii, p. 8, par. 122, "Comes in suo Comitatu, dux in ducatu, Rex in regno suo habet imperium et iurisdictionem"; par. 140, "Rex, Dux, Marchio potest condere legem in territorio suo . . . Licet Angel. teneat contra, et male, . . . nisi salvando dicas, quod loquitur in eo qui non habet merum imperium"; p. 13, par. 262; p. 14, par. 311. This work is one of the best examples of how medieval legal maxims were still widely quoted in the sixteenth century. Cf. Baro, Commentarii, "Ius Gallicum" (on D. 1, 21), p. 178, "Igitur moribus beneficiorum, Duces, Comites, Subcomites, Barones, Castellani, maximam iurisdictionem, maximumve imperium habent: . . . Maximam tamen accipe iurisdictionem, non absolute, sed ad mediam et minimam relatam"; De Figon, Discours des estats et offices (Paris, 1579), p. 27; Cujas, De feudis, IV, tit. 19, in Operum, II, 883; Chasseneuz, Consuetudines, rub. 1, pp. 92-93. Cf. also Innocent Gentillet, Discours sur

the royalist, Grassaille, argued that seigneurs possessing merum imperium should be able to try lesser cases of armed assault and bearing of arms, for otherwise, since almost all crimes involved arms, the king would absorb all jurisdiction of nobles and prelates. "The prince ought not," he argued, "to lessen the rights of anyone" (citing D. 1, 6, 2), nor should he revoke what he had conceded (Authentica, coll. 2, tit. 5).[80] Grassaille echoed the warning of Seyssel that the usurping of seigneurial rights and prerogatives by royal officials would, through endless litigation, ruin the nobility.[81]

Concerning the Estates-General, the jurists said little other than to describe its functions of choosing regents, reforming abuses, agreeing to taxes and helping to make the most important laws.[82] For the jurists,

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les moyens de bien gouverner (n. p., 1579; 1st pub. 1571), pp. 623-27, who defended the nobles and their justice against Machiavelli's criticisms.

[80] Regalium Franciae, I, ius 14, pp. 205-9. Grassaille relied heavily for his argument on Pierre Jacobi, Practica (Lyons, 1511), rub. 35, p. cxxiv^{v}. See also Esmein, Histoire du droit français, pp. 420-21, nn. 2, 5.

[81] Monarchie, II, ch. 19, p. 157.

[82] La Loupe, De magistratibus, bk. 2, tit. "Tres status," p. 210. Gregory of Toulouse, De republica, XXIV, 5, par. 1-3, pp. 1465-66. Coquille, Droict des Francois, "Du droict de Royaute," p. 5. Chenu, Livre des offices, tit. 40, ch. 26, p. 1010.

its importance stemmed largely from its historical association with the parlement, an association which was none too clear to their historical vision but which indicates that it was still regarded largely as a judicial body.[83] Although some lawyers attributed to this body a role in limiting the king--Gregory of Toulouse allowed it to punish tyrants[84]--it is likely that Bodin expressed a common opinion in arguing that the estates in no way impeded a king, for they had neither power to determine nor power to command except when the king was incapacitated. "Those who have written about the duty of magistrates," he wrote in 1576, "have deceived themselves by thinking that the power of the people is greater than that of the prince."[85] Whatever the Estates-General's

[83] Du Haillan, De l'estat et succez, bk. 2, p. 89, regarded the Estates-General as Philip IV's replacement for the Parlement of Paris. On the other hand, Le Caron, Pandectes, I, ch. 21, Oeuvres, I, 118, believed that the assembly of estates, the "ancien Parlement," had been replaced by other institutions, and La Loupe, De magistratibus, bk. 2, p. 210, acknowledged that it had "formerly" been a check (fraenum) on kings, similar to the Spartan ephors.

[84] Gregory of Toulouse, Syntagma, I, bk. 6, ch. 20, par. 12, pp. 278-79.

[85] République, I, ch. 8, pp. 141-42. Chenu, Livre des offices, tit. 40, ch. 26, p. 1010, agreed with Bodin, thinking that the book he referred to was Hotman's Franco-Gallia, a book which, he said, "tending to sedition, tries to show that the Estates are above the king."

historical relationship with parlement, Bodin considered it to be lacking in the legal powers necessary to restrain the sovereign.

Bodin similarly quashed the claims of the royal council. Other jurists stressed the council's historic role as "part of the body of the prince" in which, as in the Roman senate, was centered the political life of the realm and without which the king could do nothing.[86] Confusion between the council and the sovereign courts of parlement led to an emphasis on its juridical powers as the royal curia or sovereign court.[87] Bodin, on the other hand, clearly perceived the difference between the

[86] Among the writers who treated the power of the council were Hotman, whose Franco-Gallia was written to emphasize its importance; Boerius, De authoritate magni consilii (1512); Claude de Seyssel, Prohème en la translation de l'histoire d'Appien (written c. 1510; 1st pub. 1544), ed. Jacques Poujol (Paris, 1961; bound with La monarchie de France), pp. 80-81, par. 6; Rebuffi, De regum et principum muneribus, in Tractatus varii, p. 22, par. 1; p. 34, par. 159; Grassaille, Regalium Franciae, I, [illegible]ius 12, p. 166; Chasseneuz, Catalogus, pt. 7, consid. 12-14, pp. 165^{v}-166; De Figon, Discours des estats, pp. 1-2; Coquille, Droict des Francois, "Du droict de Royaute," p. 4.

[87] See, for example, Le Caron, Pandectes, I, ch. 23, Oeuvres, I, p. 139, and Seyssel, Prohème, ed. Poujol, pp. 80-81, par. 6. This confusion was due in part to a looseness of terminology--the council was usually called a "cour" or "curia" while "conseil" denoted the parlement--deriving from the historical development of these institutions and partly to overlapping membership. See Doucet, Institutions, I, 132-34.

council and the courts, arguing that councillors had no power to command; the king's duty to heed them was purely voluntary.[88] Other jurists, too, argued only that the king "should" obtain the council's consent to his policies.[89]

Bodin's attitude toward the council places in focus the great significance which he and other lawyers placed upon the office of magistrate. Unlike the council, this office had *imperium* which, though derived from the king, could operate independently of him. The magistrates' power to exercise their discretion when justice demanded it extended to making judgments on royal acts, causing a few jurists to speak of them as checks on royal power,

[88] *République*, III, ch. 1, pp. 343, 365-66. Bodin realized that the privy council could reverse the judgments of magistrates and sovereign courts, but argued that it did so only by extraordinary royal commission. It could do nothing without royal confirmation, unlike magistrates. Perhaps Bodin was disturbed by the influence the council had gained during the religious wars as membership in it became a goal of factions desiring control of royal policy and as members of parlement were granted admission in 1574, 1578 and 1585. See Doucet, *Institutions*, p. 133.

[89] See, for example, Boerius, *De authoritate magni concilii*, p. 896, par. 180. Seyssel, *Monarchie*, II, chs. 5-7, pp. 135-39; Coquille, *Droict des Francois*, "Du droict de Royaute," p. 4. Cf. Church, *Constitutional Thought*, pp. 127-28.

after the manner of the Spartan ephors.[90] A solid body of juristic opinion acknowledged a certain degree of independence and discretionary power for the chancellor, the parlements, and the judges of inferior courts, all of whom possessed some degree of imperium and jurisdiction.

The chancellor, in fact, was a "prince of imperium and jurisdiction," according to Longovallius.[91] He was

[90] Without mentioning ephors, Seyssel, Prohème, ed. Poujol, p. 80, observed that the king was limited by "bonnes lois et ordonnances, et par la multitude et autorité grande des officiers qui sont tant empres sa personne qu'en diverse lieux de son Royaume." In his Monarchie, I, ch. 10, p. 118, Seyssel suggested that "justice" (including the power of parlements and judges to remonstrate) was one of three "freins" on royal power, along with religion and "police." Seyssel's theory was later followed by Louis le Roy, Les politiques d'Aristote (1568), II, ch. 4 (cited by Poujol, p. 226) and Du Haillan, De l'estat (ed. of 1571), p. 79 (Poujol, p. 234). Le Roy included in Seyssel's "multitude" of officers the peers, councils and parlements, the provincial estates, mayors and other town officials. Chasseneuz, Catalogus, pt. 5, consid. 4, p. 118, affirmed that French kings allowed parlements and seneschals and bailiffs to review their patent letters "ad instar Romanorum et Spartanorum Regum, qui tribunos plebis, seu ephoros, id est, magistratus eligebant ad moderandum Regum potestem." Cf. Church, Constitutional Thought, pp. 69-70. Fauchet, Origines des dignitez, II, ch. 1, Oeuvres, p. 491^{v}, observed that these officials, as well as "inferior judges," had like ephors controlled the early Capetians, although since then their ambition had caused the kings to restore France to her "original beauty."

[91] Longovallius, Declaratio, "Epistola Dedicatoria."

set over the entire administration of justice and was, in Loyseau's words, "le chef suprême de toutes les justices."[92] The royal seal which he kept was the sign of his dignity, said le Caron, for he could withhold it from letters which were contrary to justice and the public good.[93] The parlements, too, whether they were thought to act merely in the name of the king[94] or as representatives of the three estates,[95] possessed the power to review royal edicts. Their right to withhold approval from unjust edicts received far more consideration from the jurists than did the king's ultimate

[92] Des offices, IV, 2, par. 90, cited in Doucet, Institutions, I, 106.

[93] Pandectes, I, ch. 24, Oeuvres, I, 162. Cf. Du Haillan, De l'estat, bk. 2, p. 136^{v}, who called the chancellor the "severe controller" of royal edicts, commands and gifts, and de Figon, Discours des estats, pp. 1-2. See also Doucet, Institutions, I, 105-8.

[94] Chasseneuz, Catalogus, pt. 6, consid. 9, p. 164. "Eius Parlamenti tanta semper fuit apud Francos authoritas, ut quae Rex ipse de Republica deque iure, et proventibus Regni statuerit." Grassaille, Regalium Franciae, I, ius 12, pp. 160-61, argued that the king could not ordinarily annul a parlement's acts "quia personum Regis repraesentat." Like the king (p. 177), the lords of parlement could judge according to their conscience.

[95] The Parlement of Paris' role as representative of the estates is discussed by Church, Constitutional Thought, pp. 137-39, who cites Budé, Pasquier, Haillan, Le Caron and Ragueau. The Parlement in 1593 declared itself an "abrégé des Trois Etats, image et raccourci de tous les Ordres du Royaume," an opinion expressed earlier by the Estates of Blois, 1576-77 (p. 138, n. 47).

power to override their remonstrance in a lit de justice.[96] Although Grassaille considered them representatives of the king, he observed that they possessed power to issue arrests in their own name, in contrast to the royal council which had no such independence. Moreover, he argued, since the term "curia" might refer to any judge of a public court, even inferior judges could be excused for issuing judgment in the name of the curia rather than of the king.[97] Thus inferior magistrates, according to several jurists, shared the parlements' right to remonstrate against unjust acts of the king.[98] These officials judged not of general laws and ordinances, but could review patent letters of grace and of justice,

[96] Seyssel, Monarchie, I, ch. 10, p. 118; La Loupe, De magistratibus, bk. 2, tit. "Parlamentum," pp. 213-14. See, for example, Coquille, Droict des Francois, "Du droict de Royaute," pp. 5-7; La Roche-Flavin, Treize livres des parlemens, XIII, 17, pars. 3, 23 (cited by Esmein, Histoire du droit, p. 521, n. 1; p. 523, n. 2). See also Doucet, Institutions, I, 184-87, and Church, Constitutional Thought, pp. 142-43.

[97] Regalium Franciae, I, [illegible]ius 12, p. 168.

