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Disciplines and Jurisdictions: An Historical Note

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> . . . a Prince is not *Dominus, sed Dispensator Legum*; although the Force of a Law depends upon his Authority; and therefore in Dispensing with a Law he doth not act by *Absolute Power*, but by *Administration*: For he is not *Lord over the Community, but Governour*.[1]

Contemporary interest in the question of jurisdictions arises most immediately from changes in the technologies of promulgation and transmission of law. It is a question of boundaries and relays. A mediological issue, which accompanies the supercession of the most obvious of legal borders, jurisdiction is conceived as a juridical competence over a territory, by the global possibilities and practices of satellite relay and the virtual domains of the Internet. As borders collapse the certainty of sovereignty and the determinacy of the juridical order, the meaning and purpose of law face internal and external challenge. To understand what this means and whether it matters, whether jurisdictional questions make a difference, requires a note of historical caution.

Jurisdiction tends to be assumed and is not generally an explicit issue except where it is contested. I will argue that if we currently face a species of challenge or contest over jurisdictions, it is one that mimics in inverted form the last great battle over the boundaries of legal powers, the inaugural dispute of modern common law over the demarcation of ecclesiastical and civil jurisdictions. The non-place of the spiritual jurisdiction, however, now takes the form of the virtual, the imaginary domain of the cybernetic, of IP numbers, portals, webmasters, and websites. The modern angel is the pulse code relay, the icon on which we click consent or send and watch our message, our intent, take flight into the animatrix of the ether. That being so, my second argument will be disciplinary, less historical than theoretical. The collapse of evident sovereign power, the prevalence of dispensation or even of *iustitium* in global spaces displaces one form of jurisdiction by others and specifically is witness to the demise of legal dogmatics, the deflation of the absolute privilege of law, and its evident displacement by mere administration, by pragmatics, by things done beyond the legal reason of their doing.[2] While it may at first appear that there is a deficit of law as well as an absence of ethics to the practices of administrators, it is by no means evident that this change in technology and form is anything other than an invitation to novel

conjunctions, the possibility of a pluralization of laws, an unprecedented interface of the disciplines.

The question of jurisdiction, and perhaps there is a significant logic in this, has thrown common law theorists into the classifications of Roman law. Take a recent example or two. Shaun McVeigh, in a meticulous collection of essays, begins with the *Digest* (2.1.1) and the jurisconsult Ulpian's etymology of jurisdiction as combining *ius* and *dicere*. He gives the meaning as "the saying or speaking of the law."[3] Douzinas, in the next essay, adds that speaking the law is "giving the law," a matter of gift and justice.[4] Drakapoulou offers the addition of solemnity in the declaration of law, rightly suggesting I think, that without solemnity there would be no justice.[5] So far, so good. It is useful to go back to the Romans, but a little civil law can also be a dangerous thing. Book 2 of the *Digest* continues to elaborate jurisdiction in relation to administration, the role of magistrates, the delegation of authority, and the demarcation of powers. It ends with the observation that jurisdiction is terminated by going beyond the external limits of a territory or by exceeding the internal limits of a given delegation. In such cases the relevant judge need not be obeyed.

My quibble, or perhaps this is simply a supplement, relates both to the rather narrow scope of the etymological refinement and to the historical idiosyncrasy of the source. As to the latter, and granted that jurisdiction is primarily national and territorial, it is not what the jurisconsult Ulpian, or Gaius, or Paul had to say but rather how the common and canon lawyers of the early modern period interpreted them that is significant. This is certainly a European question, a humanist interrogation of the first order, but there are specifics to the common law and to the early modern period that relate both to the actual jurisdiction and to the impact of practice upon the concept of "a power to do justice," which Bradin Cormack has so elegantly invoked in his study of the literary and the legal in the early modern period.[6] Cormack's reference is precisely to an English civilian whose definition of jurisdiction as both authority and ethics, law and justice, fits very well with the expanded sense of the jurisdictional that our other authors are striving towards.

