Deconstructing Iurisdictio

Citation for published version:
https://doi.org/10.3366/edinburgh/9781474408851.001.0001

Digital Object Identifier (DOI):
10.3366/edinburgh/9781474408851.001.0001

Link:
Link to publication record in Edinburgh Research Explorer

Document Version:
Peer reviewed version

Published In:
Reassessing Legal Humanism and its Claims

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Deconstructing iurisdictio: the adventures of a legal category in the hands of humanist jurists.
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i. Prologue; ii. ὕβρις: the original sin; iii. φθόνος θεόν: rightful chastisement; iv. νόστος: the journey of iurisdictio; v. in lieu of a conclusion: veritas vos liberabit?

i. If we were to assess the historical importance of any strand of legal scholarship by its later influence, many great scholars would be utterly marginalised to the benefit of more fortunate ones. This is of course what we do all the time. It is easy. But it is also reassuring: we like to think that time works in a Darwinian sense. We tend to associate the ‘greatness’ of an author with his ‘payoff’, and measure such a ‘payoff’ on its impact on the development of the law. In principle, this of course has its merits. The problem is that we often start with our modern system. Since we look backwards, we measure with hindsight. This way we build a linear, majestic highway connecting past and present. Anything outside of it may be safely overlooked, for it does not lead to us. Moreover, in building our highway we can happily revise the past and straighten any curve - after all, when the road bends it goes in the wrong direction. This way, our functional approach leads not just to oversimplifications, but often straight to re-writing history. More than simplifying, it mystifies. As it happens, legal humanism is one of the best examples of all this. There is no doubt that sixteenth century is the Age of Legal Humanism. Any textbook on European Legal History would tell you that.

We teach legal humanists – as we should – because of their alleged profound influence on the law. Perhaps the implied argument is that, if we were to question their actual influence, we might risk having to reconsider whether to teach them at all. And it is very comforting – and easy – to have a nice group of new figures occupying the sixteenth century. Otherwise one should seriously think of teaching the later ius commune, a subject which unfortunately lacks grand narratives and so is both difficult and terribly variegated from country to country. Whether those ‘new figures’ were effectively doing what we say they were, it is not really the point. They provide us with a superb new chapter, most useful (and timely) to break with Bartolism and make way for the institutional writers, and ultimately natural law.

That the mos italicus progressively declined (though at different times in different places) is of course true. What is arguable is whether the advent of legal humanism entailed a scission among jurists between mos italicus and mos gallicus. What exactly this mos gallicus may be is not easy to say. We use this label to group together any heterodoxy in respect of the mos italicus, and we move from the draconian principle 'semel-semper'. If a writer does not behave as a Bartolist at any given time, his entire work must be considered part of legal humanism.1

2 The link between legal humanism and Elegant Jurisprudence tends to be less pronounced in most textbooks. This of course seems bizarre, but only at first sight. For elegant Jurisprudence was yet another ‘wrong’ bending of the road leading towards the Modern Truth.

3 The opposite is of course also true: we can make sense of the later mos italicus as a unitary category only by sweeping generalisations. This has probably nurtured the Bartolists-Humanists divide nearly as much as the semel-semper principle. More deeply, it might have even contributed to its very creation.

One of the most recent attempts to explain the interplay between mos italicus and mos gallicus speaks of ‘numerous variants and gradations’ of the ‘humanist dimension’, and labels the middle ground between

* I am particularly grateful to John W. Cairns and Paul du Plessis for their advice and scrupulous editing of the script.

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As it is well known, the two main elements of legal humanism were history and philology. Legal humanism heralded, among other things, the birth of legal history in the modern sense of the term – namely, the study of the law (mostly Roman) from a historical perspective. But precisely because of this, it was hardly a turning point in legal history. The philological element could have entailed more profound repercussions, since it challenged the very foundations of the ius commune. By and large, however, the scope of those repercussions was such as to neutralise them. Strict adherence to ancient texts would have led to conclusions interesting for historians, but untenable for contemporary jurists. Legal history stemmed from legal humanism, but legal historians tend to be innocuous creatures in respect to the development of the law. Further, early legal humanists were often academics in the worst sense of the term, more inclined to quarrels than cooperation. The confusion and variety of different views on what the original text might have been was such that, rather than spreading a single voice, or a polyphonic harmony, it produced a loud cacophonous sound. Or at least this was what coeval jurists perceived.

