OUTLINE — LECTURE 20

Institutions and Politics—17th and 18th Centuries

Some wars:

1618–1648, Thirty Years' War:
1618–The 'Defenestration of Prague'
1594–1632, Gutavus Adolphus of Sweden
1583–1634, Albrecht von Wallenstein
1585–1641, Armand Jean du Plessis, cardinal-duc de Richelieu et de Fronsac
1602–1661, Jules cardinal Mazarin
1648–Peace of Westphalia

(We'll talk about this at the beginning of the lecture)

1667–1668, 1672–1678, 1688–1697, Wars of Louis XIV
1701–1714, War of Spanish Succession
1740–1748, War of Austrian Succession
1756–1763, Seven Years' War

(Try to hang on to these; we'll deal with them as part of the narrative.)

Spain:

1598–1621, Philip III, son of Philip II
1621–1665, Philip IV, son of the above
1665–1700, Charles II, son of the above, last Spanish Hapsburg
1700–1746, Philip V, grandson of Louis XIV of France; he had married Philip IV's daughter

1. The decline of Spain and the Weber-Tawney thesis on Protestantism and the rise of capitalism.
2. Regionalism in Spain – the revolts of 1640.
3. Spain's failure to develop the resources of the New World.
4. Spain's strategic problem.
5. The rise of the Northern Netherlands.

Miscellaneous Monarchs:

1650–1702, William III prince of Orange and king of England (from 1689)
1740–1786, Frederick II the Great, King of Prussia
1740–1780, Maria Theresa, empress of Austria

The emergence of Prussia.

The Empire:

1567–1602, Rudolf II, son of Maximillian II
1612–1619, Matthias, brother of Rudolf II
1619–1637, Ferdinand II, 1st cousin of Matthias and Rudolf

(I quit here on the Empire. Although it didn't end until 1806, it basically ceased to be a major force, except in Eastern Europe, after the Thirty Years' War)

France:

1589–1610, Henry IV of Navarre (Maximilien de Béthune, duc de Sully)
1610–1643, Louis XIII (Marie de Medici, Armand Jean du Plessis, cardinal-duc de Richelieu et de Fronsac)
1643–1715, Louis XIV (Jules cardinal Mazarin (d. 1661), Jean-Baptiste Colbert (d. 1682))
1715–1774, Louis XV (André-Hercule cardinal de Fleury, Henri François d'Aguesseau)
1774–1792, Louis XVI

1. The 'history of institutions'
2. The thesis of Roland Mousnier: France begins the 17th century as a country of orders and estates. It ends the 18th century as a country of social classes.
3. The Mousnier thesis continued: France begins the 17th century with a government of *officiers* (roughly, 'officers'). It ends the 18th century with a government of *commissaires* (untranslatable, but very roughly 'commissioners').

The World of Ideas—17th and 18th Centuries

A Cast of Characters in Chronological Order

1548–1617, Francisco Suarez, Spanish philosopher, theologian, jurisprude
1567–1622, Francis de Sales, French (Swiss) bishop, reformer, saint
1561–1626, Francis Bacon, English philosopher and statesman
1557–1638, Johannes Althaus (Althusius), German jurist, political theorist
1564–1642, Galileo Galilei, astronomer, mathematician, physicist
1583–1645, Hugo Grotius (Huigh de Groot)
1596–1650, René Descartes, mathematician, philosopher
1623–1662, Blaise Pascal, mathematician, religious thinker (Jansenist)
1632–1677, Baruch (Benedict) Spinoza, Dutch philosopher, moralist
1558–1679, Thomas Hobbes, *Leviathan*
1627–1704, Jacques Bénigne Bossuet, French bishop, preacher, absolutist
1632–1704, John Locke, *Treatises on Government*
1646–1716, Gottfried von Leibniz, mathematician, philosopher, jurisprude
1641–1727, Isaac Newton, English physicist, philosopher
1679–1754, Christian von Wolff, German mathematician, jurisprude
1689–1755, Charles Montesquieu, French *philosophe*, writer on government
1711–1776, David Hume, Scottish philosopher, political theorist
1694–1778, François Arouet de Voltaire, French *philosophe*, writer
1712–1778, Jean Jacques Rousseau, Genevan *philosophe*, writer on politics
1696–1787, Alphonsus Ligouri, Italian saint, moral theologian
1723–1790, Adam Smith, Scottish political economist
1703–1791, John Wesley, English religious leader
1738–1794, Cesare Beccaria, Italian penal reformer
1724–1804, Immanuel Kant German philosopher

