The Right of Sovereignty and the Exercise Thereof: Civil-Law Origins of a Public Law Distinction

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The Problem of Outsourced Sovereignty

Jean Bodin in Book I, Chapter 8 of *Six Livres de la République* (1576) introduces a problem that I shall call the 'problem of outsourced sovereignty':

> It is well known that there never was a greater power than that which was given to Henry of France [later Henri III], Duke of Anjou, by King Charles IX [his older brother], for it was sovereign power, and did not omit a single item of regalian prerogative. Yet no one can tell me that he was a sovereign, for even if the grant had been perpetual, he was styled the king's lieutenant-general. Furthermore, the clause 'So long as it shall please us' was affixed to his letters patent which indicates a grant on sufferance [*precarium*].

The King is the true sovereign, even while the Duke exercises the 'outsourced' sovereignty on the king's behalf. So what, if anything, makes the King still the superior over the Duke? Bodin: The king 'never gives so much that he does not hold back even more.'

What kind of a concessive grant does a sovereign make? It depends:

- Grant *simpliciter*, made purely and simply like a gift [*donatio perfecta*], irrevocable.
- Grant *conditionaliter*, made with conditions attached, revocable.

For Bodin, when the sovereign grants or 'outsources' sovereignty to another agent, it is done as a grant of the second kind, a grant *conditionaliter*. This means the sovereign retains, at minimum, the bare legal right to recover or 'recall' the sovereign rights he has outsourced to others. By contrast, the recipient of sovereign grants are merely 'trustees,' 'usufructs,' 'mortgages,' 'lieu-tenants,' 'custodians,' 'borrowers,' or 'precarious tenants' of sovereignty. Even though they exercise sovereignty belonging to another, they have no right to sovereignty.

Bodin's solution to the problem of outsourced sovereignty is an application of principles derived from the law of property and the law of obligations, which were made accessible to him by the innovative scholarship of the French legal humanists.

'Outsourcing' in the Civil Law

Civil law (i.e., the *jus civile* or Roman private law) differentiates between two basic types of commercial transactions, *inter vivos*:

(1) Complete conveyance and transfer of goods, as in a sale [*emptio-venditio*], alienation [*mancipatio*, *cessio in jure*, *traditio*], or gift [*donatio inter vivos*], which transfers ownership [*dominium*] from one party to another party without conditions.
(2) Incomplete conditional grants made to another party, as in servitude or usufruct [*ususfructus*, *emphyteusis*], a loan [*commodatum*], mortgage or pledge [*pignus*], innominate contracts [*precarium*], with the expectation of return

What's the difference between (1) and (2)? In transactions under (1), there is a transfer of full ownership [*dominium*] from one party to the other. But in transactions under (2), there is no such transfer; the original granting party retains his rights of *dominium* in full and is 'entitled' to recover his property through 'real actions' [*actiones in rem, vindicationes*]. In classical law, there

can be no 'sharing' of *dominium* because *dominium* was thought to be indivisible – you either have it or you don't.

This civil-law analysis makes the *dominus* – even a dormant *dominus* – superior to any lesser party like a usufruct who lacks rights of *dominium*. Could jurists, then, try to assign the rights of a *dominus* to a sovereign king?

The Rival Theory of Dominium: Divided Dominium in Medieval Law

In the Middle Ages, the Glossators and Bartolist Commentators rejected the idea that *dominium* was indivisible. Instead, they introduced the doctrine of divided *dominium* to fit the feudal practice of dividing ownership claims in land between a lord and the tenant-vassal. *Dominium* came in degrees, like on a 'sliding-scale.' But this is problematic because it allows for the co-existence of two *domini* over the same property – potentially, it also introduces the theory that the king's sovereignty must also co-exist with the sovereignty of his inferiors.