[98] Seyssel, Prohème, ed. Poujol, p. 81, and Du Tillet, De rebus Gallicis, bk. 2, tit. "De gubernatoribus provinciarum," p. 177, argued that judges who enforced a king's illicit commands shared his guilt. Cf. Gierke, Althusius, ch. 6, n. 38. For an ordinance of March, 1302, which guaranteed that seneschals, bailiffs and other judges were not bound by such a command, see Esmein, Histoire du droict, p. 525, n. 1, and further remarks on pp. 434-39.

that is, pardons and directives concerning civil procedure. This right was sometimes underplayed or treated disdainfully as a threat to orderly judicial administration,[99] but Doneau supported it,[100] and no less a royalist than Bodin gave it a detailed analysis, delineating the degree of freedom available to the magistrate with each of several types of royal letters. Of particular interest, however, is Bodin's justification for this freedom. If any subject, he argued, could refuse obedience to the just commands of a seigneur or magistrate acting beyond his territory or competence, how much more could magistrates resist commands which broke the laws of God and nature? Magistrates could not, of course, usurp sovereign rights, but the king, by the same token, ought not to encroach upon the powers belonging to magistrates.[101] The ordinary judge's power

[99] Le Caron, Pandectes, I, ch. 19, Oeuvres, I, 98-99, urged that magistrates ought never resist royal edicts too obstinately, for "it is not for the magistrate to give law to the prince." Cf. Fauchet, Origines des dignitez, II, ch. 1, Oeuvres, p. 491[V], mentioned above, n. 90.

[100] Commentariorum, I, 9, par. 12, Opera, I (cited by Carlyle, Medieval Political Thought, VI, 310, n. 1).

[101] République, III, ch. 4, pp. 409-29, esp. 413-14. The passage opposing royal interference in magisterial powers is peculiar to Bodin's Latin edition of 1586, which I have been unable to see. It occurs on p. 311 of The Six Bookes of a Commonweale, trans. R. Knolles

to demand the reason for letters of justice derived from his "office of jurisdiction," or his "equity and discretion,"[102] and in this respect they were similar to the parlements and great officials who possessed jurisdiction and a power to command.

The correspondence between juristic theory concerning magisterial office and the lawyers' views on the actual power of French magistrates was due in large measure to the common belief that jurisdiction and *imperium*, although derived from the king, could be possessed by right of office, and that the magisterial power to review royal letters was associated with the possession of jurisdiction and the power to command, a power which bestowed a certain freedom to dispense with normal legal procedure in the interest of justice. That magistrates could possess such jurisdiction in the face of increasing juristic emphasis on the king as the source and true possessor of all jurisdiction should not be

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(1606), ed. Kenneth D. McRae (Cambridge, Mass., 1962). For a shorter analysis of the types of royal letters and the magisterial freedom appropriate to each, see Le Caron, *Pandectes*, I, ch. 19, *Oeuvres*, I, 98-100.

[102] Coquille, *Droict des Francois*, "Du droict de Royaute," p. 24, allowed this right to the judge "selon son office de jurisdiction." Bodin, *République*, III, ch. 4, p. 413, said that this right "depend de leur equité et discretion."

surprising. The king as the fount of jurisdiction was a familiar principle which had not, in the Middle Ages, precluded the possibility of magisterial independence. References to this principle by sixteenth-century jurists must be balanced against medieval principles of magisterial independence also preserved, in modified fashion, by these lawyers. Specifically, medieval literature on jurisdiction taught sixteenth-century writers to distinguish between grades of jurisdiction, some of which belonged properly to magistrates, others being reserved to the prince. Only the summum imperium and fullest (plenissima) jurisdiction were possessed solely by the king. Mixtum imperium and merum imperium (once it was divorced from summum imperium) were available to magistrates by right of office, although always held "cumulatively," never "privatively," the king retaining the ultimate right to intervene when justice was denied by his inferiors.

Du Moulin's assertion that all levels of jurisdiction belonged properly only to the king was, therefore, exceptional. Evidence does not support Church's assertion that most jurists "accepted without question [Du Moulin's] dictum that all right in governmental authority was held by the king alone, and that all royal officers merely exercised a portion of the prerogative which

remained unbroken."[103] The "prerogative" was seldom equated with "all right in governmental authority," but was more often thought of as the regalian rights, or marks of sovereignty, reserved to the prince. Other rights of authority were "broken" from the royal prerogative to the extent that they could be held by right of office. Bodin argued, for example, that the creation of magistrates and the administration of justice were not necessarily marks of sovereignty, for they were powers held, in some degree, by many magistrates.[104] He reflected a common sentiment when he denounced Du Moulin's belief that magistrates were mere "users" of royal jurisdiction.[105] Other jurists undoubtedly agreed with

[103] Constitutional Thought, p. 123.

[104] République, I, ch. 10, p. 215.

[105] Ibid., III, ch. 5, p. 441. Church's inaccuracies are evident in several instances. On p. 297 of his Constitutional Thought, he says, "In place of the absolute indivisibility of the royal prerogative insisted upon by Bodin, Coquille reiterated the older concept which attributed merely supreme authority to the ruler and permitted the alienation of rights to be held utilement by others." On pp. 237-38, he maintains that Bodin allowed great officials, the parlements and "the general body of magistrates in the central government" only a "commission précaire." Bodin, however, specifically distinguished between magistrates and "commissioned officers" (see above, n. 45). Speaking of Seyssel's ideal constitution, Church argues, p. 39, "All feudal and royal officers were but royal agents who exercised a portion of the prerogative to which the king retained unbroken right." Church cites nothing in Seyssel that

his warning against the usurpation of the ordinary power of magistrates by the prince, a warning based on his belief that sovereign power could be secure only if it were restricted to the rights of majesty commonly reserved to it.[106]

Although sixteenth-century French jurists increasingly emphasized the prerogatives of the king and the indivisibility of his peculiar powers, they, like the proponents of religious causes, preserved the integrity of magistrates within the increasingly centralized monarchy. Magisterial *imperium* lost its claims to broad governmental powers which had formerly been associated with *merum imperium,* but it retained all save the highest jurisdictional authority, even in capital cases. The jurisdiction and power of coercion which Roman law attributed to magistrates by right of office, along with the Aristotelian idea of the power to command as the mark of the magisterial office, formed the core of the conception of that office as part of a structure of public power which lay beyond the king's arbitrary control.

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would explicitly support this. He refers (pp. 38-39 and notes) to Seyssel's views on authority deriving from the king and the right of appeal to the king from all inferior courts, but these were commonplaces among jurists who did not accept Du Moulin's view, Bodin being among them.

[106] *République*, IV, ch. 6, p. 632. Bodin here cited the familiar remark of King Theopompus of Sparta, for which see above, ch. 3, n. 32.

He, as the highest embodiment of that power, may have been considered its source, but he was equally its administrator, just as he both embodied and administered the powers of the crown in accordance with the laws of the realm. The jurists did not allow magistrates to resist the king by force of arms, but certainly the basis upon which they justified the magistrates' limited checks on the monarch were similar in some respects to the propagandists' views of magistrates and king alike as co-administrators within a unified government.

CHAPTER IX

PRINCELY INDEPENDENCE AND THE EPHOR THEORY IN GERMANY

The theory of resistance by inferior magistrates took root in Germany during the 1530's and 1540's, and returned to Germany around the end of the century after having served to justify resistance in Scotland and France. The theory owed much to the de facto independence of the hereditary German princes, but served also, with the added Calvinist emphasis on popular authority, to justify resistance by even the appointive magistrates of France. Concepts of unitary sovereignty such as those which the Lutherans preserved from the empire's past, but which proved difficult fully to reconcile with princely independence, were far more adaptable to France, where the government was becoming increasingly centralized. Calvinist writers considered appointive magistrates to be sharers with the king in the sovereign power, possessing a right to censure him which derived from their participation in sovereignty and their mutual obligations as

magistrates to the community (or their direct responsibility to God). Magisterial independence within a unified sovereignty was likewise common in French juristic thought, even though political unity for the lawyers was the result of an extension of royal jurisdiction, not of the assertion of community authority. Roman law itself had allowed for some degree of magisterial independence within the imperial sovereignty, so that jurists, even while rejecting the more extreme claims of medieval inferior authorities, could still attribute to magistrates a large degree of security, and even a power of restraint over the king, within the structure of public power. Thus, political and juristic thought supporting a relatively independent magistracy was available to German jurists and political thinkers of the late sixteenth and early seventeenth centuries.

The school of German lawyers who began, in the latter sixteenth century, to develop the study of "positive public law" were opposed, in principle, both to the influence of the "foreign" Roman civil law and to all non-juristic political thought.[1] In spite of efforts to purify the study of German public law from these corruptions, however, political thought and Roman

[1] See Gierke, DGR, IV, 204-9.

jurisprudence continued to affect German legal thinking. In addition to the theory of resistance by inferior magistrates which a few German writers absorbed from the Huguenots, the Calvinist emphasis on the authority of the community helped to give rise to a form of popular sovereignty in German juristic thought, a concept which earlier Lutherans and jurists had not utilized. Moreover, the jurists of Germany still followed the custom of discussing the jurisdiction of inferior authorities in terms of Roman law. In so doing, many of them attributed high criminal jurisdiction to the princes and cities of Germany as their own possession, recognizing that such in fact was the condition of the empire of their day.

The German jurists' use of both the "ephor theory" of the Huguenots and the Roman civil law reflects their conviction that the empire, in spite of its decentralization and its appearance of being a confederation of sovereign princes, was still a monarchy, in which the princes and cities still qualified as "ephors" or as "inferior magistrates." Nevertheless, as Samuel Pufendorf observed in the 1680's, the princes, "tho' they are Vassals of the Emperour and Empire, . . . they ought not to be considered as subjects, or only as

potent or rich Citizens in a Government."[2] The jurists described their power in terms of regalian rights, rights of majesty, and the other powers forming the princes' total Landeshoheit. This emphasis on the princes' status as independent rulers rather than as magistrates within a monarchy affected the German treatment of the juristic and political doctrines of inferior magistrates. On one hand, jurisdiction and imperium were treated more as elements of the princes' total governing authority than as the essential characteristics of magisterial office. In the sphere of political thought, the concept of the authority of the community, although accepted in principle by many German jurists, was modified to correspond with the princes' independence, thus preventing the full adoption of the Huguenots' ephor-theory into Germany, even by its foremost proponent, Althusius. Thus, before analyzing the princes' position in relation to Roman law doctrines of jurisdiction and to their function as ephors, we must first discuss their peculiar status in juristic thinking as both rulers and magistrates.

[2] Einleitung zu der Historie der vornehmsten Reiche und Staaten in Europa, trans. as An Introduction to the History of the Principal Kingdoms and States of Europe, 7th ed. (London, 1711), p. 282.

In 1601, Scipio Gentilis, a jurist of Altdorf, succinctly defined the problem facing jurists who favored a strong imperial government. After contrasting the position of a magistrate, "to whom any care of the republic is committed," with that of a prince, such as the Roman emperor, in whom all jurisdiction resides and from whom it flows to magistrates, he complained that "today . . . there are many princes, many lords, indeed, as far as jurisdiction is concerned, many emperors. This is what is meant by the common saying among our doctors of law that this or that duke or that republic can do as much in his duchy or [its] area of authority as the emperor in his empire." Arius was right, thought Gentilis, when he said to Augustus, "non est bona Caesarum multitudo."[3]

That a duke, or other inferior authority, could do "as much" (usually tantum) in his territory as the emperor could in the empire was indeed a popular and useful argument for the princes' far-reaching political activities. It was related ultimately to the medieval doctrine that "the king is emperor in his realm" (rex

[3] Scipio Gentilis, De iurisdictione, libri III, III, ch. 18 (Frankfurt, 1601), p. 404.

est imperator in regno suo), but derived more directly from the Bartolist notion that "free" princes or people had power within their territory equivalent to that of the emperor in the empire.[4] Although Bartolus had limited such power to corporations which recognized no superior, German jurists, led by the Imperial Cameral Court itself, interpreted this to mean "no superior other than the emperor."[5] Thus the formula that the prince could do "as much" as the emperor occurred repeatedly in the Consilia and other juristic literature of the fifteenth through the seventeenth centuries,[6]

[4] See Gierke, DGR, III, 693.