Reorganization According to Fields

1. The ‘scientific revolution’: Galileo, Bacon. The importance of mathematics: Galileo, Descartes, Pascal, Leibniz, Newton.
2. Mathematics and neo-classical culture. Versailles, Versailles Gardens, Poussin, Racine. (Lecture20_slides.pdf)
3. Application of mathematical reasoning to normative propositions: Spinoza (ethics), Leibniz (law), Wolff (law).
4. The movement away from religiously based ideas of law: Grotius, Althusius.
5. Religious pessimism: Pascal, Bossuet, Hobbes.
6. Connection between more optimistic view of politics and the end of the Thirty Years’ War (and the English Civil Wars): Locke, Leibniz.
7. The emergence of the individual as constitutive of the state: Hobbes and Locke, as opposed to earlier theories (Bodin, Althusius) that make families or groups constitutive of the state.
8. 18th century thinkers: skepticism about religion, the influence of the *philosophe* movement, criticism of existing institutions. Montesquieu, the comparativist; Voltaire, the gadfly; Rousseau, political theorist with a strain of romanticism; Smith and Beccaria, reformers. Fragonard, Chardin (Lecture20_slides.pdf)
9. Religious thought and religious movements in the 18th century, a line leading back to Francis de Sales: Wesley, Ligouri.

A Crude Sketch of the Philosophical Background

1. The move from Aristotle (Suarez) to Plato or something more like Plato.
2. Mathematical philosophy as practiced by Descartes, Spinoza, and Leibniz has much more in common with Plato than it does with Aristotle.
3. The 18th century is much more empirical and hence more Aristotelian: Hume, Montesquieu, Smith, Beccaria, even Voltaire.
4. Starting with the individual in metaphysics something new. Descartes *Cogito ergo sum*. Hobbes’s political theory also starts with the individual, and this can lead to radical secularism. The 17th century did not go there, however; even the scientists, like Newton, were firm believers.
5. The separation of law and morals. By and large, it is not until Hume that we get a radical separation of the two.

A Somewhat Less Crude Sketch of the Jurisprudential Background

Suarez, *On the Laws and God as a Legislator* (1612) bk. 2, On the Eternal Law, the Natural Law, and the *Ius Gentium*, ch. 6 Is the Natural Law in Truth Preceptive Divine Law?

1. *The reason for doubt is explained.* The reason for doubt on this question originates in the fundamental grounds of a previously cited opinion, referred to in the preceding Chapter, which was there propounded and which has not yet been explained. For in its true sense, a preceptive law never exists without an act of willing on the part of him who issues the command, as has been shown in the First Book; but, [so runs the doubt,] the

natural law is not dependent upon the will of any giver of commands; hence, it is not law in the true sense.

The truth of the minor premiss is established by the points adduced in the preceding Chapter, namely: that the dictates of natural reason, wherein natural law consists, are intrinsically necessary and independent of every will, even of the divine will, and prior, in concept, to the free act by which something is willed; examples of such dictates being the precepts that God must be worshipped, parents must be honoured, lying is evil and must be shunned, and the like; all of which has been suffi ciently proved above. Therefore, the natural law cannot be called true law. This statement is further confirmed by the fact that [this so-called law] is not a true command; and hence, it is not true law.

The truth of the antecedent is evident. For the natural law is one of two things. First, it may be a command laid upon man by himself; which is not actually the case since a command of this kind either does not exist save as an act of judgment manifesting the truth of the matter in hand, or else, if it be an expression of the will or of a choice already made, is not in itself necessary to action, nor does it impose an obligation, but [merely] leads to the actual execution of the act in question, so that it neither suffices for, nor contributes anything to, the true or proper character of law. Or, secondly, natural law may be the command of a given superior; but this assertion is also untenable, in view of the argument above stated, namely, that the natural law dictates concerning what is good or evil, without reference to the will of any superior.

2. From the foregoing it would also seem to follow that the natural law may not properly be termed divine, not with the implication, that is, that it has been given by God as by a lawmaker.