This contribution will focus on a small example of such legal humanists’ ‘voices’ and of their reception among Bartolists, the case of iurisdictio. It does not aim at completeness in the least. It is most definitely not an essay on the development of the concept of iurisdictio in the sixteenth and early seventeenth centuries, and it lacks any pretence to guide the reader into the intricacies of the subject. The scope is narrower and the purpose more modest: describing the position of some legal humanists on a specific subject, observing the reaction of non-humanist jurists and perhaps glimpsing the ultimate reasons behind their contrast. This is a significant caveat, for the focus of these pages is not on legal humanist theories, but on their immediate impact. Further, such an impact should not be assessed in general terms. The influence of legal humanism on the work of Bartolist lawyers was extremely variegated (to say nothing of the universe behind the terms 'non-humanist' and 'Bartolist'). Any general account would necessarily result in a broad narration with scant truth in it. Rather, I will focus on few humanist jurists, mostly of the first half of the sixteenth century, chosen mainly because of their frequent quotation by other non-humanist lawyers on the subject. Also, although the choice of the subject is arbitrary, I believe that the same results could be reached with a different subject. The important point is that the topic is abstract enough to attract legal humanists’ attention but not entirely detached from reality, lest it would be ignored by non-humanist jurists. Iurisdictio simply fitted the bill. Lastly, although here we are on shakier ground, it offers another advantage, as its 'deconstruction' might betray some political intent.

Two last points. The term iurisdictio refers to the jurisdictional prerogatives of a judge, not to other subjects (e.g. territorial jurisdiction, state jurisdiction, etc.). Second, references to secondary sources are extremely limited. This is intentional. There are many modern excellent works touching on the subject, but very few devoted to it.

Bartolism and legal humanism as 'moderate humanism'. Beyond this threshold the Elegant Jurisprudence lies; behind it, we are still in the province of Bartolism. R. Lesaffer, European Legal History (trans. J. Arriens), Cambridge: University Press, 2009, p. 353-354.

3 For more exhaustive works on the subject see first of all the seminal study of M.P. Gilmore, Argument from Roman law in political thought, 1200-1600, Cambridge (Mass.): Harvard University Press, 1941, esp. p. 77-85, and more recently the important contribution of L. Mannori, Per una 'preistoria' della funzione amministrativa. Cultura giuridica e attività dei pubblici apparati nell'età del tardo diritto comune, in Quaderni Fiorentini per la Storia del Pensiero Giuridico, 19 (1990), p. 323-504, esp. p. 345-407. To some extent, despite the somewhat different perspective, the present paper is meant as a gloss on Mannori's remarkable study.
Several studies mention some of the issues related to our subject while looking at other subjects. Pointing at them might have risked shifting the focus of these pages.

ii. Early modern public law evolved rapidly. But it did not move away from its medieval framework. Rather, it built on it. The whole administrative structure of the early modern state was still rooted in the medieval concept of iurisdictio. In a paradox of history, the modern idea of iurisdictio is probably closer to the Roman than the medieval one. It is well known that the medieval concept of iurisdictio derives from the conflation of two distinct categories, iuris-dictio (to 'say' the law) and iuris-ditto (the 'power' of the law).\(^4\)

Of the two concepts, medieval jurists considered that of iuris-ditto to be the general one. As such, the general concept of iurisdictio did not have a jurisdictional meaning, but it simply meant 'authority'.\(^5\) In turn, this general potestas was divided in two categories: jurisdictional power on the one hand, and any other power (we would say, both administrative and legislative functions) on the other. Jurisdictional power was termed 'iurisdicito simplex',\(^6\) while the other category 'imperium'. Imperium was in turn separated into merum and mixtum.\(^8\) The distinction was based on their different aim: imperium merum was concerned with public utility; when on the contrary the utility was mainly private, the imperium was mixtum.\(^9\) Further, imperium - both merum and mixtum - and iurisdictio simplex were each fragmented into six levels, so that, for