'Outsourcing' Relationship	**Classical Roman Law of Property**	**Medieval Law of Divided *Dominium***	**Theory of Sovereignty and Lesser Jurisdiction**
Donor	*Dominus*	*Dominus Directus* (Feudal lord)	King as a *dominus*, with granting authority over lesser jurisdictions
Donee	Not a *Dominus* (Possessory, Usufructuary, *Tutor*, *Emphyteusis*)	*Dominus Utilis* (Vassal or tenant)	King's agent (also a *dominus*?) (*Seigneurial* noble, magistrate, officer)

How should we interpret the jural status of the King's agent (in the SE corner of the chart above)? Is he a *dominus* 'in his own right' [*suo jure*]? Or is he merely an agent holding rights and powers 'by the goodwill of another' [*alieno beneficio*]? Depends on whether you adopt the classical theory or the medieval theory of *dominium*.

The Legal Humanists

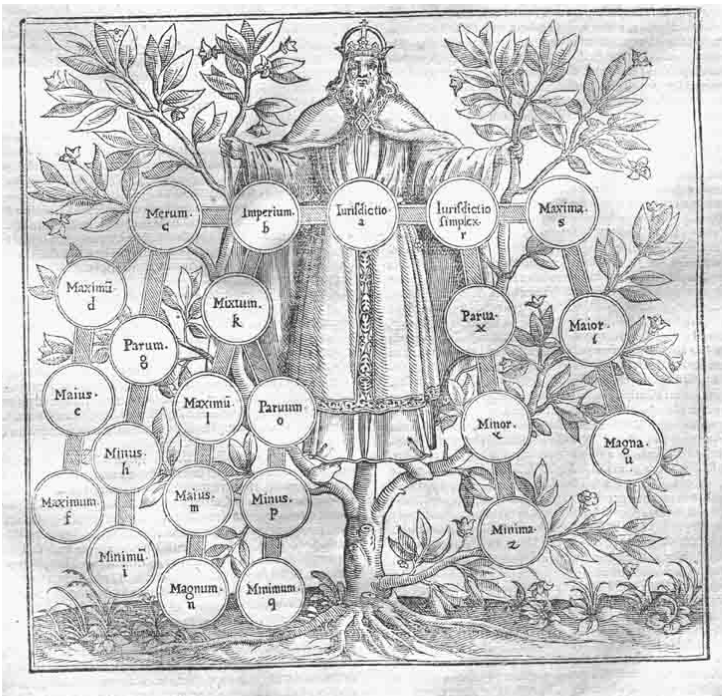
The humanists of the C.16 rejected the medieval doctrine of divided *dominium*, as unhistorical, and instead restored the classical understanding of *dominium* as absolute and indivisible. But this move supported the emerging royalist ideology because it meant that no recipient of a royal right or power could ever be regarded the *dominus* of it. Such grants were never intended to alienate the permanence of the Crown's demesne. The King, thus, retains his *dominium*, even while he grants them – by charters, letters-patent, delegations, enfeoffments, etc. – to his vassals or his officers for them to exercise those rights. Only the King is *dominus* with a full *jus in re*; everybody else is a usufructuary or tenant with a mere *jus in re aliena*.

Andrea Alciato [Alciatus]

As Chair of civil law in the University of Bourges, Alciato not only wrote several major humanist treatises on the civil law but also trained many others to follow in the legal-humanist tradition. In his *Paradoxa* and *Commentarii in Digesta*, Alciato begins his attack on the medieval doctrine but revisiting an old C.13 medieval debate between the Italian lawyers Azo and Lothair on the question of *imperium*: 'To whom does *merum imperium* belong?'

Lothair: *Merum imperium* belongs exclusively to the Emperor.
Azo: *Merum imperium* belongs to the Emperor and to anybody who exercises the right of the sword [*jus gladii*], like a magistrate, or a pro-consul.

Lothair won the debate and won the Emperor's horse, but Azo's doctrine was the standard view in the Middle Ages – he lost a horse [*equum*], but he defended justice [*aequum*]. Azo's view was standardized in Accursius' Gloss and expanded in a more systematic form in Bartolus' 'Tree of Jurisdictions,' reprinted in early modern editions of the *Digestum Vetus*:



Instead of just one site of *merum imperium*, Bartolus permits no less than six grades.