But I repeat, *as by a lawmaker,* since it is clear that natural reason and its dictates are a divine gift, descending from the Father of Light. It is one thing, however, to say that this natural law is from God, as from an efficient primary cause; and it is quite another thing to say that the same law is derived from Him as from a lawgiver who commands and imposes obligations. For the former statement is most certain, and a matter of faith, both because God is the primary cause of all good things in the natural order, among which the use of right reason and the illumination which it affords constitute a great good; and also because, in this sense, every manifestation of truth is from God, according to the saying in the *Epistle to the Romans* (Chap. i [, v. 18]): ‘For the wrath of God is revealed from heaven against all ungodliness and injustice of [those] men that detain the truth of God in injustice.’ Paul, in explaining why he uses the expression, ‘the truth of God’, adds (*ibid.* [, v. 19]): ‘Because that which is known of God is manifest in them. For God hath manifested it unto them’; by means, surely, of the natural light of reason, and by means of visible creatures whereby the invisible things of God may come to be known. It is in this sense, then— that is, as referring to an efficient cause and to the function of instructing, so to speak . . . .

3. *The first opinion: holding that the natural law is a law not truly preceptive, but rather demonstrative.* . . . So it is that many writers distinguish between two aspects of law, the one indicative, the other preceptive, and hold that the natural law is law in the first sense, not in the second. This is the view expressed by Gregory of Rimini 1 (on the *Sentences,* Bk. II, dist. xxxiv, qu. 1, art. 2, shortly after the beginning, § *Secundum corollarium*), ... even if God did not exist, or if He did not make use of reason, or if He did not judge

of things correctly, nevertheless, if the same dictates of right reason dwelt within man, constantly assuring him, for example, that lying is evil, those dictates would still have the same legal character which they actually possess, because they would constitute a law pointing out the evil that exists intrinsically in the object [condemned].

10. . . . the natural law, as it exists in us, is an indication of some divine volition; hence, it is pre-eminently an indication of that volition whereby He wills to oblige us to the keeping of that law; and thus it follows that the natural law includes the will of God.

The Institutes of National Law

England:

Sir Edward Coke, 1552–1634, *The Institutes of the Laws of England*
John Cowell, 1554–1611, *Institutiones iuris Anglicani ad methodum et seriem institutionum imperialium compositae & digestae*

French Customary Lawyers:

Guy Coquille, 1523–1603, custom of Nivernais treated comparatively
Antoine Loisel (Loysel), 1536–1617, maxims arranged according to the *Institutes*
Gabriel Argou, 1640–1703, all of French law arranged according to the *Institutes*

1. Now I want to turn to something that is a more specific question, something that forms a part of tomorrow's more general discussion of legal developments in the 17th and 18th centuries but that we are not going to be able to deal with in the detail that it deserves. When we last spoke of the French intellectuals who were concerned with law in the sixteenth century, we suggested that, in addition to the political theorists, whose work cannot be sharply separated from the others, there were four main streams of effort, historians of Roman law, comparativists, students of the customs, and systematizers who operated both with Roman law and customary law. We also suggested that one leading modern scholar of the period, Donald Kelley, has argued that the historians, the comparativists and the students of custom had much in common – he attributes to all of them the invention of modern historical method – but that the systematizers were off in a world by themselves. The way in which I presented the story last week suggested that I had my doubts. I do, and I would like to make those doubts more explicit this morning.
2. My problem with Kelley's thesis is that he doesn't spend enough time considering what happens next. What happens next is complicated. It includes the *grandes ordonnances* that we talked about last week. These display an increasing willingness to adopt a single rule for the whole of France, as in the case of the *ordonnance* of Blois on the topic of marriage, but also by the second half of the 17th century to systematize. We will see tomorrow that the movement in the direction of natural law is largely of product of places other than France, first, Spain, then the Low Countries, and finally Germany, but the theory of natural law had considerable influence in France, as can be seen in the great 17th century law book by Jean Domat, *The Civil Laws in Their Natural Order*. Now natural law involves a mixture of empiricism and system. The great books of the natural lawyers combine abstract reasoning derived from postulates about the nature of man and human society with empirical inquiry designed to check whether societies the world over have, in fact, followed these rules. We will have to say more about the natural law school tomorrow, but the fact that it

appears at the end of the 16th century suggests that the systematizers were not off in world by themselves, but that their efforts were integrated into historical, comparative and customary inquiry.