[5] See Gierke, DGR, III, 696-97. Nicolaus Losaeus, Tractatus de jure universitatum, IV, ch. 1, par. 35 Lyons, 1627; 1st pub. 1601), p. 312, repeated the argument that a corporation not recognizing a superior "ipsa est Camera, et Princeps sui ipsius."

[6] Examples are Ulrich Zasius, Responsorum juris sive consiliorum, II, cons. 1, par. 21 (Basel, 1538), p. 9; Hieronymus Cagnolus, Commentaria doctissima in primam et secundum Digesti . . . partem (on D. 2, 1, 3) (n.p., 1566), p. 70, par. 157; Andreas Gaill, De pace publica, I, 6, par. 10 (Cologne, 1586), p. 62; Marcus Antonius Natta, Consiliorum . . . tomi quattuor, III, cons. 487, par. 9 (Frankfurt, 1588), p. 22; Zacharias Friedenreich, Politicorum liber (Strasbourg, 1609), pp. 174-75; Christopher Besold, Discursus politici, disc. 4, ch. 3 (Strasbourg, 1623), pp. 91-93. Cf. Gierke, DGR, III, 693, n. 17, and IV, 224, n. 75. The notion that the princes had dominium directum in relation to their subjects, while they had only dominium utile in relation to the emperor, may be traced back to Baldus (on C. 6, 58, 1), and was later repeated by Ludovicus de Gozadinis, Consilia, cons. 90 (Lyons, 1550); Matthias Wesenbeck,

often being applied to imperial cities as well as to princes.[7] In concrete terms, it meant that these inferior authorities were, as Christopher Besold of Tübingen put it, "perpetual magistrates" and "perpetual dignities," having dominium directum over subjects and things in their lands.[8] Their powers included regalia, rights of majesty (iura maiestatis) and rights of empire (iura imperii) which they might have acquired either from the emperor or by prescription.[9] Dukes, of course,

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Consilia, cons. 27, par. 28 (Basel, 1575), p. 760; George Obrecht, Tractatus de iurisdictione et imperio, ch. 4, par. 16 (Mulhouse, 1602), p. 30; Bartholomeus Volckmar, De jure principum, ch. 13, par. 6 (Frankfurt, 1618), p. 174. In most cases, it was mentioned in conjunction with the idea that princes could do as much in their territory as the emperor in the empire. It was disputed by Thobias Paurmeister, De iurisdictione Imperii Romani, ch. 4, par. 70, 2nd ed. (Frankfurt, 1616; 1st pub. 1608), p. 574, who generally felt that Italian jurists insisted too strongly on the independence of Italian princes and cities.

[7] Gaill, De pace, I, 6, par. 11, p. 63. Christopher Besold, De iure et imperio imperialium civitatum, par. 8 (Tübingen, 1619), p. 14. Volckmar, De jure principum, ch. 7, par. 9, p. 64. Phillip Knipschildt, De juribus . . . civitatum imperialium, II, 4, par. 68, 2nd ed. (Ulm, 1687; 1st pub. 1657), p. 280. Cf. Gierke, DGR, III, 693, n. 17; 696, n. 27.

[8] Discursus politici, disc. 4, ch. 3, p. 93.

[9] Nicolai Belloni, Consiliorum volumen, cons. 51, pars. 3, 4; cons. 59, par. 10 (Basel, 1544), cols. 269-70, 305. Marc Antony Peregrinus, De iuribus et privilegiis fisci, I, tit. 2, par. 76 (Basel, 1619; 1st pub. 1588), pp. 39-40. Wesenbeck, Consilia, cons. 27, par. 29, p. 760. Heinrich von Rosenthal, Tractatus . . . juris feudalis, ch. 5, concl. 13 (Frankfurt, 1721; 1st pub.

could more readily qualify for these rights than counts, barons, or cities,[10] but these lesser powers might also have the "rights of princes" if invested with perpetual regalia and general (omnimodam) jurisdiction.[11] The specified regalian rights most often mentioned were those outlined in the Consuetudines feudorum (II, tit. 56, "Quae sint regaliae"), such as coining money, making laws, creating magistrates, delegating dignities and

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1588), p. 155, who cautioned, however, that the prince might have the same power in genera but not in specie, for some regalia were reserved to the emperor. Similarly cautious was Henricus Bocerus of Tübingen, Tractatus de regalibus, ch. 4, par. 2 (Tübingen, 1608), p. 444, who, in dealing with the much-discussed question of whether the emperor could concede to others "regalia majestatis," allowed that he could concede some, like the right to legitimate or to create notaries, but not the rights to declare war, make universal laws and institute new taxes. He admitted, however, that these rights were coveted by the princes, electors and the other "states of the Empire."

[10] Aegidius Bossius (d. 1546), "Tit. de regaliis," par. 5, in Tractatus varii (Venice, 1574), p. 372, "Et quando quis creatur etiam dux nedum rex non solum regalia de quibus in d. titul. videntur translata, verum etiam omnia quae sunt reservata in specie soli principi, et imperatori propter excellentiam." Andreas Knichen, De jure territorii, ch. 1, pars. 1379-80 (Wittenberg, 1622; 1st pub. 1600), p. 109, included margraves with dukes, "cum sint Duces, Marchiones perpetuo constituti, censentur ipsis permissa omnis potestas et quae Imperatori reservata sunt in signum imperialis coronae."

[11] Paurmeister, De iurisdictione, ch. 11, par. 42, p. 886. Christopher Besold, Conclusiones juridicae (Tübingen, 1618), pp. 29-33, and his De jure . . . imperialium civitatum, pars. 8-9, pp. 14-16. Knipschildt, De juribus, II, ch. 1, pars. 33-36, p. 162.

regalia, collecting taxes and legitimatizing bastards.[12] The courts of the princes were to enjoy immunity from interference by the emperor,[13] and some jurists even considered princes to be above the law (legibus solutus) in certain instances.[14] They were thought also by some jurists to possess plenitude of power[15] and the right to use the title, "Dei Gratia."[16] Subjects of princes

[12] See, for example, Rolandus a Valle, Consilia, I, cons. 29, par. 26 (Frankfurt, 1584), p. 143; Wesenbeck, Consilia, cons. 27, pars. 27-29, pp. 759-60; Hippolytus Riminaldus, Consiliorum, I, par. 15-21 (Venice, 1574), pp. 264-65; Bossius, "Tit. de regaliis," par. 11, p. 372, who said, "Qui dicunt omnes dignitates uti a fonte profluere a Caesare, . . . non bene dicere, quia etiam ab aliis inferioribus descendunt"; Volckmar, De jure principum, ch. 6, pars. 11-14, pp. 65-68. Friederich Pruckmann, Tractatus de regalibus, ch. 4, par. 35 (Berlin, 1587), p. Dv.

[13] Henricus Bocerus, Tractatus de iurisdictione, ch. 8, par. 80 (Tübingen, 1609), pp. 392-95. Philippus-Henricus Hoenonius, Disputationum juridicarum libri tres, II, disp. 1, par. 10 (Herborn, 1614), p. 36, offers the significant reason, "quia hodie, non ut olim tanquam magistratus, sed velut domini ipsi provinciis et territoriis suis praesunt status Imperii."

[14] See Gierke, DGR, III, 696, n. 26.

[15] Peregrinus, De iuribus . . . fisci, I, ch. 2, par. 79, p. 40, and Petrus Heigius, Quaestiones juris, q. 40, par. 25 (n. p., 1609; 1st pub. 1601), p. 366, mentions the right to use plenitudine potestatis.

[16] Thomas Michaelis, Conclusiones juridicae (Basel, 1601), p. F, par. 45. Besold, Conclusiones juridicae, p. 27. See also Erich Hancke, Bodin, Eine Studie über den Begriff der Souveränetät, in Untersuchungen zur Deutschen Staats- und Rechtsgeschichte, XLVII (1894),

were, as the Lutherans had argued, more heavily obligated to the princes than they were to the emperor.[17]

The royal qualities attributed to the various grades of princes made several jurists despair of devising schemes to reconcile the princes' claimed position with the concept of "magistracy" as portrayed in civil law. Besold, for example, argued that the princes were more comparable to emperors than to the Roman provincial praesides with whom they had been traditionally linked.[18] For such reasons, Thobias Paurmeister of Kochstedt considered the empire "toto caelo" removed from the old

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p. 48. Andreas Barbatia, Consiliorum, II, cons. 34, par. 62 (Venice, 1580), p. 98, calls upon Romans 13 to support his view that inferior powers enjoyed privileges similar to those of their sovereigns because they were all established by God.

[17] Volckmar, De jure principum, ch. 13, par. 7, p. 174, argued "Unde ratione dominii subditos Principi suo fortius ad obediendum astringi quam Imperatori," and cited for support Knichen, De jure territorii, ch. 1, par. 168, and Peter Gregory of Toulouse, De concessione feudi, q. 4, par. 12. For Knichen's view, see Gierke, DGR, IV, 227, n. 83.

[18] Discursus, disc. 4, ch. 2, p. 93. This opinion was shared by Bernhard Sutholt, Dissertatio de jurisdictione, par. 405, in his Dissertationes undeviginti (Hardervici, 1665), pp. 649-50. Baldus (on C. 4, 18, 2) had compared dukes to emperors rather than to praesides, and Besold's position seems to be an extension of this to other nobles as well. Baldus was cited by Wesenbeck, Consilia, cons. 27, par. 28, p. 760, and Obrecht, De iurisdictione, ch. 4, par. 16, p. 30. Cf. Bocerus, De jurisdictione, ch. 8, par. 84, p. 397, and, for Besold and Knichen, see Gierke, DGR, IV, 226-28, nn. 83, 87.

Roman Empire.[19] Indeed, there seemed to be a surfeit of emperors, and this, as Gentilis said, was "not good."

Most jurists would no doubt have agreed that so much princely power was intolerable had they not possessed several means by which to preserve a theoretical unity in the empire and a subordinate place for the princes as "magistrates." Some writers who allowed princes "as much" power as the emperor interpreted "as much" to mean "analogous" or "similar," but not "equal."[20] Nearly universal was the opinion, deriving from medieval jurisprudence, that the emperor's concessions of regalia and jurisdiction could never include the powers reserved to him (reservata principi) as inherent parts of his majesty and right of superiority.[21] Even though he

[19] De iurisdictione, prefatory epistle.

[20] See Volckmar, De jure principum, ch. 1, pars. 3-4, pp. 7-8; ch. 7, pars. 1-2, p. 62, who argued that the princes, by their eminence analogous to the emperor's, acted vice Imperatoris in their territories; and Thomas Michaelis, Conclusiones juridicae, par. 45, p. F, who termed princely jurisdiction "eandem vel similem quam Imperator in universos." Besold, Discursus politici, disc. 4, ch. 3, p. 91, said princes had "liberam fere et Regiam potestatem."

[21] See, for example, Pruckmann, De regalibus, ch. 3, par. 2, p. Ciii; Regnerus Sixtinus, Tractatus de regalibus, I, ch. 2, pars. 1-44, 4th ed. (Nuremberg, 1716; 1st pub. 1602), pp. 15-21; Joachim Cluten, Sylloge rerum quotidianarum, concl. 17-22, in Nicolaus Hampel, Nucleus, discursuum seu disputationum (Giessae, 1621), pp. 36-46;

might concede to others supreme and absolute power, he still retained his imperial honor and fullness of power.[22] Grants of "major regalia" were cumulative, not privative, and the obligation of fidelity to the emperor could never be alienated.[23] His supreme jurisdiction remained intact even though high jurisdiction was shared with many inferiors. The princes might indeed possess dominium directum over their subjects, as did the emperor, but in relation to their sovereign lord, their dominium could be considered a usufruct (dominium utile).[24] Their dignity was "royal," though Paurmeister, not because of

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Volckmar, De jure principum, ch. 6, pp. 55-61; Paurmeister, De jurisdictione, ch. 4, pars. 13-15, p. 45; see also Gierke, DGR, IV, 225.