The second point is more substantive and topical. Borrow another definition of jurisdiction, this time from Coke and of such importance or opacity that the learned Chief Justice houses it in Latin, the proper language of authority and majesty: *iurisdictio est potestas de publico introducta cum necessitate juris dicendi* [vel aequitatis statuendae]—jurisdiction is a power introduced for the public good, because of the necessity of stating the law [and of establishing equity].[7] The part in brackets is left out by Coke, who was often editorializing or simply sloppy, but completes the quotation, which is from the glossator Azo and implies rather more than Coke was willing to relate. So pause a moment. The definition or maxim deserves unpacking.

Return to the etymology. In a straightforward but overlooked syntactic sense, the word is formed from law and speech. More than that, simple but significant, law precedes speech. No speech without prior law. Structure sets the stage for performance. So one could argue,

although the immediate reason for this is that speaking the law relates to public pronouncements, to the social, to the realm of institutional discourse and not to the mother tongue, the gynaeceum, or private and intimate conversation. The definition of jurisdiction relates to a public power and care, *Salus populi complicati*, as it used to be termed, meaning with the general welfare enfolded in it.[8] Maybe one could go further and translate this in a more contemporary idiom as complicated by common feeling or popular sentiment. The latter emendation, bastard or correct as it may be, allows for a progression to a further implication. Law precedes speech, but equally is limited by speech. Jurisdiction both expresses a power, a species of *imperium* or *potestas*, and states a limit or boundary of that power. Jurisdiction is thus equally a definition of the expenditure and termination of power, a depiction of its boundedness and of the constraints of its place and time. Thus the Spanish humanist, Nebrija, in his discussion of the term, after citing Azo, goes on to distinguish four concessions of ordinary jurisdiction: First is inanimate law or sacred writing (*lex inanimata vel canon*); the second is animate law made by the Pope or the Emperor. Then he refers to custom and lastly to what we would term doctrine, the universally approved (*universitas approbata, ut mercatorum*).[9] The primary distinction is between the inanimate or dead letter, the mere writing, the simple record—the relic, the vestige, the footprint—of law, and the living law, the spirit that breathes vigor into the text, that creates, dispenses, improves, and alters the law in the occasion of its rebirth and much less frequently its demise for desuetude or irrationality. What is important, however, from a theoretical viewpoint, is the second feature of jurisdiction, its equation with *lex animata*, a living law embodied in a patristic figure, and expressly also in their delegates (*suo Vicario*), the filial and fearful followers of the sovereign. Here law comes to speech, and by benevolent extension justice emerges in the institution, amongst other discourses, as a mode of elaboration, emendation, and interpretation. As event and as practice.

Note then that jurisdiction, which is conceived as a public presence, is nonetheless delineated *in personam*, as belonging to the person and as traceable to a donation, be it lineage or delegation to the individual in their public role. *Anima lex* is the judge and by extension, by synecdoche, the court, which acts and in acting disseminates and dissipates law in the sociality. It is here that the juridical faces its limits, its severest critics, the questioning of its foundations not simply because this is its point of visible application (as opposed to pontifical pronouncement), but also because it is through the court, through the mouth of the judge that the sovereign speaks the law as illocutionary force and image of regulation. The political process of lawmaking, of Bulls and Edicts, of legislation and administrative orders only becomes law for us when it is enfolded into the common law, when it is interpreted and inscribed in judgment. It is in and through the jurisdiction of the courts that law most obviously now achieves its solemnity and gains its visible authority and expression. It is from here that judgment is declared, reasons are given, orders inscribed and paper flows along with the various images that now relay and accompany them. Jurisdiction is a species of enactment of power, a symbolic joining of law, of court and judgment, in the mêlée of the social.