3. The most striking illustration of this proposition appears in the writers of institutional treatises. Justinian's *Institutes* had been studied from the time of the revival of Roman law, perhaps before, but the principal focus of the glossators and commentators had been on the more complicated books of the *Corpus Juris*, the *Digest*, the *Code* and the *Novels*. What happens in the late 16th and 17th centuries is an outpouring of literature entitled *Institutes* or some linguistic variation of the word. It appears in virtually every country. Coquille, Loisel, and Argou are notable in France, but there are a number of others. Even England is not immune. I probably need not remind you that the Sir Edward Coke's four-volume treatise on the laws of England is known as the *Institutes*. That work, however, shows very little conscious application of the learned law or of the scheme of the *Institutes*. The first part is about property; the second about statutes; the third pleas of the crown, and fourth jurisdiction of courts. Roughly contemporary with Coke (1605), however, a civilian named John Cowell, tried his hand at institutional treatise of English law, and called it *Institutiones juris anglicani ad methodum et seriem institutionum imperialium compositae & digestae* "The Institutes of English law composed and digested according to the method and order of the Imperial institutes."
4. These institutional treatises are extraordinarily varied. They are remembered in the standard historiography for having applied the scheme of Justinian's *Institutes* to customary law. That is certainly what some of them do. Argou in France shows the strongest tendency in this direction, and Argou's treatise was very successful, probably because it made it easier for university-trained lawyers to learn customary law. I do not want to belittle the achievement of Argou. It takes a considerable amount of craft to jam a legal system that has no structure, or which has a quite different structure, from that of the *Institutes* into the sausage skin of the *Institutes* and end up with something that is not an obvious misfit. Cowell's treatise in England was a total flop. This was partly for political reasons. Rightly or wrongly, Roman law in England was associated with absolutism and with James I, whereas the common law was associated with parliamentary opposition to James I. I think, however, that I am far enough away from the political controversies of the English 17th century to be able to say that Cowell just doesn't do a very good job. His mixture of Justinian and English law is not true to either.
5. Let us look more carefully at the overall structure of the three treatises that we have extracted in the *Materials*, beginning with Argou (1st ed. 1692, 10th ed. 1717) on p. XVII-8.

Book I. The estate of persons

1. Serfs, dead-hand and slaves
2. The nobility
3. Civil death and infamy
4. Paternal power

5. Emancipation
6. Noble and bourgeois guardianship
7. Minors
8. Tutors
9. Curators
10. Bastards
11. Resident aliens
12. Domicile

Book II. Things

1. The division of things
2. Fiefs
3. Free-alod
4. *Cens* and seigneurial rights
5. Rights of justice
6. Honorific rights
7. Servitudes and the reports of experts [procedure to determine the state of rights in land]
8. The *retrait lignagier*
9. Possession
10. Prescription
11. Gifts inter vivos
12. Testaments
13. Institution and disinheritance of children and legitimate portions
14. Substitutions and trusts
15. Legacies and gifts mortis causa
16. Military testaments
17. Codicils
18. Execution of testaments
19. Heirs and other successors by universal title
20. Intestate succession
21. Succession of descendants
22. Succession of ascendants, the right of return and the Edict about mothers
23. Succession of movables and acquests in collateral line

24. Succession to propres
25. Primogeniture and the succession to fiefs
26. Succession of husband and wife
27. Succession of the fisc
28. Partages and hotchpot, and the debts of succession
29. The degrees of kinship

Book III. Obligations

1. Obligations in general
2. Marriage
3. Contract of marriage
4. Community
5. Continuation of the community
6. The faculty to renounce and take back
7. That each spouse pay his debts contracted before marriage
8. Dowry, paraphernal things, stipulation of propres, and furnishing
9. That the future spouses shall let the survivor of their father and mother enjoy the movables and conquests of the predeceased during their lives
10. Augmentation of dowry and dower
11. *Préciput*, gems and jewels, habitation and morning
12. The reemploy of alienated *propres*
13. The indemnity of debts of about which the woman has spoken
14. Gifts made by contract of marriage
15. Contractual intuitions and substitutions
16. Clause by which fathers and mothers declare their children free and quit
17. Renunciations
18. Second marriages
19. The authority of the husband
20. Separation of goods and habitation
21. Education of children, support
22. Mutual gift
23. Contract of sale
24. *Réméré* or *retrait* by agreement
25. Ground rents

26. Constituted rents
27. Leasing or letting for hire
28. Long-term leasing
29. Exchange
30. Two species of loan and tenancy at will
31. The Senatus-Consultum Macedonianum
32. Partnership
33. Deposit
34. Simple agreements
35. Clauses and conditions in contracts
36. Quasi-contracts
38. Crimes
39. Penalties