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\(^5\) Accursius, Digestum vetus, Parisis, apud Gulielnum Merlin, 1566, vol. I, ad Dig. 2.1.3, col. 164, § Mixtum est; Bartolus de Sassoferrato, Super prima et secunda parte Digesti veteris, Basileae, ex Officina Frobeniana, per Hieronymum Frobenium, et Nicol. Episcopion, 1562, ad Dig. 2.1.3, p. 112, § Imperium, n. 3-4: 'qu[a]ero unde dicatur iurisdictio? dicit glossa hic quod dicitur a ditione quod est potestas et iuris quasi iuris potestas [...] nam potestas et iurisdictio idem sunt, ut dixi: et est potestas iuris, ergo est iurisdictio.' See also Azo, Summa codicis, Basileae, per I. Heruagium, 1563, ad C.3.13, § Quoniam, col. 183, n. 1: 'dicatur autem iurisdictio a ditione (quod est potestas) et iure, quasi dicat, legitima potestas'.

\(^6\) Bartolus de Sassoferrato, Super prima et secunda parte Digesti veteris, cit., ad Dig. 2.1.1, § Ius dicentis, n. 2, p. 107.

\(^7\) Ibid.: 'Ius dicere potest etiam ubi nullum est litigium, ut quando interponitur decretum, super alienatione rerum minorum, vel super transactione alimentorum, quae sunt misti imperii' (mixtas was a medieval corruption for mixtus). It follows that iudicium dicere is not coterminous with ius dicere. While the former denotes iurisdictio simplex, the latter is the expression of imperium. See ibid., n. 1: 'venio ad quod et primo ad ea quae tanguntur in gl. et quae quare dicit ius dicentis, et non iudicis dicentis? Respond[e]o gl. hoc ideo quia non de omni iudice, sed tantum de eo qui habet merum et mixtum imperium'. For this reason Bartolus stresses the importance, in the Liber Extra, of the term 'ius dicere' to designate the chief prerogative of the iudex. See ibid., n. 4: 'nam idem est dicere iudex, quod ius dicens, extra de ver. sig. c. forum [X.5.10: 'iudex dictus quasi ius dicens populo'] quod placet, quia hic sincopatur, quia detractitur litera: scilicet de medio. Iem quia appellatio iudicis refertur ad [iudices] maioros [...] Et ideo dicitur [ius] dicentis, et non iudicis, quia sic placuit sibi.' Cf. Azo, Summa Codicis, cit., ad C.3.13, § Quoniam, n. 20, col. 187: 'quod non dixit officium iudicis, sed officium ius dicentis'.

\(^8\) Bartolus de Sassoferrato, Super prima et secunda parte Digesti veteris, cit., ad Dig. 2.1.3, § Imperium, n. 4, p. 112: 'iurisdictio in genere sumpta, dividitur in duas species, scilicet in imperium simpliciter sumptum, et in specie quod est iurisdictio [...] nam potestas et iurisdictio idem sunt, ut dixi: et est potestas iuris, ergo est iurisdictio. Idem de mero et mixtum imperio [...] cui etiam iurisdictio inest, sicat genus inest speciei suae [...] Est ergo iurisdictio genus: [...] imperium subdividitur in merum, et mixtum. Non enim iurisdictio dividitur in merum et mixtum imperium, sed imperium simpliciter sumptum dividitur in merum et mixtum.' See further ibid., n. 7-13 and n. 14-22, p. 112-113, on merum and mixtum imperium respectively.