Alciato was the first major theorist to challenge Azo's doctrine and tried to revive Lothair. If *imperium* was property, whose property was it – the prince or the magistrate? It cannot be shared, as in the divided *dominium* doctrine because, as the civil law requires [*duo insolidum domini*], there cannot be two owners [co-*domini*] in the same property. So only one must be the owner [*dominus*], while the other must be like a 'usufruct' with mere *usus* or *exercitatio* of the *imperium*. The latter holds jurisdiction, but only a mere 'delegated' or 'outsourced' jurisdiction [*concessa, mandata, delegata*].

<u>*François Le Douaren*</u> [Duarenus]
Alciato's student and successor at Bourges, Duarenus restates Alciato's position that lesser magistrates or officers do not have *merum imperium*, only the 'exercise' or 'use' of it. Their powers were derivative and could be revoked by the granting prince. Only the prince has proprietary right and title [*titulus*] to *imperium*; magistrates merely have the capacity to 'exercise jurisdiction' [*iurisdictionem exercere*]. In fact, the essence of property [*nuda proprietas*] held by the prince must be separated from its use or exercise [*separata ab usufructu*]. Magistrates are even like *procuratores* who act in the place of *dominus* [*in loco domini*] in his absence.

<u>*Hugues Doneau*</u> [Donellus]
Donellus, who taught at Leyden and had a direct influence on Grotius, comments in his *Commentarii in Jure Civili* that jurisdiction can be held *suo jure* as property, or *alieno beneficio*, by a grant from someone else. A king is said to be like a *dominus* because he can grant and delegate his jurisdictional powers for others to exercise. But, like a *dominus*, Donellus points out

the king still retains 'the right of revoking and recovering for oneself one's own property' [*ius revocandae et sibi vindicandae rei*]. Same analysis applies to a king's sovereignty: Just as an owner could recover property he has lent to a borrower, so too could a ruler revoke and recover at his pleasure [*revocare potest cum vult*] all jurisdictional rights he has lent or delegated to another agent by way of concessive grant.

Charles Dumoulin [Molinaeus]
Dumoulin's commentary on fiefs in his *Commentarii in Consuetudines Parienses* continues the humanist analysis to the case of seigneurial jurisdiction. A *seigneur* does not 'own' his fief or his jurisdictional powers; it is merely granted to him, *in concessione*, on loan [*commodato*] from the king: 'The king retains the full right of property [*dominium directum*] and the universal royal right [*jus regium*] over the whole kingdom, which can never be transferred…[and] this is because regalian rights are attached inseparably to the crown [*regalia sunt de juribus coronae, et illi annexa et inseparabilia*].'

Some conclusions
By the time Bodin develops his analysis of 'outsourced' sovereignty, he is merely applying the doctrine developed by the humanist lawyers. It is noteworthy that even Bodin retains the proprietary language in describing the sovereign as a *dominus*, while magistrates and officers of state are described as 'trustees,' 'borrowers,' or 'tenants' whose rights and powers are merely 'on loan' or 'mortgaged.'

This distinction between the right of sovereignty and the exercise of sovereignty becomes part of the standard analysis in early modern constitutional theory from Althusius, Loyseau, and Domat to Hobbes, Pufendorf, and Vattel. See, e.g., Hobbes, *De Cive* XIII.1:

> We must distinguish between the *right* [*jus*] and the *exercise* [*exercitium*] of sovereign power [*summi imperii*]; for they can be separated [*separari*]; for instance, he who has the right [*is qui habet jus*] may be unwilling or unable to play a personal role in conducting trials or deliberating issues. For there are occasions when kings cannot manage their affairs because of their age, or when even though they can, they judge it more correct to content themselves with choosing ministers and counselors, and to exercise their power through them.

The legal-humanist theory provides the basis for treating 'government' as an intermediary professional political class that resides in the interstitial space between the sovereign authority and the subjects of a state. It is a class that can sometimes abuse its powers – which makes an absolute sovereign authority necessary. One function of the concept of sovereignty here is that, rather than supporting absolutism or arbitrary rule, it surprisingly reinforces a theory of 'limited' government – it ensures that government officials remain 'tethered' to the sovereignty of the whole state.