[22] Peregrinus, De iuribus . . . fisci, I, tit. 3, par. 72, p. 97, "Imperator, et Rex possunt plenitudinem suae potestatis alteri communicari; ideoque Duces, Marchiones, Principes, Comites, et Dominos erigunt, cum plenitudine suae potestatis eam non a se abdicando, sed illis eam potestatem, communicando." Pruckmann, De regalibus, ch. 5, par. 22, p. Fiv, allowed rights "soli principi reservata" to be conceded if specifically mentioned in the instrument of concession, although he also warned (p. F) that a prince would commit "homicide of dignity" if he should lose these "viscera of the empire." Cf. Rimina1dus, Consiliorum, cons. 57, par. 16, p. 264; Natta, Consiliorum, II, cons. 402, pars. 19-20, p. 103.

[23] Besold, Discursus politici, disc. 4, ch. 2, p. 76. Bocerus, De regalibus, ch. 4, n. 5, p. 448. Cf. above, ch. 8, at nn. 23, 24.

[24] Knichen, De jure territorii, ch. 1, pars. 1397-98, p. 110. Cf. Obrecht, De jurisdictione, ch. 4, par. 16, p. 30; and Gierke, DGR, IV, 226, n. 80.

the princes' own eminence, but because it was so closely associated with the imperial dignity which stood above them.[25] By such reasoning, jurists preserved the "sovereignty" of the emperor even while the princes enjoyed "sovereign rights."

The fact that the imperial sovereignty appeared to be divided had prompted Bodin to consider the empire an aristocracy.[26] Many jurists of Germany vehemently replied that it was, as it had always been, a monarchy (albeit a "mixed monarchy," composed of monarchy and aristocracy), and that its princes were magistrates.[27]

[25] De jurisdictione, I, ch. 4, par. 8, p. 43.

[26] République, II, ch. 6, pp. 321-22. See also above, ch. 2, n. 61.

[27] Petrus Heigius, a councillor of the Elector of Saxony, argued against Bodin that although the electors were comparable to kings and the other princes all had summa potestas, the empire was as monarchical as when the Roman senate (analogous to the princes) limited the emperor. See his Quaestiones iuris, q. 2, pars. 17-27 (ed. of 1606), pp. 36-38. Hermann Vultejus, Ad titulos codicis, qui sunt de iurisdictione, Commentarius (Frankfurt, 1599), dedicatory epistle, pp. 2-4, distinguished between the monarchical "form of state" and the aristocratic "form of government" in the empire, but became involved in controversy with Gottfried Antonius, who argued, in his Disputatio de potestate imperatoris (1608), in Melchior Goldast, Politica imperialia (Frankfurt, 1614), p. 629, for the monarchical character of the empire. Vultejus nevertheless attracted many followers. For a fuller discussion of juristic views on the monarchical nature of the empire, including Vultejus and Antonius, see Gierke, DGR, IV, 220-22. Cf. Cluten, Sylloge, concl. 16, pp. 34-35; Volckmar, De jure principum, ch. 12, pp. 131-60.

The basic argument against Bodin was that sovereignty could indeed be shared; that a monarchy need not be distinguished by one person holding the sovereignty alone.[28] The empire was regarded as a corporation. Its princes and cities were not simply a collection of discreet powers, but were "members of the empire," and could thus share in its sovereignty.[29] This meant, for Besold, that in a mixed monarchy such as the empire, sovereignty resided _in solidum_ in a _collegium_ or _corpus_. One member of this college possessed "great eminence," along with

[28] See, for example, Hoenonius, _Libri duo Disputationum_, I, disp. 9, par. 3, (Herborn, 1608), p. 166, who cited Beza and the _Vindiciae_ in arguing that in a monarchy a king might very well share sovereignty, save the highest level, with "ephors"; and Henning Arnisaeus of Halberstadt, _Doctrina politica in genuinam methodum quae est Aristotilis_ (1606), cited in Hancke, _Bodin_, p. 46, n. 12, "Plura enim sunt capita et jura, quorum concursus efficit majestatem perfectam, quam quidem totam et universum pluribus communicari impossible est, sed partes eius nihil prohibet disiungi et pluribus attribui; ita quidem ut in singulis sit particula majestatis, in toto vero corpore summa et plena majestas ex concursu partium suas majestatis particulas in unum comportantium resultans." For other views of shared sovereignty, see Gierke, _DGR_, IV, 224-27. For the dissenting views of Zacharias Friedenreich and Theodor Reinking, who, like Bodin, argued for indivisible sovereignty, see Gierke, _Althusius_, ch. 3, p. 154, n. 92.

[29] See, for example, Antonius, _Disputatio_, p. 629, "In Imperio nostro Proceres sive Status parte aliqua iurium maiestatis, non ut singuli, sed ut universi, et quasi Collegium aliquod vere fruuntur."

some rights which were not held *in solidum* with others.[30] His sovereignty was not injured by sharing it with his colleagues, however, for as the Roman senate did not detract from the majesty and power of the Roman emperor, so the estates of Germany, successors of the senate, did not decrease the emperor's status. The estates' use of the title, "Von Gottes Gnaden," only amplified the imperial majesty.[31] With the emperor as the head who gave direction to the members, argued Theodor Reinking in 1616, the estates were only magistrates who had become hereditary, and whose rights, conceded out of the imperial majesty itself, in no way diminished that sovereignty.[32]

[30] *De statu reipublicae mixto*, in *Operis politici . . . editio nova*, ch. 1 (Strasbourg, 1641), p. 176, "in statu mixto, majestatem in solidum penes collegius esse, licet in ille collegio caput plerunque multis modis, prae reliquis membris excellet: non tamen in solidum, omni iure Imperii fruatur."

[31] Besold, *Discursus politici*, disc. 1, p. 18, and his *Conclusiones juridicae*, p. 27.

[32] *Tractatus de regimine saeculari et ecclesiastico*, 3rd ed. (Marburg, 1641; 1st pub. 1616), I, cl. 5, ch. 6, pars. 57-92, cited by Gierke, *DGR*, IV, 225, n. 79. Volckmar, *De jure principum*, ch. 1, par. 3, p. 7, included the emperor and the princes in his list of magistrates, distinguishing them, as "superior magistrates" (comparable to this category in the Roman government) from the "inferior magistrates" of the states of the empire.

The princes, then, in spite of increasing doubts concerning their identity with Roman provincial *praesides*, were still considered magistrates by many jurists. Nearly all discussion of princely jurisdiction during this period, even those written by jurists who formally denied that princes were magistrates, based their analysis on Roman law doctrines of the jurisdiction and *imperium* of magistrates. In many respects, the German treatment of this matter differed little from the French, but the ambiguous position of the princes in Germany led inevitably to important differences. The German attempt to combine unitary government with independent magistrates was bound to favor the latter.

In analyzing the nature of *merum imperium*, some imperial jurists continued the Bartolist tradition of defining it broadly. Near the end of the sixteenth century, Hieronymus Treutler, who taught law privately in Marburg, equated it with *summa potestas*.[33] Several jurists associated it with the general authority of

[33] *Selectarum disputationum*, I, disp. 3, thes. 3, 3rd ed. (Marburg, 1596), pp. 24-25, "Id tamen verum est, merum imperium vocari summam potestatem." Related to such a view was Rolandus a Valle's opinion, *Consilia*, II, cons. 48, p. 162, that in a case of notorious injury one having *merum imperium* could be a judge in his own case and "ius sibi dicere."

princes, die Landsfürstliche Obrigkeit, which followed, as Johann Meichsner argued, from merum imperium "as an effect from its cause."[34] This authority was not, of course, limited to judging legal cases, but included the power to make laws and statutes. It also included the protection of subjects, and, since this was carried out by the power of the sword, merum imperium could be identified (as Martin Bucer had suggested) with the right of protectio.[35] It could also be argued, from medieval commentaries, that merum imperium included various fiscal powers stemming from the right to levy

[34] Decisionum diversarum causarum in Camera Imperiali judicatarum, II, bk. 1, decis. 8, par. 2 (Frankfurt, 1688; 1st pub. 1603), p. 379, "ex mero imperio sequi die Landsfürstl. Obrigkeit, tanquam ex causa effectus."

[35] Meichsner, Decisionum, II, bk. 2, decis. 3, pars. 4-6, esp. par. 6, p. 71, ". . . talis protectio dominos universales, videlicet Landsfürsten, qui omnimodam jurisdictionem et superioritatem, vel merum imperium habent, et non ad alios pertineat."

fines, and extending as far as the right to collect imperial taxes (Reichsteuer).[36]

As in France, however, most jurists restricted merum imperium to high criminal jurisdiction, including cognition, as well as the power to punish. They might include other powers such as the right to ban, to deport, to absolve the innocent, or even to exercise the power of command and coercion in civil cases, but all of these were powers strictly related to the jurisdictional authority of the prince's criminal court (Obergericht).[37]

[36] Meichsner, Decisionum, II, bk. 2, decis. 3, par. 6, p. 71. Cf. Ulrich Zasius, In primam digestorum . . . partem paratitla (on D. 2, 1, 3) (1539), Operum omnium (Frankfurt, 1590), I, 179, pars. 11-12; Knichen, De jure territorii, ch. 3, pars. 402-12, p. 168; Natta, Consiliorum, II, cons. 636, par. 9, p. 345. The connection of merum imperium to powers of the fisc, however, was often disputed, as was its identification with regalia of any sort. See Aegidius Bossius (d. 1546) "Tit. de regalis," par. 18, in Tractatus Varii (Venice, 1574), p. 373, and Bocerus, De regalibus, ch. 1, pars. 24-29, pp. 14-17, who argued that jurisdiction "toto genere differt" from regalia. Other jurists maintained the connection between imperium and regalia. See, for example, Matthias Stephani, Synopsis of his Tractatus de jurisdictione (with which it is bound), ch. 38, pars. 18-19, (Frankfurt, 1611), p. 233, and Michaelis, Conclusiones juridicae, par. 68, p. Hiv. For useful summaries of arguments for a broad interpretation of merum imperium, see Mager, De advocatia armata, ch. 6, pars. 591-601, p. 244; and Knipschildt, De juribus, I, ch. 12, pars. 129-34, pp. 99-100. Mager and Knipschildt, however, opposed this position. See also Gierke, DGR, IV, 209-10.

[37] Especially useful are Mager, De advocatia, ch. 6, pars. 603-37, pp. 245-47, and Knipschildt, De juribus, I, ch. 12, pars. 135-58, pp. 100-3. They both rejected

Nevertheless, although merum imperium was considered less than full public power, it was still thought to bestow upon one with a "perpetual dignity," such as a duke or count, the "fullest jurisdiction" in his territory. No one in Germany with hohe Obrigkeit or alta jurisdictio was without merum imperium, and all those with superior jurisdiction also possessed inferior jurisdiction.[38] Hence, it was an integral part of that total authority by which the prince could do in his territory as much as the emperor could do in the empire, salva reservata principi.