\(^9\) Ibid., n. 6. Cf. also ibid., n. 15, p. 113.
instance, *merum imperium* ranged from the power to enact general laws to that of imposing a modest fine.\(^{10}\)

This complex system was based on two pillars. First, there was no clear-cut conceptual distinction between *iurisdictio* and *imperium*. They formed a single and unitary category in which jurisdictional prerogatives were but a part of a more general power of government.\(^ {11}\) Second, and crucially, the different kinds and degrees of jurisdiction were not to be distinguished according to the functions of the magistrate or the territorial extension of his jurisdiction, but rather according to the personal status of the *iudex*.\(^ {12}\) So that the first and foremost division was that between *iudex nobilis* and *iudex mercenarius*.\(^ {13}\) Unlike the *iudex mercenarius*, the *iudex nobilis* did not need a lawsuit to exercise his jurisdiction. Ultimately, the distinction between *iurisdictio simplex* and *imperium* did not lie in their specific characteristics, but in the status of the *iudex* who exercised them.

iii. Even from such a short survey it should be clear that the medieval understanding of *iurisdictio* was hardly faithful to the Roman sources. Unsurprisingly enough, the first jurist to insist on the point was Andreas Alciatus (Andrea Alciato, 1492-1550). In the second book of his *Paradoxa*, Alciatus methodically demolished the *ius commune* concept of *iurisdictio*. There is nothing in the sources to justify the idea of *iurisdictio* as a broad and all-encompassing genus. *Merum imperium* hardly designs a general, all-encompassing power. The sources speak of *'merum'* in the restrictive sense of *'solum'* - and not 'absolute' and 'unbounded', as the Civilians would have it. When *imperium* is *merum*, it has no *iurisdictio*. Deprived of any jurisdictional prerogative, *merum imperium* is just the *'potestas animadverteendi in facinorosos homines'* (D.2.1.3), that is, the power to inflict a punishment.\(^ {14}\) Since Ulpian speaks of a *'gladius potestas*', this punishment must refer only to criminal proceedings. Clearly, it has nothing in common with the jurisdictional sphere - *iurisdictio*.\(^ {15}\) Not only, therefore, do extra-jurisdictional powers (*'dictio'*) have hardly any similarity at all with *iurisdictio*, but they are not even included in *merum imperium*. Correctly understood, *merum imperium* is but a magistrate's prerogative, not the supreme power reserved to the prince alone.\(^ {16}\) In turn,

\(^{10}\) Ibid., n. 8-12, 17-22 and 24-26, p. 112-114 (on *imperium merum, imperium mixtum* and *iurisdictio simplex* respectively). This six-fold division meant that not even the whole of *iurisdictio* (simplex) was entrusted to the *iudex mercenarius*: *ibid.*, n. 24, p. 113.


\(^{12}\) Bartolus de Sassoferrato, *Super prima et secunda parte Digesti veteris*, cit., ad Dig. 2.1.3, § *Imperium*, n. 15-16, p. 113.

\(^{13}\) Ibid., ad Dig. 2.1.1, § *Ius dicentis*, n. 12, p. 108-109: 'officium nobile est quod per se stat sive hoc iudex suo motu exerceat. sive ad postulationem alterius [...] Quoddam est officium mercenarium quod per se non stat, sed deservit actioni'.

\(^{14}\) Andreas Alciatus, *Paradoxorum ad Pratum libri sex*, Mediol[ani], Alexander Minutianis, 1518, lib. 2, ch. 6, fol. 17v: 'merum imperium nil alius esse, quam potestatem gladio animadverteendi in facinorosos homines: et haec definitio cum re definita convertitur: quamobrem iure civili valere eam, negandum non est. [...] gladius hic non simpliciter pro telo accipi debet, sed pro quacunque poena, qua ex delicto plectendus sit reus'. Cf. also ibid., lib. 2, ch. 7, fol. 17v.

\(^{15}\) Ibid., lib. 2, ch. 8, fol. 17v: 'imperium aut merum, aut mixtum est. Merum imperium est habere gladii potestatem ad animadverteendum in facinorosos homines. Mixtum est cui etiam *iurisdictio* inest, quod in danda bonorum possessione consistit. *Iurisdictio* est etiam *iudicis* dandi licentia'.