The social presence of law is made visible not so much by the substance of jurisdiction, the technical and demographically marginal interstices of court and judgment, as by the accoutrements, the architectural, heraldic, vestimentary, and dramatic features of legal performance. Here we can return also to the early modern definitions of jurisdiction and add to the observation that jurisdiction is never singular but always bounded by other jurisdictions. The term itself also has its proper company. The question of jurisdiction that founds modern common law and its hieroglyph, the Crown, relates to the assertion of national identity against the Roman Pontiff, to be sure, but it also and more subtly, and to modern sentiments at least more opaquely, relates to the interior order and plurality of authorities. In the early legislation on Royal Supremacy the relevant determination of "jurisdictions" is as follows: "That the King, his heirs and successors, should be taken and accepted the only Supream Head in Earth of the Church of England, and should have and enjoy, annexed to the Imperial Crown of this Realm, as well as the title and style thereof, as all Honours, Dignities, Preheminences, Jurisdictions & c." Elsewhere, we find "jurisdiction, power, superiority, preheminence or authority Ecclesiastical or Spiritual in this realm."[10] To this it is added that "Faith and true Allegiance" entail assisting and defending "all jurisdictions, privileges, preheminences and authorities granted or belonging" to the sovereign. Stillingfleet expatiates this as a power: "to exercise, use, occupy and execute all manner of Jurisdictions, Privileges and Peheminences in any wise touching or concerning Spiritual or Ecclesiastical Jurisdiction within this realm of England."[11]

It is the placement of jurisdiction in the context of "Honour, Dignity and Preheminence" that is most striking and in need of interpretation. The authority of jurisdiction depends upon the authority of "him who gave it," or more broadly "of whence it came." That being the case, and the issue here was the authority of the Crown over the Church, the argument as to honor and dignity, the precedence of the Royal jurisdiction over the Roman interference, depends upon an elaborate justification. First, it is argued that the Crown has precedence in a literal sense: its jurisdiction is of greater antiquity and so more legitimate than that of the Romans. Here the Act of 24 Hen. 8 cap. 12 offers an extended preamble, stating: "Whereas by divers Authentick Histories and Chronicles, it is manifestly declared and expressed. . ." that the Crown has "plenary, whole and entire Power, Preheminence, Authority, Prerogative, Jurisdiction & c."[12] Just as law precedes speech, here power and preeminence precede jurisdiction. This may seem obvious, but the support of power by chronicles and histories, by the simple assertion of age, does display a limit of law, a joining of legality with the humanist discipline par excellence at precisely that moment when law is least independent and so most vulnerable in the sense of depending upon another jurisdiction. The identity of law, its authenticity, is here expressly a matter of historical method, of narrative recollection.

While the narrative basis of the plenary power and prerogative should certainly be noted, the order of expression, which places jurisdiction last in the lists that variously start with "honour," "plenary power," and "preheminence" is highly indicative. History, and more than

that an antiquity which some of the historians refer to as being so old as to be of "indefinite time," acts as the mode of presentation of precedence as an innate system of honor, a hierarchy that descends from the celestial to the temporal and imbues the sovereign with "iure divinarum et humanarum," the dual power and jurisdiction that had previously been accorded to separate estates.[13] The origin of jurisdiction, beyond the limited etymology, lies in the power of the Crown, now the sovereign, to speak the law, because it is the function of the sovereigns and their delegates to be *Principes jus dixerint*.[14] This power, as the common lawyers put it, is one of the *flores quae faciunt coronam*.[15] Those flowers are honors, dignities, and "preheminences," and honor, of course, is legally coded and significant.[16] The *notitia dignitatum* are the visible signs, the various plastic representations of family, office, and role, of status and social and legal jurisdiction. The point to be made, however, is that this order of legal statuses is one which descends according to a scrupulously notated hierarchy from plenitude, expressed through the living representative of the divinity, to the various vicarious orders of Church and State, of law and administration, of the household, the bedchamber, the kitchen. All have their proper competence and authority within the primary if intangible hierarchy of honor. The echelons and escutcheons of office and place belong to what Agamben terms an acclamatory order, an angelological and choral heirarchy that replicates the divine order within the terrestrial realm.

The key to understanding the disciplinary significance of the honorific basis of jurisdiction is the glory that underpins the kingdom and shores up the law through all its greater and lesser instances. As Agamben argues at great length, the theological function of glory, of the whole acclamatory order and its choral apparatuses, "is a matter of nothing less than neutralizing of the idea that the glory and sovereignty of God are reducible to the *brutum factum* of his force and omnipotence."[17] Honor institutes a hierarchy of visible notations of veneration, obedience, and collective rites of approbation, practices of observance and of recognition of power that precede and generally pre-empt any specific act of enforcement. This in sum is jurisdiction as a structure, the visible portal of authority and authorship of law, the manifest power to do justice. And of course such power is not legal in a positive sense because jurisdiction precedes and exceeds law, it indeed includes, as the early modern sages were so fond of debating, the power of dispensation of law and the "*Omnipotent Engine of a non obstante*," the disputable means by which the sovereign acts outside the law.[18] The sovereign has a purple pen and can write into the law as also excuse, thereby excepting and exonerating their subjects by suspending the rule of law.