Book IV. Accessories and Consequences of Obligations

1. Coobligors, bonds, certifiers
2. Recourse and guarantors
3. Gages, hypothecs, privileges, and movable and real seizures
4. Separation of patrimonies
5. Cessions, transports and subrogations
6. Bodily constraint and cession of goods
7. How obligations are extinguished
8. Novation and delegation
9. The exercise of debtors' rights
10. Transactions
11. Actions
12. Exceptions
13. Discussions
14. Restitution in whole
15. Eviction
16. Delay by hypothec
17. Restitution of fruits, deterioration, damage and interest, expenses and amelioration
18. Interest

19. Proofs and presumptions

20. Commerce by sea and land

6. Argou, as I have said, shows the most obvious influence of Justinian's *Institutes*. It is divided into four books, persons, things, obligations, and, here he departs from J's titles, accessories and consequences of obligations, but it turns out that this book includes at the end (title 11 forward) the law of actions, including a relatively full treatment of the *ordo*. Except for two sections on crimes (3.38-39), which turn out to have to do largely with delict, and one on seigneurial justice (2.5), public law is no place to be found. Commercial law receives a skimpy treatment at the end (4.20), something of an afterthought. The topics within the books are treated in the order that we would expect from reading Justinian, the law of things proceeds from single things to testaments, to intestate succession to obligations, beginning with contract. There's one notable exception to Justinian's order: marriage and marital property are treated as part of the law of obligations, rather than as part of the law of persons and of single things. The law of obligations as Justinian would have understood it, however, is largely derived from Roman law, as can be seen from the titles (3.23-39). The law of things, on the other hand, incorporates much of French customary law. We learn of fiefs and free-aloes, the *retrait lignagier*, dower, and the distinction between *propres*, inherited land, and *conquest*.

Book I

1. Concerning persons

2. Concerning marriage

3. Concerning dowers

4. Concerning avowry, guardianship, bail, guard, tutelage, curatorship

5. Concerning account

Book II

1. Concerning the quality and condition of things

2. Concerning lordship and justice

33. Justice is patrimonial.

35. Fief, *ressort* [geographical judicial competence], and justice have nothing in common.

3. Concerning servitudes

4. Concerning testaments

5. Concerning successions and heirs

6. Concerning partition and hotchpot

Book III

1. Concerning agreements

2. Concerning mandates, proctors and intermeddlers

3. Concerning community

4. Concerning sale

5. Concerning *retraits*

6. Concerning leases

7. Concerning gages and hypothecs

Book IV

1. Concerning rents

2. Concerning *cens* [and similar charges]6. Concerning payments

3. Concerning fiefs

4. Concerning gifts

5. Concerning responses (a kind of surety)

Book V

1. Concerning actions

2. Concerning bars and exceptions

3. Concerning prescriptions

4. Concerning possession, seisin, complaint of novelty, sequestration, *recreance* and *maintenue*

5. Concerning proofs and reproaches

Book VI

1. Concerning crimes and gages of battle

2. Concerning penalties and damages

3. Concerning judgments

4. Concerning appeals

5. Concerning execution

6. Concerning taxes

7. Loisel (first ed., Paris 1608) (back up one page to XVII-7) has six books, further away from Justinian's basic scheme. But he, too, follows the basic scheme of the *Institutes* in that he proceeds from persons to things to actions. Within the law of things, the basic pattern runs from single things, to succession, to obligations, but the law of obligations is far less contractual than it is Justinian and more concerned with property. Public law appears a bit more frequently in Loisel than it does in Argou. There is, for example, section on taxes (6.6), but public law is still not prominent.

[Introduction] Concerning the law of royalty

Concerning the peers of France

Concerning dukes, counts, barons, lords of castles

Concerning rights of justice in common

Concerning fiefs

Concerning *cens*, *bordelages* [a charge in produce rather than money] and other charges that remove direct lordship

Concerning many common rights in feudal, censual, *bordelage* and other tenures

Concerning personal and dead-hand servitudes

Concerning real servitudes and predial rights in cities and fields

Concerning woods and usage of them

Concerning communities or partnerships

Concerning the rights of the married

Concerning dower

What things are movables, conquests, or *propres*

Concerning gifts

Concerning the state of persons, tutelage and curatorship

Concerning the *retrait lignagier*

Concerning wills

Concerning successions and heredities

Concerning prescriptions

Concerning executions on movable and immovable goods and persons, respites, cession of goods, hypothecs