\(^{16}\) Ibid., lib. 2, ch. 6, fol. 17r: 'si merum imperium nil alius est, quam potestatem animadverteendi in facinorosos homines habere, certe haec potestas magistratibus tribuitur: quo circa et merum imperium habere dicendum est.'
the sources are quite clear in that mixtum imperium consists of bonorum possessio and
of iudicis dandi licentia.¹⁷ The entire distinction so dear to Civilians between iudex
nobilis and mercenarius, and ultimately between public and private utility, is therefore
completely groundless. ¹⁸ For instance, condemnation and absolution alike are
principally aimed at public utility. But if merum imperium had the monopoly of all
actions primarily inspired by public utility, then we should conclude that absolution
would fall within merum imperium too. And this is not what the sources tell us. In short,
the whole understanding of the Civilians, 'who followed Bartolus as a prince of the
Legal Republic',¹⁹ was seriously flawed.

Alciatus' Paradoxa heralded the offensive. And yet his triumph was partial. Almost by
default, among humanist jurists the pars destruent of an author's argument was
considerably more successful than his pars construens. While most legal humanists
agreed on what iurisdictio and imperium were not,²⁰ no such consensus was reached on
what they actually were. The reconstruction proposed by Alciatus was successful
mainly in its repudiation of the old scheme, but not in replacing it with a new one.²¹

Having duly deconstructed the Civilians' concept of iurisdictio, the problem was how
to put its pieces together. Merum imperium was particularly problematic, and to some
degree representative of the legal humanists' approach, as it triggered endless learned
disputes. Humanist jurists proved considerably more apt at digging into the texts than
building on them. The main points on which, by and large, many of them tended to

¹⁷ Ibid., lib. 2, ch. 8, fol. 17v. Space limits do not allow forays into the intricacies of the subject and most
of all on the manifold interpretations of 'iudicis dandi licentia'. The issue of iurisdictio delegata gave
rise to endless and very complex controversies on its meaning and - moreover - scope. Thankfully,
however, such controversies did not create new interpretations of imperium but rather depended on it.
We will return to the point in the conclusion.
¹⁸ Ibid., lib. 2, ch. 7, fol. 17v.
¹⁹ Ibid., 'quem, uti legalis reipublicae principem alii sequuntur'.
²⁰ An obvious exception must be made for Ulrichus Zasius (Huldrzych Zási, 1461-1536). On our subject,
Zasius was a strict adherent to the Bartolian orthodoxy, the main addition being solely a more punctual
reference to the textual sources than the average Civilian. Nowhere he detached himself from the
Bartolian reading of jurisdiction (at the most reporting some variations proposed by Baldus). In his work
both definitions and scope of iurisdictio, mixtum and merum imperium are perfectly adhering to the
Bartolian lectura, together with the distinction between publica and privata utilitas and between iudex
nobilis and mercenarius, as well as with delegata iurisdictio. Zasius' work on iurisdictio and imperium
may be found in his comment to De iurisdictione omnium iudicum (In sequentis ff: veteris titulos lecturae
nempe de justitia et iure, de legibus, de iurisdictione omnium iud., Basileae 1537, p. 101-126), and in his
Paratitla to the first part of Digestum vetus (In primam Digestorum Partem Paratitlā, Basileae, apud
Mich. Ising, 1539, ad D.2.1, p. 34-39). The first of the two works is particularly detailed on iurisdictio
degelata (ad D.2.1.4-5, p. 111-126), a subject which on the contrary would receive just scant attention in
the Paratitla. Zasius' work on our subject received great attention - especially by non-humanist jurists.
No Civilian had any problem in quoting him approvingly or in relying on his interpretation. Zasius was
by far the 'legal humanist' most frequently quoted by later Bartolists. On Zasius' alleged humanistic
approach see S. Rowan, Ulrich Zasius. A Jurist in the German Renaissance, 1461-1535 (Frankfurt am
²¹ Alciatus followed a three-fold division based on actio, persecutio and accusatio to explain iurisdictio,
mixtum and merum imperium respectively. Alciatus, De Verborum Significatione Libri Quattuor,
Ludgumun, Seb. Gryphius, 1530, ad D.50.16.178.2, § Actionis, p. 219-220; ad D.50.16.9, §
Persecutione, p. 109; ad D.50.16.197, § Indicasse, p. 232 respectively. See also (but on a smaller extent)
his Paradosorum ad Pratam libri sex, cit., lib. 2, ch. 10-11, fols. 18r.-19r. In particular, the least
successful element of Alciatus' three-fold division was probably the explanation of mixtum imperium as
persecutio, chiefly because leading to an autonomous category rather than to an intermediate one
between iurisdictio and merum imperium. As it will become apparent in the next few pages, it was
precisely the closeness between iurisdictio and mixtum imperium what attracted most humanist jurists
(and so possibly made Alciatus' scheme less appealing).
agree were two. First, as the modica coercio of mixtum imperium is instrumental to ius dicere, iurisdictio and mixtum imperium are deeply related, and hardly separable from each other. Second, merum imperium is fully separated from mixtum imperium and iurisdictio. And this was precisely the problem. Merum imperium is described in the sources as animadversio in facinorosos homines. Hence, most legal humanists considered it as the executio of the judgment in criminal cases. But if the executio is entrusted to the magistrate with merum imperium, and merum imperium is wholly detached from iurisdictio, it follows that such a magistrate may not have any cognitio of the subject matter. In short, the magistrate empowered to give execution to the judgment could not also hear the dispute, and vice versa.