Whether merum imperium could be identified, or only associated, with the general authority of the princes,

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merum imperium as protectio, arguing that this power belonged to those with power to command, that is, to those with civil jurisdiction. This represented a severe restriction of merum imperium, which had previously been associated with the magistrate's power to command, but of course it did no damage to the prince who had civil jurisdiction as well. See also Conrad Pincier, Tractatus de jurisdictione et imperio (Frankfurt, 1605), p. 77, par. 59; Bocerus, De iurisdictione, ch. 5, pars. 12-20, pp. 189-95; Gaill, De pace publica, I, ch. 6, par. 15, p. 64; Michaelis, Conclusiones juridicae, pars. 75-81, pp. Iii-Iiv; Obrecht, De jurisdictione, ch. 3, par. 25, p. 26; ch. 4, par. 11, p. 29; Anon., Responsum juris, oder Gründlicher Bericht von . . . der Freyen und Keyserlichen Reichsstätten, Standt, Regalien (Frankfurt, 1612), pp. 77-78.

[38] Obrecht, De jurisdictione, ch. 3, par. 25, p. 26; ch. 4, pars. 14-15, p. 30, where he argued that an imperial grant of merum imperium, with regalia, to a person with "perpetual dignity" conveyed to him "plenissima jurisdictio."

German jurists generally agreed that it belonged to those officials by right of office.[39] Those jurists who wished to abide by the formulations of Roman law found this difficult to accept. In the early sixteenth century, for example, Henning Goden insisted that dukes did not have merum imperium by right of office, that they therefore could not mandate it to others, and that they were not princes in the same sense as was the emperor. Merum imperium, he admitted, was in practice freely mandated, divided and sold, but he considered this an abuse.[40] Other jurists attempted to reinterpret

[39] Frequently the possession of this power by right of office was denied to magistrates inferior to the princes. See, for example, Paurmeister, De iurisdictione, I, ch. 3, par. 9, pp. 21-22, " . . . hanc administrandi officii rationem non ad potestatem et imperium, quae in libero alicuius arbitrio posita sit, sed ad muneris obeundi necessitatem referendum esse manifestum est." Cf. the sources cited by Hancke, Bodin, p. 22, nn. 9-11. An exception was George Obrecht, De jurisdictione, ch. 6, par. 80, p. 61, who argued that judges subject to cities, dukes and others "non ex mandato, sed proprio iure de maleficiis cognoscere, et in facinorosos animadvertere."

[40] Consilia, cons. 2, pars. 18-22 (Wittenberg, 1545), pp. 125-26. Cf. the Italian jurists of the early seventeenth century, Giovanni Belloni, De mandata iurisdictione disputatio, ch. 8, q. 2 (Parma, 1616), pp. 121, 126, 141, 148-49, who interpreted Roman law faithfully, but added that "haec, quae de mero imperio diximus, non videntur hodie procedere, quia causae meri imperii . . . videntur esse delegabilis . . . ex generali consuetudine."

Roman law to fit the practices of their day.[41] In the 1530's, Ulrich Zasius, supporting Azo in his argument with Lothair, urged that Roman law had allowed some inferior officials "to have" merum imperium as their own. Accordingly, superior magistrates and secular dignities in the empire, such as dukes, counts, barons and other lords, had this power "ex dignitate et conditionis excellentia."[42] Later jurists continued to favor Azo as they continued to believe that Roman law had, in fact, allowed merum imperium to be held by right of office.[43] Since the law had provided for the delegation of this power a lege, George Obrecht of Strasbourg concluded that the princes and lords of Germany could delegate it

[41] Cf. the similar attempts of French jurists mentioned above, ch. 8, pp. 276-80.

[42] Paratitla (on D. 2, 1, 3), pars. 25, 36, p. 180. For a fuller treatment of Zasius, see Gilmore, Argument, pp. 57-62. The ambiguity in the word, "habere," was solved by interpreting it to mean "to have the right to something," based on D. 50, 16, 188, as we have seen above, ch. 8, n. 67. Cf. Volckmar, De jure principum, ch. 13, par. 4, p. 173.

[43] Zasius' arguments were repeated by Joachim Mynsinger, Responsorum juris, resp. 16, pars. 18-19 (Basel, 1596; 1st pub. 1576), p. 134. Among the other followers of Azo, see Volckmar, De jure principum, ch. 13, par. 4, p. 173; Henricus Bocerus, De jurisdictione, ch. 8, pars. 3-6, pp. 339-40; Obrecht, De jurisdictione, ch. 4, pars. 7-10, pp. 28-29; ch. 6, pars. 71-80, pp. 59-60.

"as if by living law."[44] The superiority of the emperor could be preserved, under these circumstances, by regarding his "cumulative" grant of *imperium* to transfer more than the mere exercise of that power while it allowed only the emperor a full right in it,[45] or by treating the princes' possession of *imperium* "proprio iure" as deriving from their *dominium directum* over their subjects, although in relation to the emperor, that *dominium* was only *utile*.[46]

Attempts to explain the political condition of the empire by such feudal interpretations of Roman law were doomed, of course, to attract few followers. Increasingly, German jurists attempted to describe the empire in terms peculiar to itself. Several jurists around the turn of the century frankly accepted the fact that, although "formerly" *merum imperium* was not held by right of office and could not generally be mandated to others, "today"

[44] *De jurisdictione*, ch. 6, par. 80, p. 61. The princes, he said, did not mandate *merum imperium* merely in their own power, "quia iudices ab ipsis non delegantur, sed tanquam a viva lege constituuntur."

[45] Hieronymus Muscornus, *Tractatus de iurisdictione atque imperio* (Cologne, 1596; 1st pub. 1581?), pp. 23-24, pars. 33-35.

[46] Knichen, *De jure territorii*, ch. 1, pars. 1397-98, p. 110. For the distinction between *dominium utile* and *dominium directum*, see above, at n. 24.

the reverse was true. They built no bridges to the law of the ancient Roman Empire, but accepted the status quo of general custom.[47] One could now simply affirm that Lothair had accurately described the situation in ancient Rome, and that Azo's observation was true only of the modern empire. The Roman emperor, because of the people's transfer of all its imperium, had been the only holder of merum imperium by right of office, a charge which Joachim Stephani of Griefswald attributed to provinces becoming infeudized and hereditary.[48] Scipio Gentilis observed that the form of the empire was changed when it was translated to the Franks, and the whole

[47] Treutler, Selectarum disputationum, I, disp. 3, th. 5, pp. 27-28. Pincier, De jurisdictione, ch. 3, pars. 19-25, pp. 90-93. Hermann Vultejus, In Institutiones . . . commentarius, tit. 18, 4th ed. (Marburg, 1613), p. 539, gives a brief explanation: "Ex quo etiam sit, ut hodie gladii potestas mandari possit, quod olim non poterat. Cur non etiam olim? Quia hoc quod est legis, non est meum, et quod meum non est, a me non potest mandari. Merum imperium erat legis; a nemine igitur nisi a lege mandari potest." Johannes Rosbach, Praxis civilis . . . secundum ordinationem . . . camerae imperialis, tit. 2, pars. 32-33 (Frankfurt, 1630), pp. 30-31. Hoenonius, Disputationum juridicarum, II, disp. 1, par. 6, p. 20.

[48] De iurisdictione, ch. 3, par. 25-44, pp. 50-56, esp. pars. 36-38, pp. 54-55. Cf. Christopher Besold, Dissertatio politico-juridica, sect. 1, ch. 5, (Strasbourg, 1625), pp. 49-51, "Verum hodie, mutata Reipublicae forma, cum Provinciae in Feuda sint commutatae; non ut olim muneris et administrationis, sed patrimonii sunt nomina, nec revocari possunt."

structure of *imperium* and jurisdiction was altered when Charlemagne created "new dignities" and gave them rights of majesty or regalia which became hereditary, and which allowed these officials to have the right of the sword "tanquam suum et iure Dominii."[49] Michaelis and Bocerus would commit themselves to no specific time, but noted that "gradually" these offices and territories had become patrimonial and the special command of a superior had become unnecessary for holding *merum imperium*.[50] These jurists, in the analyses of the jurisdictional structure of the Roman Empire, past and present, had been forced to break with at least one important aspect

[49] *De jurisdictione*, ch. 23, pp. 417-18. Elsewhere in this work, however, Gentilis seemed to take the view that only the prince had *merum imperium* as his own, favoring Lothair's view to that of Azo (ch. 3, p. 348), and refuting in detail Cujas' argument (see above, ch. 8, n. 70) that *merum imperium*, because held *iure magistratus* by many, had become *mixtum imperium* (ch. 6, pp. 433-47). He did not, to my knowledge, reconcile this inconsistency. The change in the nature of magistracy was commonly thought to have occurred at the time of Charlemagne. See Gierke, *DGR*, IV, 211, who cites (n. 16), among others, Vultejus, Knichen, Paurmeister and Sutholt.

[50] Michaelis, *Conclusiones juridicae*, par. 132, p. K. Bocerus, *De jurisdictione*, ch. 8, par. 8, p. 343.

of the old empire and its law.[51] Although they claimed to have "conciliated" Lothair and Azo,[52] they did so not by means of legal interpretation and distinction (although this had been tried), but by means of a sharpened historical awareness. The conciliation of Lothair and Azo

[51] This is not to imply, of course, that the entire system of jurisdiction in Roman law was discarded, nor that commenting upon it was seen to be irrelevant. A statement by Gentilis, De jurisdictione, ch. 18, p. 404, who was fully aware of how times had changed (see Gierke, DGR, IV, 158, for his argument that Roman law did not apply to the "free cities" of the empire) indicates otherwise. "Hinc illae hodie, tot quaestiones in Repub. et iure Romano inauditae de Iurisdictione: veluti; An iurisdictio et merum imperium praescriptione adquiri possint? Item an consuetudine adquiri possit? Item; An iurisdictio et ius gladii habeatur iure territorii? Item, An concesso aliquo castro, sive alio praesidio intelligatur etiam iurisdictio et merum imperium esse concessum? Item, An merum imperium non solum mandari: sed etiam prorogari in alterum possit? quae omnes quaestiones, si ius Romanum spectes, absurdissimae sunt, sed nostris moribus, et utiles, et necessariae." Similarly, Besold, De statu reipublicae mixto, ch. 2, p. 178, comments, "Sane jus Romanum, ratione, non Imperio nos ligat . . . nunquam enim Corpus Juris receptum fuit instar legis, sed loco juris artis." (underscoring mine). For juristic opposition to Roman law, see Gierke, DGR, IV, 205, n. 2.

[52] The first, to my knowledge, to consciously "conciliate" Lothair and Azo in this fashion was Joachim Stephani, De iurisdictione Judaeorum, Graecorum, Romanorum, ch. 3, par. 44, 2nd ed. (Frankfurt, 1604); 1st pub. 1599), p. 56, "Et ita merum imperium apud Imperatorem quidem tanquam in fonte seu capite est: sed propter publicam utilitatem, et Imperii factam mutationem, etiam in aliis Magistratibus competit." Cf. Besold, Dissertatio politico-juridica, sect. 1, ch. 5, pp. 48-50, who implies a conciliation; Matthias Stephani, De jurisdictione, ch. 11, par. 10-24 (Frankfurt, 1611), pp. 114-15; Sutholt, Dissertatio de jurisdictione, pars. 400-4, pp. 646-49.

had occurred at the cost of the historical continuity of Roman institutions.

In two major respects, then, the condition of the empire affected the juristic discussion of magisterial jurisdiction. On one hand, it led to the conclusion that the jurisdictional structure of the empire could not be adequately described in terms of a law which assumed the existence of only one person with royal powers. Even in France, of course, where the king was truly a king, jurists realized that the status of inferior magistrates did not correspond with Roman law, so it should not be surprising that German jurists came to the same conclusion. For the latter, however, the step was much more significant, for it reflects the growing historical awareness which dispelled the belief that the ancient empire still lived in the "empire of the German nation." Secondly, the independence of the German princes, both from the emperor and from each other, prevented the growth of the concept of a structure of public offices such as developed in France. In spite of juristic assertions that the empire was a monarchy and that the emperor was the source of all judicial authority, the jurisdiction of the princes was too much a part of their hereditary power as princes to allow the emperor's claims to have full value. Thus, his central

authority could not become the focal point of a jurisdictional system which, as in France, was under royal control, and protected the integrity of inferior magistrates, but belonged in propriety to neither the king nor the magistrates, but to the realm. The German "realm" was hopelessly divided. Hereditary possession of jurisdiction could not, as in France, be dismissed as an abuse, for the princes were less magistrates than they were patrimonial lords. Lothair and Azo could be reconciled in France by attributing certain rights in merum imperium to both king and magistrates--a "constitutional" conciliation. In the empire, Lothair and Azo could be harmonized only by a chronological line of demarcation, preventing Lothairs' views from preserving a viable imperial unity.