What then does the invisible order of prior jurisdiction, annexed now but still extant in common law, mean for jurisprudence? The answer is that it is not only the legitimacy but also the very meaning of law that depends upon the hierarchy of order and honor. What we assume to make law possible and recognizable as the public realm is shored up by, depends upon, and is subtended through a complex of choral, laudatory, honorific, and acclamatory rites and ceremonies that give meaning to the occasional and itinerant moments of lawgiving and judgment. The legal order has the key. This is quite literal. The

claves regni or keys to the kingdom are the hymnological and spiritual grounds of legal foundation whereby, as Agamben relays, we work so that others may rest, so that *Rex otiosus* may enjoy his proper leisure. The keys are symbols of transmission from one order to the other, from the civil to the ecclesiastical, from the temporal to the spiritual, from outer to inner. It is the latter that perhaps has most resonance still. The jurisdiction ends where the private begins; secular law reaches its limit where spiritual life starts: "Here we see, the Prerogative bounded, where the Interest of *particular Persons is concerned* . . . And there is *Bonum singulorum Populi*; and . . . Laws that concern that the *King cannot Dispense*."[19] Plenitude, "preheminence," and prerogative are delegated honors, vicarious jurisdictions and even the sovereign has jurisdictional limits, although such limits are internal rather than external, spiritual as opposed to temporal.

The latter point leads to the necessity of delineating the nature of the honorific jurisdiction and so also the object of the acclamatory. The keys to the kingdom are keys to another realm, a domain of the spirit and its invisible angelic transmissions, but also a sphere of the cerebral and consensual, of censure and critique. We can return to Bracton and the basic distinction, which was that there was *authoritas judicandi, sive juris discendi inter partes*, an authority to judge, that states the law between the parties, and then a different and non-coactive power "proceeding by censures" and towards which the sovereign owes not jurisdiction, but "the Right of Protection and Assistance."[20] In modern argot this suggests a protected status and independent jurisdiction, a foundational though non-coercive force of intellect and criticism. The dual polity was in theological terms simply a duality, a unity divided in two along the same lines as the trinity, which made three divinities into one for the consensual purposes of appearing to be monotheistic. As Tony Carty has argued, the Hobbesian aggrandizing of the State over spirituality rather diminished the political importance of the duality, but it nonetheless remained awaiting its critical recuperation. No reason, in other words, that scholars, and for Carty that means international lawyers, should not take up again the discursive cudgels and proper jurisdiction of censure. The duality is a possibility, an inauguration or more properly a potential recuperation of a jurisdiction of censure that properly belongs inside but epistemically outside the powers and determinations of the state.[21]

Take up Carty's argument for a moment in relation to international law, a test case in that it is neither genuinely international nor substantive positive law. Here the state is most visible as an actor and least sacral in its acts because there is no settled jurisdiction nor any "authentick" chronicles and histories to guide legal practice or judgment. These have to be written outside of the coercive behaviors of states in their international capacity. These are the domain of what we can coin as "an extimate public sphere" and it is censure alone, the doctrinal, humanistic, and historicist political acumen of the international legal community, the *communis opinio* of the international bar that alone can censure and reign in the excesses of force that take the place of jurisdiction. International law, to borrow from Carty, is "*an intellectual task in which the only sovereign the jurist should recognize is his or her own*