This conclusion was already implicit in one of the first French legal humanists who followed Alciatus, Ioannis Longovallius (Jean Longueval). But Longovallius did not bring Alciatus' argument to its ultimate consequences.\(^{22}\) The honour belongs to Ioannis Gillotus (Jean Gillot).\(^{23}\) Gillotus sharply divided the legal proceeding in three phases: cognitio, sententia, and executio. As with Alciatus and Longovallius, and perhaps even more than either of them, in Gillotus mixtum imperium encompassed almost any judicial prerogative.\(^{24}\) While cognitio and sententia pertain to iurisdictio and mixtum imperium, executio is the province of merum imperium. Executio is wholly detached from the legal proceeding because it is only concerned with executing the judgment (‘sententiae effectus’). Once the decision is rendered, the controversy is over. This way, the magistrate with mixtum imperium enjoys full iurisdictio over the dispute while at the same time the distinction between mixtum and merum imperium is maintained.\(^{25}\)

In Gillotus, the prerogatives of the ordinary (or delegated) judge were consistent with the sources and so surely correct. But the problem remained in respect to the magistrate with merum imperium: he would have to execute someone else's judgment without being able to look at it. Lacking any cognitio, he would resemble more an executioner than a magistrate. The problem was particularly thorny in case new evidence emerged after the jurisdictional phase. Gillotus sought to solve the problem by restricting the divide between merum and mixtum imperium. To this end he resorted to the old (Civilian) stratagem of dividing a legal category in a broad and general sense and a narrow and specific one. So, Gillotus argued, when specifically referred to criminal cases merum imperium is to be understood in its narrow meaning - merum as 'only': only imperium, without any iurisdictio.\(^{26}\) In this sense, merum imperium is just potestas gladii. Its scope is restricted exclusively to animadvertere, which simply means chastisement (‘pestionem ipsam significat’).\(^{27}\) As such, in criminal trials merum

\(^{22}\) Ioannis Longovallius, *Nova et facilis declaratio ad legem imperium ff. de iurisdictione omnium iudicium*, Parisis, 1528. Longovallius’ treatise was divided in four parts. The first two were devoted to a lengthy critique of the relevant Bartolist authors. The third, and rather shorter, to an exposition of the correct approach on the subject. The fourth, and longest, to its applications. *Merum imperium consists of mera coerc[il]io* (pt. 3, fol. 20v), whereas in mixtum imperium coercion is instrumental to the exercise of iurisdictio (ibid., fol. 21r). The difference between the two lies therefore in that the coercitio of mixtum imperium is but a means to a different end, which is iuris-dictio in its broad sense (ibid., fol. 22r). It follows that the modica coercitio of mixtum imperium is instrumental to iurisdictio, and moreover that mixtum imperium and iurisdictio form a unitary category, radically opposed to merum imperium.

\(^{23}\) Ioannis Gillotus, *De iurisdictione et imperio libri duo*, Parisiis, O. Mallardus, 1538. As this (in all probability, first) edition is extremely rare, I have relied on the more accessible version in Zilettus, *Tractatus universi iuris*, 1584, vol. III, pt. 1, fols. 2r-18r.