Concerning contracts and agreements

Concerning bastards and aliens

Concerning seisin

Concerning *chaptel* of beasts [a kind of partnership in a herd]

8. Coquille is the least concerned with the order and content of Justinian's *Institutes*. His pattern largely follows the pattern of the titles of the custom of Nivernais on which he is commenting (titles on p. XVII-2 then skip over to XVII-6). It begins with a kind of law of persons, proceeding from the king through the peers to castellans to rights of feudal justice. Then there is a longish series of titles on the law of things. The final titles, however, are decidedly mixed up from the point of view of Justinian. Titles concerning persons are mixed in with titles concerning obligations with titles concerning property. The final title (on *chaptel*, a kind of partnership in herd animals) has all the hallmarks of an afterthought, as it may well have been in the original.

Principles of the French institutional treatises

1. Important as the overall structure is, I would like to focus on another aspect of the institutional treatises, their focus on principle. This is most obvious in Loisel. The content of his treatise is a series of maxims, pithy statements of rules, derived, for the most part, from customary law. We probably should say something about maxim jurisprudence, because we have said little about it so far. Title 17 of Book 50 of the *Digest* contains 211 maxims derived from juristic writing, some of which almost certainly did not have the status of maxims in classical law, although some of them may have.

2. *Digest* 50.17 attracted the interest of the medieval jurists quite early on. Bulgarus wrote a commentary on D.50.17, and works in this genre appear throughout the Middle Ages and into the early modern period. Parallel developments occurred among the canonists.

3. Maxim jurisprudence does not have a very good press these days. It particularly doesn't have a very good press in the Anglo-American world. We need to be reminded that as smart a jurist as Francis Bacon, who was an almost exact contemporary of Loisel's, thought that a truly scientific approach to English law would involve extracting principles from the amorphous mass of case law and arranging these principles in a structured and logical fashion. His effort in this regard is interesting but odd, and like most of his works, he probably never finished it. Loisel did finish, and his work was an instant success. What it did show was that there were guiding principles in the customary law. Some of them looked very much like Roman law; some of them had probably in fact been borrowed from Roman law (the same was true of Bacon's maxims and even those of Lord Coke in England). Part of the difficulty that we have with maxim jurisprudence today probably did not concern the jurists of the 17th century. We have difficulty with maxim jurisprudence because we do not regard it as a precise solvent of cases. I'm not sure that anyone in the 17th century thought that it was. The notion that a judge can be bound by the law to reach a unique result in any given case is a product largely of the 18th and 19th centuries not of any earlier period. I think that the jurists of the earlier period liked maxims and brocards because they expressed central tendencies of the law, ways of organizing a mass of disorganized material, ways of creating presumptions about a result that would then admit exceptions if reasons could be found for making the exception.

4. The other reason why today we are uncomfortable with maxim jurisprudence is that a careful study of many maxims shows that there are frequently maxims on opposite sides of the same proposition. Let me take an example from Loisel (p. XVII-7), one that touches upon one of our major institutional themes, the relationship between the tenure of land and feudal jurisdiction. In this regard French customary law had two maxims: *fief et justice sont tout un* "fief and justice are all one" [found in L. 2.2.33 in the form *la justice est patrimoniale*] and *fief et justice n'ont rien de commun*, "fief and justice have nothing in common" [found in that form in L. 2.2.33 and in L. 2.2.35 in the form: *fief, ressort et justice n'ont rien de commun ensemble*].[1] Obviously confrontation with such seemingly contradictory principles makes for

[1] For a full-scale discussion of these maxims, see Génestal in R.H.D. 1950.

thought. In a world that is seeing increasing distinctions between public and private law, the second of the two maxims sounds more like what makes sense. Remember how Bodin insisted that all jurisdiction came, at least in some sense, by delegation from the crown. Loisel avoids the contradiction by changing the contradictory maxim, substituting instead *la justice est patrimoniale*. The question is whether that principle could be reconciled with the notion that *fief et justice n'ont rien de commun*. Ultimately it was in this way: What the first maxim means, the 17th century lawyers said, as had apparently some of the medieval lawyers – it is not at all clear that this is what it meant originally – is that someone who has the right to hold a feudal court cannot separate that right from the land to which it is attached. Fief and justice are all one means that one cannot sever the justice from the fief, granting the fief to one person and the justice to another. On the other hand, fief and justice have nothing in common, one is a matter of private law, the other of public, and the king can certainly create jurisdiction independent of land-holding.