Like the Roman law doctrines of jurisdiction, the ephor theory required modification in order to apply to the princes and cities of the empire. This theory, in its most advanced form, rested on the belief that magistrates, like kings, were agents of the people, deriving their authority from the community. The German princes, on the other hand, possessed their authority by hereditary right to their lands, a right which, at some point, had been conferred or acknowledged by the emperor. The

princes' independence required no appeal to popular sovereignty, and was quite compatible with the superiority of the emperor.[53] Nevertheless, the ephor theory found its way into several political and juristic writings of this period, and carried with it the doctrine of popular sovereignty. Some German writers came to view the princes as popular officials, but in general, the ephor theory and popular sovereignty yielded to the problems posed by princely independence. Writers such as Keckermann and Besold seem to have feared that to add popular authority to the princely suzerainty which, however great it was, always remained inferior to the emperor, might threaten the last vestiges of the emperor's superiority and imperial unity. At best, as Althusius seems to have recognized, the popular authority of magistrates did not agree with contemporary juristic thought according to which territorial authority owed nothing to the people of the territory. Althusius and other writers willingly applied the ephor theory and popular sovereignty to the empire as a whole, but were reluctant either to regard the princes as popular officials or to apply the

[53] See Gierke's discussion of the foundations of princely authority, DGR, IV, 229-33, esp. 229, n. 92.

ephor theory, as Fickler had done,[54] to the individual territories.

The writers who preserved an emphasis on the popular authority of magistrates were generally those who treated the rights of corporations or who dealt with political theory in general, divorced from juristic thought. Among the former, the most prominent was Nicolaus Losaeus of Turin, whose De jure universitatum of 1601 circulated widely in Germany and elicited similar works by German jurists. In this work, Losaeus described the popular nature of all corporations (provinces, cities, towns and colleges) and their right to create and consor their own administrators.[55] Among the political thinkers were Otto Casmann, a theologian and philosopher, and, later, the philologist M. Zuerius Boxhorn (d. 1653), both of whom recognized election as an important means of creating magistrates, emphasizing that even in cases of hereditary succession or "occupation," authority

[54] See above, pp. 223-24.

[55] De jure universitatum (Venice, 1601), I, ch. 3; II, ch. 1, par. 61, p. 110; III, ch. 19. Cf. Besold, De jure universitatum (Tübingen, 1621), pars. 4-8, pp. 17-30. For the corporational thought of both writers, see Gierke, (DGR, IV, 3-8, 11-16. According to Gierke (III, 682), they, along with Henricus Bruningus, "geben zunächst inhaltlich die mittelalterliche Korporationslehre ziemlich unverändert wieder."

ought to rest upon popular consent.[56] Lesser magistrates, thought Casmann, were those officials whose power was "close" to that of the supreme magistrate, and who were to moderate, tanquam socius gubernationis, the supreme imperium he held. They had power first to review his decrees and give counsel, then to mitigate or rescind unjust decrees, and finally to resist forcefully his violent oppression within their territory.[57]

Among jurists, none so completely applied the Huguenot ephor theory, including its emphasis on community authority, to Germany as did a law professor of Strasbourg, George Obrecht (d. 1612), whose legal studies in France had been terminated by the St. Bartholomew

[56] Casmann, Doctrinae et vitae politicae . . . systema, chs. 3, 4 (Frankfurt, 1603), pp. 11-16. Boxhorn, Institutionum politicarum libri duo, bk. 1, ch. 3 (Leipzig, 1659), pp. 24-34. Casmann (d. 1607) taught at Stade, Boxhorn at the University of Leyden.

[57] Systema, chs. 9, 10, pp. 35-48. The identity of the magistrates who could depose a tyrant depended on who had placed him in office, whether the people, the senate, the electors or other magistrates, a doctrine enunciated earlier by Zwingli. In several respects, Casmann's treatment of magistracy depends heavily on that of Lambert Daneau, for which see above, pp. 213-19.

massacre.[58] Considering the electors, counts, barons and imperial cities to be ephors who represented the whole body of the people, Obrecht attributed to these officials collective superiority over the emperor, as a chapter stood above its bishop or a corporation above its actor. As contutores, their obligation to guard the republic was not annulled by his misdeeds. The electors were responsible for the whole empire while the princes and cities defended their own territory, even if the inaction of others required them to act alone.[59]

[58] Among the jurists who repeated aspects of the theory of resistance by inferior magistrates, but treating it only in passing, were Volckmar, De jure principum (1618), ch. 11, par. 16, pp. 125-26 (who, showing evidence of continued Lutheran influence on this theory, cited Luther's Warnung, Melanchthon's edition of Luther's Von der Frage die Nothwehr belangendt [Hortleder, II, ch. 28], and the Von der Nothwehr Unterricht [Hortleder, II, ch. 29]); Zacharias Fridenreich, Politicorum liber, ch. 26, pp. 144-48; Theodor Reinking, Tractatus de regimine saeculari (1616) (for which see Gierke, Althusius, pt. 2, ch. 3, p. 154, n. 93; ch. 6, p. 311, n. 116); Knipschildt, De juribus, II, ch. 4, pp. 1163-64. The fullest account of the theory, next to that of Obrecht, was given by Hoenonius, Libri duo disputationes, (Herborn, 1608), I, disp. 2, pp. 16, 23; disp. 3, pp. 55-58; disp. 9, pp. 166-95, who did not, however, make it expressly relevant to the empire. Althusius' influence, present in all of these works, was especially strong on Hoenonius.

[59] De principiis belli et eius constitutione, in Disputationes II. juridicae (Strasbourg, n. d.; 1st pub. 1590), thes. 114-99. At the end of his treatment, he cited only the Vindiciae. He explicitly forbade resistance by private persons, even against the illegal behavior of inferior magistrates.

Most writers, however, especially the jurists, failed to make so complete a transfer of Huguenot thought to the empire. Valentin Forster, in 1586, based resistance by inferior magistrates on a covenant between God, the magistrates and the people, a variant of the Vindiciae's first covenant. He omitted, however, the second compact between people and king and generally emphasized the divine origin of political authority rather than the popular.[60] Writing in 1607, Bartholomeus Keckermann, a Reformed theologian of Heidelberg and Danzig, did consider the ephors to "represent the whole realm," having sworn their oath first to the realm and then to the supreme magistrate, as the Huguenots had asserted. Moreover, these ephors (corresponding to the German high nobility) were contutores whose collective authority was superior to that of the emperor. Their superiority, however, issued only from their special agreement with the emperor, for by nature, "the prince

[60] De jurisdictione Romana, pt. 2, sect. 6 (Wittenberg, 1623; 1st pub. 1586), pp. 673-81. Unlike Obrecht, Forster allowed private resistance against inferior officials (sect. 7, p. 689) on the basis of self-defense, the limits beyond which the magistrate acted as a private citizen, and the just resistance against a judge who brought "irreparable injury," all of which arguments the Lutherans had relied upon (see above, ch. 1, nn. 20, 22, 26-28).

is the head of the ephors."[61] Unwilling to admit that the princes' role as representatives of the community should give the ephors an inherent collective supiority over the emperor, Keckermann attributed that superiority to an act of the emperor. The relationship between the princes and the emperor had priority, in his mind, over the princes' relation to the people.

Keckermann's problem was felt more acutely by Christopher Besold, who was even more reluctant to admit the emperor's inferiority. Although he recognized a popular power to create magistrates in democracies, and accepted in modified form the Huguenot ephor theory, he argued, in his Dissertatio politico-juridica of 1625, that in principle the creation of major jagistracies and dignities pertained only to the "summum imperium," which, in the empire, meant the emperor.[62] He refused to accept Keckermann's idea of contract, arguing that any agreement which created superiors to the emperor would create a

[61] Systema disciplinae politicae (1607), I, ch. 28; II, ch. 4, Operum omnium (Cologne, 1614), II, 566-67; 612-16. Unlike Casmann and Forster, Keckermann faithfully cited his sources, which included the Vindiciae, Hotman, Ursinus, Daneau, Bodin, Althusius and Casmann.

[62] See his Discursus politici, disc. 2, ch. 2, p. 37; and Dissertatio politico-juridica, sect. 3, ch. 3, pp. 151-52.

"pure aristocracy," whereas the empire, he felt, was a mixed monarchy. Besold did allow the estates of the empire a right of resistance, and assigned the aristocracy, as ephors, the task of counselling and restraining the emperor, but the right of resistance rested on the emperor's lowering of himself to private status by illegal action, not on the pretended superiority of the ephors.[63] Apparently, Besold's desire to preserve the monarchical status of the empire required that he sanction neither the popular authority of the princes nor a contract, either of which might imply the princes' collective superiority to the emperor.

Neither Besold nor Keckermann were opposed in principle to the idea that political authority emanated originally from the community, and in this they represented common opinion among jurists and political thinkers. They experienced difficulty only in applying this principle directly to the princes, a difficulty

[63] De statu reipublicae mixto, ch. 3, pp. 188-90, esp. p. 89, "sui natura Princeps, caput etiam Ephororum sit, (ita tamen, ut si contra officium aliquid agat, tum ut privatus, ac inferior habeatur). At ubi in omnibus, ex speciali pacto, Ephori superiores censentur; non tunc status mixtus, sed pura Aristocratia, Respublica illa aestimari debet." Cf. his Dissertatio politico-juridica, sect. 1, ch. 2, p. 11, "si enim Imperium perpetuum est et summum, haud precarium erit vel subalternum."

faced also by Johannes Althusius in his Politica methodice digesta of 1603.[64] Of all the writers of this period, Althusius most systematically and comprehensively amalgamated political and juristic ideas into his scheme for a corporative society and government. Basic to this system were the authority of the community and the ephor theory of the Huguenots. Opposing the trend in his day for inferior corporations to lose their autonomous privileges before the rising sovereign state,[65] Althusius built his state upon an ascending hierarchy of "symbiotic consociations," arguing, as did Losaeus, for their rights to create and limit their own magistrates and to make

[64] Published at Herborn, followed by an expanded edition of 1610 and a third edition of Herborn, 1614. Hereafter, my citations refer to the edition of C. J. Friedrich (Cambridge, Mass., 1932), which is based upon the 1614 edition. Friedrich gives an excellent analysis of Althusius' total system in his Introduction. See esp. pp. lvi-lx, lxxiv-xciv. In general, he emphasizes the symbiotic corporativeness of Althusius' state, as opposed to the "federalistic" interpretation of Gierke or the notion that Althusius merely reflects the Ständestaat of the sixteenth and seventeenth centuries, as argued by Wolzendorff. See also Gierke, Althusius, pt. 1, chs. 2, 3, pp. 18-49, and Mesnard, L'Essor de la philosophie politique, pp. 585-615, for comprehensive accounts.