conscience."[22] The sacralization of the state that Carty attributes to Hobbes leads to a theory of omnipotence that allows it a pretended or non-historical and unchronicled jurisdiction to decide all disputes: "the decisive aspect of this exercise of authority is the absorption of all symbols of legality into the state, which includes the unification of the religious and the political."[23] To this absolutism, Carty opposes the elaboration of doctrine, the expression of criticism, the independence of intellect, and the power of conscience in the expression and exposure of injustice. In a word, action as opposed to obeisance. It is this which Hobbes in his fashion most feared: the Doctors claim to set up a ghostly authority against a civil "working on men's minds, with words and distinctions, that of themselves signifie nothing, but bewray the obscurity that there walketh in another Kingdome, as it were a Kingdome of Fayries, in the dark."[24] The Ghostly power, from a pluralist perspective, is precisely the scholarly impetus to challenge unjust laws and to circumscribe excessive claims to jurisdiction.

The State cannot be censor of itself, as the unfortunate history of international law generally indicates. It needs an alien will within, an ethics that it is the role of the jurist here to provide. In a similar spirit and affray, the positive laws dictated by the sovereign and its delegates, the personal jurisdiction of the vicars of law, the sages and judges, also need their explicit limits and their intellectual conscience bearers. The extrinsic public sphere, the arena of nation states, has its internal equivalent, the intimate public sphere, as Berlant has coined it, where again it can be argued that there is no law but only jurisdiction, and here in Azo's other sense, which is to say that here the jurist's role is *aequitatis statuendae*, to offer censure, to address conscience, to form their own collective opinions and in sum to think, to criticize, to do justice in just words.[25] For that to be possible, to have meaning, requires a reorientation of the relation of law to scholarship, of conscience to doctrine, which begins with the deflation of the acclamatory and choral relation of legal academics to State and law. What is needed, in other words, is not just expertise in law, an ability to incant in solemn tones the prevalent cases and clauses, but also a sense of the purpose and conscience that history and practice have given these norms by virtue of what has been done with them and to whom. A critical idiom is one that knows the rules but takes its distance from law.

There is then and finally a sense in which jurisdiction as "a power to do justice," captures an ambivalence and plurality in the concept of jurisdiction. First, to borrow from McVeigh's formulation, the jurisprudence of jurisdiction turns upon the jurisdiction of jurisprudence. I have formulated this in terms of a move away from the acclamatory and choral function of jurisprudence towards a more distanced and critical position of thought and censure. Jurisprudence is the name of the humanistic accounting of law, its momentary and alien internal disposition, the realm of private opinion or better of intimate public expression of a volitional jurisdiction carried into law. This may seem obscure or somewhat abstract but gains a fairly simple expression in the notion that where authority founds law and allows for the making and the abrogation of rules, jurists by contrast inhabit a more scholarly world

and jurisdiction within which they exercise a discretionary power and judgment, a capacity for interpretation that does not simply and judicially apply establishment and precedent, edict and rule. The jurisdiction of jurisprudence belongs to the other realm; it is a species of what used to be termed *ius quaesitum alteri*, the law of the other, meaning the law of conscience that binds in honor and is properly propelled by a critical apprehension and inheritance of the jurisdiction of the spiritual as adopted by the disciplines.

There is a conflict, as Foucault elaborated, between disciplines and norms. It is this thematic that Agamben implicitly takes up in his massive reconstruction of the mislaid doctrine of *oikonomia*, the unseen distribution of unequal power and privilege in the private realm that subtends and maintains the public. Law is here conceived, and with considerable empirical accuracy, as a grandiose and spectral presence that ideally does nothing or on rare occasions is raised from its useless slumbers or inactive leisure to make pronouncements but still to do nothing: *rex regnat sed non gubernat* as the maxim goes. Here, as Stillingfleet laconically affirms in my select and selected epigraph, Lordship is not government, and absolute power is distinct from administration. The theology of the *oikonomic* treats the sovereign as separate from yet dependent upon an administration that both glorifies and ignores his rule.[26] Therein lies the complexity of jurisdiction as the concept that generates the disciplines in their plurality and critique in its ethical and censorious roles.