\(^{24}\) *Ibid.*, pt. 2, ch. 11-14, fols. 13r-15r, and ch. 15, n. 3, fol. 13r.


\(^{26}\) *Ibid.*, pt. 1, ch. 6, n. 2, fol. 5r.

\(^{27}\) *Ibid.*, pt. 1, ch. 7, fol. 3v, and esp. ch. 8-9, fol. 4r-v.
imperium refers exclusively to the executio of the decision.\textsuperscript{28} Being solely concerned with executio, it does not partake in the act of rendering the judgment. For criminal offences, merum imperium commences when iurisdicio finishes.\textsuperscript{29} By contrast, in civil proceedings merum imperium may be considered in its broader meaning of potestas iuris dicendi. The so-called lex imperium (D.2.1.3), concluded Gillotus, is clear in keeping distinct mixtum from merum imperium so long as the latter means gladii potestas animadvertendi in facinorosos homines. But when merum imperium does not have such a meaning, the execution of the decision may well be entrusted to the same magistrate that pronounced it.\textsuperscript{30}

Insisting on the residual nature of merum imperium and on the strict separation of executio from cognitio, Gillotus reached a deadlock. He was able to solve it only by resorting to some acrobatic interpretations of merum imperium, which however remained hardly satisfactory. At least, in the eyes of his fellow legal humanists. An attempt to solve the impasse was made by another (and more famous) French legal humanist, Petrus Loriotus (Pierre Loriot, d. 1568 ca.).\textsuperscript{31} Loriotus accepted Gillotus’ three-fold division of cognitio, sententia and executio,\textsuperscript{32} but sought to avoid the resulting impasse. According to Loriotus, iurisdicio had to be kept wholly detached from merum imperium (which was merely ‘delictorum coercio’), in accordance with the sources.\textsuperscript{33} On the other hand, it was imperative that the magistrate empowered with executio (and so with merum imperium) could also have cognitio, lest it appeared as a mere executioner. Logically, the only way to achieve both things was to relegate iurisdicio to the pronouncement of the sententia, and to keep it distinct from cognitio.\textsuperscript{34} Hence, for Loriotus iurisdicio had to become only the act of pronouncing the decision, ius-dicere in the narrowest possible sense of the term.\textsuperscript{35} This way, merum imperium and iurisdicio would remain separated, but at the same time the magistrate empowered with executio could also have cognitio of the matter.\textsuperscript{36}

Loriotus’ scheme was undoubtedly ingenious, but it did not meet with much success among other legal humanists. And this not because his dilemma of cognitio, sententia and executio might resemble the famous river-crossing puzzle with a wolf, a goat, and a cabbage. Rather, because the cure of Loriotus was almost worse than the Bartolian disease. Firstly, merum imperium was once again a general potestas encompassing the whole criminal jurisdiction.\textsuperscript{37} Secondly, Loriotus’ iurisdicio was even narrower than the Bartolists’ iurisdicio simplex. Once again, albeit for different reasons, it occupied