5. We can see how it all came out in Argou's treatment of the topic: (bk. 2. ch. 5, pp. 1.188-9 of the 1753 ed. [p. XVII-8]): "The justice of lords is patrimonial in France. It gives many rights to those who possess it, but some of these rights are purely of public law, such as the nomination or provision of officers, the exercise of justice, the matters of which their officers can have cognizance."

6. "There are other rights purely lucrative or honorary and which can be considered as a true patrimony. Even though the lords enjoy them only by reason of the high justice which pertains to them, one can nonetheless put these rights among the rights of property." [A. goes on to describe a number of which escheat is most important.]

7. Just in case you missed the point, the 1753 edition of Argou adds at the beginning: "All justice, royal or seigneurial, comes from the king, and is dependent on him mediately or immediately."

The Underlying Method of the Institutional Treatises Illustrated by Coquille

1. Guy Coquille, 1523-1603, was a practicing lawyer in the customary courts. All of his works were published posthumously. Nivernais, where Coquille practiced, is a small duchy located at the eastern end of the Loire plain, bordered by the Orléanais on the north, Burgundy on the east, the Bourbonnais on the south and Berry on the west. Its custom, like that of Clermont-en-Beauvaisis about which Beaumanoir wrote so famously in the thirteenth century, would not be important were it not for the fact that Coquille wrote a commentary on it in the late 16th century.

2. The fact that all the customs of France, some 285 of them, were homologated in the 16th century made it possible to Coquille to do the kind of exercise that we see him doing here. What makes his work interesting is that, like many of the customary lawyers of this period, Coquille went far beyond the specific custom on which he was commenting to do an exhaustive comparison of the rules of the custom of Nivernais with other customary jurisdictions and with Roman law. The results of the comparative method can be seen in the extract from Coquille in Part 17 of the *Mats*. In one sense it is quite mechanical. Once the customs had been redacted, it is a relatively simple task to lay them side by side the way he does in the title on marital property in his Institutions to see how the rules are similar and how they differ. But there is much more to Coquille's effort than simply getting it all under the right category. There is running throughout Coquille's work a sense that once one makes the comparative effort one is also obliged to ask the question what is the right rule. In this way, very early on the stream that runs from the comparativists and the historians connects with that being espoused by the systematizers. If the historians never ceased to remind Frenchmen how it was that their institutions and laws had come to be the way they were, the systematizers never ceased to remind them what it was that they ought to be. The comparativists, then, provided the link between the two.

Guy Coquille, *Institution au droict des francois*, tit. 12 (Concerning the rights of the married), *Mats.* XVII–2 to 7

3. There follows the texts which are commented upon in the lecture:

"A married man and woman are common, without there being any agreement, [in] movables, debts, and movable credits, made and to be made, and in conquests made during the marriage. This is said in almost all the customs of France."

"A married woman, after the words of present tense and solemnization of the marriage in the face of the church, is in the power of her husband and out of the power of her father, and cannot contract or go to court without the authority of her husband."

"Nivernais, concerning the rights of married people, art. 2, and in the first article, speaks of solemnization in the face of the church. Paris art. 220 speaks of from the day of the nuptial blessing. Poitou, art. 229, speaks of the nuptial blessing in the face of holy church. Nivernais in speaking of the solemnization of marriage in the face of holy church speaks with greater efficacy than Paris which speaks simply of the nuptial blessing for two reasons. The first is that the nuptial blessing can be made by the priest in a private house, or clandestinely without assembly. The second reason is that all weddings are not subject to the nuptial blessing, for second and third weddings do not receive the ceremony of blessing and blessing is there forbidden. [X 4.21.1, .3.] And that this public ceremony is required was decided by my teacher, Mariano Socini, the younger.[2] Consilium 31 and Consilium 86, vol. 1. And he cites [Nicholas de Tudeschis on X 4.17.15], and the same [Nicholas] decided this in Consilium 1, vol. 1,[3] saying that when there are only words of the present tense, they are called *sponsalia de presenti* and the words "matrimony" and "husband and wife" are used if the marriage has been consummated.[4] This modification of the public ceremony ought to be general, for although the words of the present tense make the marriage according to the canon law so far as the bond of marriage is concerned, nonetheless with regard to those matters of the civil law, such as marital power, the community and the dower, publication and ceremony is necessary, which consists not only in the ministry of the priest by the nuptial blessing but also in a grand and notable assembly of Christians in the place where Christians are accustomed to assemble, for "church" signifies both the assembly of Christians and the place where they assemble. Sens, art. 272. Auxerre, art. 190. Berry, marriages, art. 7, which speaks of deflowering or consummation as the solemnization, but Poitou and Nivernais speak more properly."