To raise the question of jurisdiction as a jurisprudential question transpires to be a radicalizing gesture. Scholars cannot dispense law nor offer any species of *non obstante* or waiver of law. What then is their jurisdiction, their purview and remit? The answer is curiously angelic. They exist between norm and community; they are, to borrow from Zartaloudis, "truly bi-polar: while two laws or tensional poles are internal to law, a normative and a non-normative aspect of the same, the tension of these two aspects with the purely exterior, non-juridical realm of common use resists its fusion with the legal realm."[27] For Zartaloudis this bi-polar version of Hegel's unhappy consciousness of the intellectual is elaborated in terms of profanation, the turning of the study of law to the common—meaning human—use of law. Most sympathetically, this addresses "the comedy of the fulfillment of law," conceived as a para-legal exercise whose "success or failure depends on conceiving of the law anew against its hyperbolic and tragic interpretation" and is willing to candidly acknowledge its ineffectiveness, its moments of pure senselessness. For the purposes of the discussion of jurisdiction the key issue is the antinomy of law and non-law, the liminal point of contact between discipline and norm, between the angelological, the realm of "Fayries," of phantasm and thought and the dead letter of law.

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NOTES

1 Edward Stillingfleet, *A Discourse concerning the Illegality of the Late Ecclesiastical Commission, in Answer to the Vindication of it* (London: Henry Mortlock, 1689), 31.

2 On the Roman conception of *iustitium*, see Giorgio Agamben, *State of Exception* (Chicago: Chicago University Press, 2005), 41 et seq.

3 Shaun McVeigh, ed. *The Jurisprudence of Jurisdiction* (London: Routledge, 2007), 3.

4 Costas Douzinas, "The Metaphysics of Jurisdiction," qtd. in McVeigh, *Jurisdiction*, 23.

5 McVeigh, *Jurisdiction*, 23, 34.

6 Bradin Cormack, *A Power to Do Justice: Jurisdiction, English Literature and the Rise of Common Law 1509–1625* (Chicago: Chicago University Press, 2007).

7 *Le Case del Marshelsea* 10 Co. Rep. 69, at 73.

8 Stillingfleet, *Illegality*, 41.

9 Antonio Nebrissensi (viro doctissimo), *Vocabularium utrisuque iuris* (Venice: apud Marcum Zalterium, 1612), s.v.

10 John Godolphin, *Reportorium canonicum or An Abridgement of the Ecclesiastical Laws of this Realm Consistent with the Temporal* (London: S. Roycroft, 1678).

11 Stillingfleet, *Illegality*, at 3.

12 Stillingfleet, *Illegality*, 49.

13 John Favour, *Antiquitie Triumphing over Noveltie: Whereby it is Proved that Antiquity is a True and Certaine Note of the Christian Catholicke Church* (London: Richard Field, 1619), 35: "antiquity has no bounds, no limits, it signifies the age of indefinite time."

14 Godolphin, *Repertorium*, 2.

15 As most famously stated in the *Commendam Case*, reported as John Colt and Glover *against* the Bishop of Coventry and Litchfield, Mich. 10 Jac. Rot. 2642, Hobart 140, at 143 (1616).

16 Guido Pancirolus, *De notitia utraque dignitatum* (Lyon: Gabianus, 1608); John Selden, *Titles of Honor* (London: W. Stansby, 1614).

17 Giorgio Agamben, *Le Règne et la gloire. Homo Sacer II* 2 (Paris: Seuil, 2008), 319.

18 Stillingfleet, *Illegality*, 59.

19 Stillingfleet, *Illegality*, 41.

20 Stillingfleet, *Illegality*, 15.

21 Anthony Carty, *The Philosophy of International Law* (Edinburgh: Edinburgh University Press, 2007).

22 Carty, *International Law*, viii.

23 Carty, *International Law*, 125.

24 Carty, *International Law*, 126. Richard Hooker is to similar effect in prohibiting and indeed ridiculing the criticism of law in his preface to *Of the Lawes of Ecclesiastical Politie* (London: R. Scott, 1676 edition).

25 The concept of the intimate public sphere is coined in Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham: Duke University Press, 1997), 3–15.

26 For a lucid explication and extension of Agamben's thesis on *oikonomia*, see Thanos Zartaloudis, *Giorgio Agamben: Power, Law and Criticism* (London: Routledge, 2010), 80–93.

27 Zartaloudis, *Law and Criticism*, 306.