[65] See Gierke, Althusius, pt. 2, ch. 5, pp. 239-42, nn. 30-37.

laws necessary for their own administration.[66] Moreover, he looked upon the commune as "almost" a microcosm of the province or kingdom in its managing of public affairs, emphasizing, accordingly, the importance of the provincial estates, as well as the estates-general and the ephors as organs of the corporate people.[67] The ephors and the chief magistrate were elected to administer affairs too complex for all the people to manage at once. To these ministers they gave the power and authority necessary for this task, as well as the ius gladii, but always retained to themselves the sovereignty. The ephors were nothing more than representatives of the

[66] Althusius' analysis of the corporative structure of the state is beyond our scope, but perhaps may be summarized by his statement in Politica, ch. 38, par. 114, p. 398, "Negare vero, regna et societatem hanc universalem publicam ortum suum a primis initiis suis a familia, collegis, pagis, oppidis et civitatibus ac provinciis habuisse, est cum ratione insanire, et omnem historiis fidem abrogare, et contradicere omnibus iis quae supra late docuimus in cap. 1. 2. 3. et 4." For the significance of Althusius' corporation theory, see Gierke, Althusius, pt. 2, ch. 5, pp. 243-44, n. 43.

[67] Politica, ch. 6, par. 16, p. 53, where he speaks of cities and "small republics," "in qua negotia communia ad civitatem pertinentia, eodem fere modo, quo in regno et provincia aguntur et tractantur." See also ch. 8, passim; ch. 17, pars. 56-61, pp. 133-35; ch. 33, passim.

whole people, as guardians who represented their wards.[68]

Among their most solemn responsibilities was the restraint of the chief magistrate within the bounds of his office. Their charge was to protect the rights reserved to the people in their grant of authority to the chief magistrate. This they did as a college, in which capacity they were superior to him, though inferior as individuals. As checks on royal power, they might give counsel and consent, interfere with the ruler's unjust decrees, or undertake collective armed resistance after the estates had given judgment and after all peaceful means of restraint had been exhausted.[69] The ephors

[68] Ibid., ch. 18, pars. 1-42, pp. 136-42. Althusius frequently used the juristic argument regarding the delegation of imperium, as expressed in par. 27, p. 140, that "Quantumcunque enim est imperium et jus quod alteri conceditur, minus tamen semper est eo, quod concedens sibi reservavit." Ephors thus created were of two types: "general ephors" of the whole realm, such as the seven electors, and "special ephors" who administered territories, such as the princes and cities. See ch. 18, pars. 110-12, pp. 154-56.

[69] Ibid., ch. 18, pars. 67-89, pp. 147-51; ch. 38, par. 56-63, pp. 389-90. Friedrich, Introduction, p. lx, argues that Althusius' founding of the power of the estates on "the corporate solidarity of the organized community" led him beyond the doctrine of Calvin and the Vindiciae on this subject. Althusius, however, was somewhat vague on the role of the estates in the specific business of removing a tyrant, while he explained fully the role of the ephors. Perhaps he was influenced by the fact that electing and deposing emperors was the task of seven "ephors."

were qualified to resist their head in part because they had been given the power to elect him, in part because of the reciprocal contract binding the chief magistrate and the people, and in part because of the obligation shared by the estates and the chief magistrate *in solidum* by which each was bound to amend the faults of the others.[70] Any ephor who administered only a part of the realm could resist only in his territory. He could, however, as the head of a component member of the state (and, presumably, in consultation with his estates), withdraw his territory from subjection to the tyrant, and then defend himself and his territory against certain reprisal. Cities which stood immediately under the chief magistrate were equally members of the state, and had the same privileges.[71]

[70] *Politica*, ch. 38, pars. 30-47, pp. 382-87; on the contract, see ch. 19, par. 7 *et passim*; ch. 20, pars. 19-21, pp. 183-84. I would agree, however, with Friedrich, Introduction, p. lxxxvii, that the contract is of secondary importance in the structure of the state, contrary to Gierke's assertions (as in *Althusius*, pt. 2, ch. 5, p. 244, n. 43). The same, I would argue, is true of the contract in the Huguenots' state.

[71] *Politica*, ch. 38, par. 53, p. 388; par. 110, pp. 397-98. In par. 76, p. 392, he allowed any one optimate or part of the realm to choose its own king or form of government when the rest of the state allowed the tyrant to destroy the fundamental laws or the laws of God, an argument obviously related to Althusius' support of the Dutch in their war against Spain.

In Althusius, then, the doctrine of popular sovereignty seemingly became the basis of a democratic form of corporate state in which the ephors, as heads of living units of the symbiotic body, made concrete the people's superiority over both the summus magistratus and the form of government itself.[72] A new dimension had been added to the Huguenots' ephor theory. The ephors, as administrators of provinces and cities, seem to have been analogous to the administrators of all lesser corporations, owing their authority to the people of their territory and representing them in political affairs. At this point, however, Althusius failed to coordinate completely the ephor theory with his state composed of symbiotic consociations. He was prevented from doing so by contemporary juridical thought on the constitution of the empire.

Althusius inherited from the ephor theory and from medieval legal and political thought the idea that "the people" were one organic whole whose sovereignty was one and indivisible. As a collective unit, they established a government which included both a chief magistrate and ephors. Medieval writers had debated whether the people transferred, or only delegated, their sovereignty to the

[72] See ibid., ch. 20, par. 20, p. 184, and Friedrich, Introduction, p. lx.

prince, but Althusius, following a distinction made by Bodin between a "majestas regni" and a "majestas regis," argued that both people and king had majesty, the people having propriety in it, the king exercising it for them.[73] German jurists and political writers of the next several decades further developed the theory of "double majesty," arguing that the emperor's "personal majesty" was "summa et absoluta" in its own sphere, although limited by the "real majesty" of the people, from which it derived.[74] This form of the doctrine of popular sovereignty, however, did not affect the princes who were still, from one point of view, "inferior magistrates" with authority from the emperor, rather than true princes with authority from the people of their territory.[75] "The people," to German writers anxious to preserve imperial unity, meant the people of the empire as a whole who conferred majesty on

[73] Politica, ch. 9, pars. 23-24, p. 93.

[74] See Gierke, Althusius, pt. 2, ch. 3, pp. 164-72, nn. 124-44; DGR, IV, 216-19, 222.

[75] See Gierke, Althusius, pt. 2, ch. 3, p. 171, n. 143, where he suggests that, since the princes' power derived from the "majestas realis" of the people of the whole empire, it could be treated as if transferred down from above. Cf. above, n. 53, and Matthias Bortius, De natura jurium majestatis et regalium (cited by Gierke, ch. 3, p. 166, n. 126) who speaks of "jura regni" as including the people's right to elect the ruler, while the "jura regia" include major regalia (to which the right to create magistrates was usually connected).

the emperor who, in turn, conferred dignities on his inferiors. To apply the doctrine of popular sovereignty to the individual territories and their princes would destroy imperial unity.

Althusius himself was too heavily influenced by Calvinist writings and corporation theory not to speak of the ephors, along with the chief magistrate, as creations and representatives of the people,[76] but he was too much a German jurist to avoid treating these imperial ephors as other jurists treated the princes and imperial cities. By "ephors," he meant only the authorities immediately under the emperor, not the inferior magistrates subject to them.[77] He compared the ephors to Roman provincial praesides, but claimed for them powers distinct from those of any ordinary magistrate, attributing rights of majesty and superiority which enabled them to do as much in their territories as

[76] Politica, ch. 18, par. 26, p. 140. Citing Losaeus, De jure universitatum, I, ch. 1, pars. 47, 48, Althusius argued, "Ejusmodi universalis hujus symbiosis ac regni administratores et rectores, universalis consociationis corpus, seu totum et universum populum, a quo constituti sunt, repraesentant."

[77] Corresponding to Althusius' limitation of the "ephorate" to those authorities directly under the emperor was his denial that magistrates inferior to them had any right in their jurisdiction. See Politica, ch. 23, par. 35, p. 220. Cf. above, n. 39.

could the emperor in the empire. These rights, however, did not prejudice the emperor's universal jurisdiction, for they were received from the emperor, who held the power of electing the princes as a regalian right conceded by the people, and retained superiority in whatever he conceded to others.[78] The ephors, then, whether "general" or "special," were essentially officials of the whole state, rather than representatives of the people of their territories. Althusius apparently considered the ephors of Germany to be created by the people of the whole empire through the emperor, thus combining popular sovereignty with actual German practice. This did not fully contradict the Calvinist ephor theory, in

[78] Ibid., ch. 8, par. 53, p. 83, "Licet autem hi praesides, praefecti, vel rectores provinciarum suum superiorem, summum regni magistratum, a quo ipsis haec administratio et potestas conceditur, agnoscant: tamen jura majestatis et principis in suo districtu et territorio habent, et vicem summi principis obtinent, atque tantum in suo territorio possunt, quantum Imperator, seu summus magistratus in regno, superioritate et praeeminentia, et quibusdam aliis specialiter exceptis, et summo magistratui constituenti reservatis." Cf. ch. 18, par. 59, p. 145, "Eliguntur autem et constituuntur ejusmodi Ephori consensu totius populi . . . . Quandoque etiam princeps, vel summus magistratus, aut optimates habent potestatem ephori eligendi, vel in locum demortui substituendi alium, idque ex populi concessione et beneficio." See also ch. 18, par. 112, p. 156; par. 115, p. 157; and, for the superiority reserved to the emperor as the giver of authority, ch. 8, par. 55, pp. 83-84; ch. 38, pars. 74-75, p. 392.

which inferior magistrates had also received their offices from the people as a whole, acting through the king.[79] Althusius' emphasis, however, was different, for he, like his contemporaries, viewed the emperor's role in "creating magistrates" as essentially that of a feudal lord dispensing patrimonial regalia and jurisdiction, whereas the Huguenots had developed at least the germ of the idea that the king was merely a dispenser of public authority emanating from the community. Althusius faithfully applied his corporational theory to the ephors only in the case of imperial cities, attributing to them regalia, jurisdiction and *imperium* "suo proprio jure" and the right to elect and be governed by their own magistrates and councils.[80]

[79] Cf. above, pp. 172-74.

[80] *Politica*, ch. 6, pars. 41-52, pp. 58-60. See also Gierke, *Althusius*, pt. 1, ch. 3, p. 47, n. 33. Cf. Volckmar, *De jure principum*, ch. 15, pars. 5-9, pp. 210-12, who also applied these principles of corporational government to cities and lesser bodies, but insisted that in the "states of the empire" all authority of the people had been transferred to the princes. Civic magistrates represented the citizens and required their consent for legislation, but princes were not representatives and promulgated laws on their own authority, the subjects giving only tacit consent, at best. While Althusius did not go nearly this far in denying the authority of the people of territories, Friedrich's statement, Introduction, p. lxxxvi, that Althusius "is merely generalizing from what he sees in the city states of his day," must be accepted with reservations.

Since the ephors received their authority directly from the emperor, Althusius further compromised his corporational doctrines by allowing them to be corrected or prosecuted only by their sovereign prince.[81] In this respect, too, he reflected contemporary thought, for most of the writers who allowed resistance against the emperor by his inferior officials and estates did not grant similar rights to officials in the territories of the princes. The constitution of the empire, the most frequently employed justification for resistance,[82] had no counterpart within the territories. Infrequently, resistance against the princes might be justified either by arguments from natural law, such as those used earlier

[81] Politica, ch. 8, par. 91, p. 87, "Prioris generis praeses immediate imperio subjectus, administrationis suae rationem tenetur reddere imperatori" who can remove him from office if necessary. Cf. ch. 20, par. 21, p. 184. Althusius allowed the subjects of "praesides" to submit themselves to the protection of another if their prince failed to defend them (ch. 8, par. 92, p. 87). See also below, n. 83.