"A married woman, after the words of present tense and solemnization of the marriage in the face of the church, is in the power of her husband and out of the power of her father, and cannot contract or go to court without the authority of her husband. Nivernais, tit. concerning the rights of married persons, ar. 1. Paris, art. 223. Poitou, art. 225. Sens, art. 111. Auxerre, art. 221. Melun, art. 213. Bourbon, art. 232. Orleans, art. 194. Troyes, art. 80. Laon, art. 19. Reims, 12.13. Blois, art. 3. Bourgogne, art. 20. None of said customs remits the nullity of the contracts which the wife makes without authority after the dissolution of the marriage, either with regard to her husband, or herself or her heirs. [Citations omitted.] This decision of absolute nullity has been taken from the subtleties of the Roman law, in that an act done by a *filiusfamilias* when he is in power, remains null, even after his emancipation [D.29.1.33 (an odd cite for this proposition); D.19.6.1.2 (on point)], and so it was desired to infer the same of the wife in power of her husband. But it seems that since the power of the husband is all that renders the woman incapable of

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[2] Professor of law at Bologna, and a member of a distinguished legal family, Socini died in 1556.

[3] See above Sec. 14C.

[4] The French text is corrupt here. This seems to be what it means. Panormitanus says that the word "matrimony" is sometimes used of *sponsalia de presenti* and sometimes only of those that have been consummated.

disposition that only the respect of the husband ought to make the nullity and not that the nullity be in and of itself. A woman considered in herself, who has reached the age of majority, can without difficulty make all sorts of contracts, so that her person does not carry any prohibition. Only the survival of the husband, who has the wife in his power, clouds and covers that liberty of the woman. It is therefore only in respect of the said power that there is a prohibition, which is a temporary hindrance, not inherent in the person, but being outside and causative, it ought to cease when the cause ceases."

"The customs of Nivernais in the said art. 1 and Burgundy art. 20 do not permit the wife to make a will without the authority of her husband. But Poitou, art. 275, Auxerre, art. 238, Berry, concerning wills, art. 3 and Reims, art. 12, permit the married woman to make a will without the authority of her husband. In truth the will cannot and ought not be subject to the authority nor depend in any way on the will of another, so that it ought to move of the pure and entire liberty of the testator. [D.28.5.32 (on point)]. Wherefore it would seem that if the prohibition of the custom ceases, or if the husband doesn't complain, one cannot challenge the validity of a will made without the authority of the husband in those provinces where a woman is forbidden to make a will without the authority of her husband."

4. There's very complicated issue involving assignments for dotal payments on p. XIV-4. It's too long to read in full, and even if we did read it, I'm not sure that we could understand it. The important point about it is that Coquille is willing to assign a purpose for these assignments, and on the basis of this purpose to criticize the custom of Nivernais and perhaps that of Burgundy for what they do with them. American lawyers have a tendency to think that examining law from a teleological point of view is an invention of the American legal realists of the early twentieth century. I think that we can see it here in the late sixteenth.

5. Bottom line: Perhaps the easiest of Coquille moves to see is where he makes a comparison and the comparison reveals that there is a difference among the customs. Here he has a tendency to look to the Roman law rule, the rule of the *ius commune*, and to privilege that rule. He won't deny that the contrary custom exists but he will require that it be clearly stated and he will apply it only in those situations to which it applies. We saw basically the same techniques being used by the Italian jurists in the 15th century when they were dealing with statutes that were contrary to the *ius commune*. That makes it look as if the *ius commune* and juristic interpretation totally wins the day. But the *ius commune* was malleable stuff. And Coquille's search for principle goes further. Sometimes he will ask what the purpose of the custom is and will refuse to apply it in situations where he does not believe that its purpose applies. Again, we saw the same technique in Panormitanus' interpretation of the statutes of the Italian city-states. Occasionally we will find an argument that the custom is just flat-out wrong, either that it contradicts other higher principles or that it – this argument is usually only hinted at – that it does not correspond with social reality.

Phèdre**,** act I, scene III: "Ce n'est plus une ardeur dans mes veines cachée: C'est Vénus tout entière à sa proie attachée." "It is no longer a passion hidden in my heart: It is Venus herself fastened to her prey."