[82] When not justified by the ephor theory, resistance against the emperor could be based upon the oath of capitulation, the emperor's subjection to the court of the Count of the Palatinate, and the power of the electors to depose him. See Heigius, Quaestiones juris, q. 4, pp. 65-74; Matthias Stephani, De jurisdictione, II, ch. 1, pars. 152-54, p. 22; Bocerus, De jurisdictione, ch. 8, pars. 75-79, pp. 389-91.

by the Lutherans,[83] or by the right of corporations to correct their own administrators;[84] Althusius himself allowed the provincial estates, as bearers of the authority of the corporate provinces, to have a voice in territorial government,[85] but he clearly pointed out that princely regalia were removable only by the emperor. Althusius' corporation theory applied both to inferior corporations and to their macrocosm, the empire, but not fully to the territories of the ephors. The provincial estates possessed most normal corporational privileges,

[83] See above, n. 60. Cf. Joachim Mynsinger, Singularium observationum (Helmstadt, 1599; 1st pub. 1563), cent. 5, par. 18, p. 351, who is cited by Althusius, Politica, ch. 38, par. 110, p. 398, in favor of the right of cities to resist a tyrannous ephor in some cases. Similar arguments for resistance against magistrates of all kinds were given by Franciscus Zoanettus, a professor of law at Ingolstadt, in his Tractatus de defensionis tripartitae, pt. 3, in Anon., Tractatus aliquot docti et utiles (Cologne, 1577), pp. 129-43. Nevertheless, Zoanettus insisted that resistance against tyrants be done "a Republica, vel a maiore magistratu" (p. 142). He was frequently cited by later writers in the Huguenot tradition.

[84] See above, n. 55, and the anonymous Responsum juris, p. 111, par. 25 (cited above, n. 37). Among the sources this author cited was Fernandus Vasquez, whose Controversiarum illustrium (Lyons, 1599; 1st pub. 1564) made some of the strongest statements in the sixteenth century minimizing the differences between royal and magisterial authority and allowing defense by inferior magistrates. See especially the preface, pp. 40, 44; ch. 12, par. 9, p. 146; ch. 20, par. 4, p. 181; ch. 25, pars, 2, 3, p. 220; ch. 41, pp. 344-46.

[85] Politica, ch. 8, par. 5, p. 74.

but not the right to depose their prince, for he, as a magistrate, was responsible to the emperor, or, ultimately, to the entire corporate people of the empire, who presumably could act against him only through the emperor. Again, Althusius' position was compatible with the Huguenots' ephor theory, for it, too, had allowed inferior magistrates to be corrected only by the supreme magistrates. The implications of Althusius' argument, however, were more foreboding, for the ephors of the empire were also princes of territories, confronted by inferior magistrates and assemblies of estates whose potential powers of limiting the princes, according to either corporational theory or the ephor theory, were severely curtailed by the princes' immunity, as magistrates, from correction by their inferiors.

Various elements of German political and juristic thought respecting inferior authorities are summed up in Althusius. He, like several other writers in this period, accepted the ephor theory of the Calvinists. He attempted to combine it with juristic doctrines of the rights of corporations and the constitution of the empire. Unlike Keckermann and Besold, who feared to create ephors superior to the emperor lest imperial unity be injured, Althusius, basing this unity upon the corporate structure

of society, placed the ephors collectively above the emperor and treated them very much as the Huguenots had treated the magistrates of France, particularly respecting their rights of resistance. Indeed, considerable unanimity existed among German writers concerning the ephors' role as checks on royal power, but in analyzing the total structure of political power, Althusius and his contemporaries presented a picture which differed from that of the Huguenots. The German princes, although they had served as the Lutheran prototypes of Huguenot inferior magistrates, were too much like princes to remain in that position. In spite of juristic attempts to portray the empire as a unity and the princes as magistrates, the princes' independence within their largely feudal relationship to the emperor would not allow them to be regarded as popular magistrates, deriving their authority from the people by means of a merely formal act of the emperor. Althusius, in spite of his corporation theory and belief in popular sovereignty, could not escape this fact.

Contributing to this princely independence was the jurists' acquiescence in the patrimonial possession of jurisdiction and merum imperium. These powers were thought to derive from the emperor, to be sure, but since they had become so closely associated with the

feudal regalia of the princes, the concept of a structure of public *imperium*, embodied ultimately in the emperor, but shared in by the princes as inferior magistrates, could not develop. In juristic as in political thought, the princes' status as princes outweighed their role as inferior magistrates. Perhaps Althusius' recognition of this caused him to neglect the Azo-Lothair controversy in his *Politica* and to deal with *merum imperium* only in passing.[86] For him, the possession of *merum imperium* was no longer of crucial political import. The argument of Lothair had been consigned to the distant past, while Azo was nearly universally accepted.

Nevertheless, the princes were also magistrates, and they benefited considerably from their ambiguous position in juristic and political literature. As princes, they enjoyed such autonomy in their regalian and jurisdictional rights as to render Roman law incapable of describing them and the emperor unable seriously to threaten them. As magistrates however, they avoided the hazards that beset rulers who must share their authority with inferiors and to some extent be limited by

[86] He treated the princes' *imperium* and jurisdiction in his *Dicaeologicae libri tres* of 1617 (the revised edition of his *Jurisprudentia Romana* of 1588), I, ch. 33 (which I have not seen), cited in Gierke, *Althusius*, pt. 1, ch. 3, p. 47, n. 33.

them. As magistrates of the whole empire, they might, according to doctrines of popular sovereignty, receive authority from the whole body of "the people," but their status as hereditary rulers nominally subject only to the emperor and deriving their authority from him, prevented that popular sovereignty from becoming the direct source of their authority. As magistrates, they were immune from correction from below (except for some provisions of natural law); as princes, they mitigated the power which the emperor held over them as magistrates. As princes, they should have been held accountable to the people of their territory, according to the doctrine of popular sovereignty; as magistrates, they were responsible only to the people of the whole empire, whose theoretical control over them was diminished by the princes' relationship, as princes, to the emperor. In short, they were responsible neither to their own people nor to those of the whole empire, and their subjection to the emperor, while real enough to preserve theoretical unity in the empire, had little practical effect. Imperial superiority lifted its tired head during the Thirty Years' War, but finally acknowledged, in 1648, that its inferior magistrates were truly sovereign princes.

CONCLUSION

Sixteenth-century attitudes toward inferior magistrates were products of various combinations of political and legal ideas inherited from the past, modified to suit the changing political conditions of this period. The medieval heritage of political ideas offered to Lutheran writers the concept of vocatio, by which a man could serve God in any station of life. Lutherans applied this especially to the princes and cities who, they said, were called and given the sword by God to ensure justice and protect true religion. Their theoretical equality with the emperor in this regard formed an important element of the ideology which supported the independence of the princes, even though the Lutherans, like later German writers, maintained that the empire was a unity under a sovereign emperor. Many Calvinist political writers, although not untouched by this concept, were also receptive to the notion of community authority which, according to medieval writers, must justify all political resistance. Medieval writers

had seldom clarified how or through whom the community was to act, but Calvinist thinkers developed schemes whereby the estates, the great officers of the realm and the local magistrates each had their own task to perform in the name of the community.

Above all, the Calvinists suggested a solution to the medieval problem of how royal claims to authority over these officials upon whom the community relied could be reconciled with the concept that these officials acted for a community which possessed at least a casual sovereignty over the king. All magistrates, even those appointed by the king, were considered popular officials. Royal claims to superiority over them were reduced to mere formality; their obligations were to the people who created them, not to the king who formally installed them in office. The doctrine of popular sovereignty thus had significant meaning for the relationship of king to magistrates, at least in the writings of Calvinists of France and England. For German writers, however, popular sovereignty was focused upon the emperor alone. His conferment of dignities, regalia and jurisdiction upon the princes was still regarded in too feudal a fashion to allow this act to be a mere formality. The princes thus owed nothing to their subjects, but at the

same time their hereditary independence rendered them virtually immune to the emperor's superiority, even though it may have originated by imperial concession. Calvinist writers portrayed magisterial independence of the king in a unified government by emphasizing their dependence on the community. German writers enhanced the traditional independence of the princes and cities by reinforcing the trend toward decentralization and princely autocracy in Germany.

In addition to these fundamental political ideas derived from medieval thought, political writers of the sixteenth century employed several medieval legal concepts, again altering them when necessary to fit their political environment. Natural law ideas of self-defense and resistance against potential injury had found expression in Roman laws allowing resistance to malevolent magistrates and in feudal customs sanctioning a vassal's armed action against his lord. These were common justifications for resistance. Although natural law and Roman law implied that anyone could take arms, feudal law seemed more closely related to the Protestants' desire to limit resistance to inferior authorities. Perhaps this fact has led many observers to overemphasize the importance of the feudal elements in Protestant theory--

the contract and other aspects of dualism--but many Protestant writers were too aware of the more unified nature of the state in their day to be satisfied with feudal justifications for resistance. More suited to their purposes were corporational ideas inherited from classical literature, Roman and canon law, and, to some extent, from conciliarism. By the corporate analogy, increasingly centralized government could be reconciled with a degree of independence for all officials of the corporation who served the entire body rather than the supreme head. Collectively, the inferior officials were superior to the head; their obligations were mutual and were not broken by royal breach of contract, unlike the feudal contract which allowed resistance only on the basis of being freed of contracted obligations. To the extent that political writers relied upon the corporate analogy, to that extent they advanced from feudalism toward constitutional forms of resistance which allowed the structure and binding obligations of government to go on even while the chief administrator was being removed by orderly procedure.

Medieval legal thought and practice had also allowed inferior magistrates a limited power to interpret or remonstrate against unjust royal edicts and patent

letters. This power was based upon the king's subjection to the law of which they were administrators, and was still supported by many sixteenth-century political and legal writers on this basis. A few political thinkers, however, associated it with the authority of the community which had created both the law and the law's administrators. Jurists viewed inferior magistrates as creations of the king rather than of the people, but they nevertheless realized that this power depended upon the magistrate's possession of some degree of jurisdiction by right of office. The power to review royal letters was commonly associated (at least in France) with the magisterial "power to command" or freedom from the strict confines of legal procedure, that is, with the essential nature of magistracy itself.

Juristic discussions of the precise nature of the magisterial office knew no better basis for analysis than Roman law passages dealing with jurisdiction and imperium, along with the store of medieval commentaries on these passages. Roman law contained significant elements which limited royal power, and its application to monarchies in the late Middle Ages and the sixteenth century did not mean unqualified support for absolutism. Certainly, Roman law taught that all jurisdiction emanated from the prince, but it also provided guarantees

against the prince's direct and arbitrary control over his judges. Various degrees of jurisdiction and *imperium* adhered to magistrates by right of office and were beyond the princes' immediate control. Much controversy had emerged in the Middle Ages over whether Roman magistrates had possessed *merum imperium*, the highest magisterial power, by right of office, and this continued among jurists of the sixteenth century. A significant body of opinion, however, held to the opinion of Azo, that even this power belonged to magistrates *iure magistratus*. In part, this reflects the jurists' recognition that in both France and Germany many jurisdictions were hereditary. Leading jurists of France, however, particularly Bodin and Loyseau, began to think of this magisterial office or power to command as part of a total structure of public power centered in the king, but, like the crown, belonging to the realm rather than to any magistrate or king as a person. In this respect, too, jurists as well as political writers employed terminology and concepts derived from earlier centuries to describe conditions of their day in terms which reflected more sophisticated understanding of the developing modern state and the position within it occupied by inferior authorities. Differences between French and

German treatments of magisterial jurisdiction and *imperium* indicate clearly the extent to which feudal concepts still dominated German thought while French jurists adjusted to more recent political developments.

Crucial differences of emphasis existed, of course, between juristic analyses of the power of inferior magistrates and the more polemical treatments of the political writers. Jurists seldom spoke of rights of resistance, and few Protestant writers treated in depth the specific legal powers and jurisdiction of inferior magistrates. Concrete juristic influence on political thought, moreover, was sporadic. Nevertheless, the Protestant theory of resistance by inferior magistrates who possessed a degree of independence and a duty to enforce justice within a unified realm was remarkably similar to the thinking of several leading French jurists, and, except for the Calvinist emphasis on magistrates as popular officials, it suited several German jurists at the end of the century as well. Such similarity must reflect at least a common reaction to growing or threatening royal centralization during the sixteenth century.

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