\begin{itemize}
\item \textsuperscript{28} Ibid., pt. 1, ch. 10, n. 2, fol. 4v-5r; pt. 2, ch. 3, n. 1-2, fol. 7v, and ch. 5, fol. 8v.
\item \textsuperscript{29} Ibid., pt. 2, ch. 5, n. 9-10, fol. 8v.
\item \textsuperscript{30} Ibid., pt. 2, ch. 6, n. 6, fol. 9r-v.
\item \textsuperscript{31} Petrus Loriotus, De iurisdictione et imperio, in Id. De Iuris Apicibus, Tractatus, vol. VIII, Ludguni, apud Sebastianum Gryphium, 1545, cols. 29-46. Loriotus was probably the only legal humanist to write on the subject in a schematic (and concise) way.
\item \textsuperscript{32} Ibid., axiomata 15-16, cols. 33-34.
\item \textsuperscript{33} Ibid., esp. axiomata 10, 14-15, 25 cols. 32-34 and 36-37.
\item \textsuperscript{34} Ibid., axiomata 20, col. 35: ‘Adde sanam non esse Gilloti interpretationem, causae cognitionem pro iurisdictione accipientis: cum res separatae sint, et assessor cognitionem habeat, non iurisdictionem: sit qu[a]e cognitio usque ad sententiam dumtaxat, iurisdictio proprie et in sententia est, et in executio’. Cf. ibid., axiomata 25, col. 37: ‘merum purum significat: ut Imperium merum sit pura potestas et separata, non a cognitione (ut Gillotus arbitratur) sed a iurisdictione’.
\item \textsuperscript{35} Ibid., axiomata 1-3, cols. 29-30.
\item \textsuperscript{36} Ibid., axiomata 26, col. 37: ‘non obstat quod in executionibus non admittatur causae cognitio, id enim ex eo fit, quod ante exequaturum (sic) iam plena causae cognitione adhibita fuit, sine qua nulla esset exequutio’ (sic).
\item \textsuperscript{37} Ibid., axiomata 38, col. 41. Cf. also axiomata 26 and 38, cols. 37 and 41 respectively.
\end{itemize}
a very marginal role - in Loriotus, the mere pronouncement of the decision.\textsuperscript{38} Lastly, \textit{mixtum imperium} (vaguely defined as ‘\textit{potestas specialiter concessa, cui iurisdictio inest}’)\textsuperscript{39} was not - as we shall see - the main and nearly all-encompassing category of other humanist jurists, but it was relegated to the execution of civil decisions\textsuperscript{40} and to non-contentious jurisdiction.\textsuperscript{41}

Although of course incorrect, it would be tempting to use the 1540s to draw a line between earlier and later legal humanist works - both on our subject and, perhaps, beyond it. None of the earlier efforts of humanist jurists to provide a coherent and systematic picture of \textit{iurisdictio} and \textit{imperium} was particularly successful. But they remained the main ones. It was not the difficulty of the task that discouraged later authors. Rather, it was a progressive shift in their interest. From the 1540s their work became increasingly academic and abstract, and its focus progressively more detailed and specific. Each topic underwent a scrupulous scrutiny according to its adherence to classical sources, legal and non-legal alike. Whether any single sub-topic would fit into the larger picture, it was no longer the point. The more the attention focused on the single classical sources, the less it mattered whether they could underpin abstract and general principles. The door to unbridled historical and philological speculations, already unlocked, now burst open.

With specific reference to our subject, it is with the 1540s that the 'deconstruction' of medieval \textit{iurisdictio} lost its character of instrumentality, a means to the end of providing accurate categories more faithful to the sources. The emphasis was progressively more on the analysis of the sources and less on general legal categories. By and large, source analysis became an end to itself. Similarly, the early contrasts among scholars such as Longovallius, Gillotus and Loriotus (each devoting a considerable part of his work to questioning that of the others, Alciatus included) now became fully-fledged academic squabbles on the (allegedly, scarce) learning of the rivals.

In the late 1540s Duarenus, Goveanus and Corasius proposed a new interpretation of \textit{iurisdictio} and \textit{imperium}. Franciscus Duarenus (François Douaren, 1509-1559), accepted the division between \textit{merum imperium} on the one side and \textit{iurisdictio} and \textit{mixtum imperium} on the other, but he offered a new explanation for this, rooted on the jurisdictional prerogatives of different magistrates.\textsuperscript{42} The \textit{praetor} had only jurisdiction in private disputes, not in criminal offences. Those were entrusted to the \textit{quaestores}.\textsuperscript{43} Shortly thereafter Antonius Goveanus (António de Gouveia, \textit{ca.}1505-\textit{ca.}1566) published his succinct comment to D.2.1.3.\textsuperscript{44} Goveanus agreed with Duarenus that

\begin{itemize}
  \item \textsuperscript{38} \textit{Ibid.}, axioma 38, col. 41 (‘\textit{nil alius […] quam iuris dicendi officium, iure magistratus concessum}’). Cf. also axiomata 26 and 36-37, cols. 37 and 40-41 respectively.
  \item \textsuperscript{39} \textit{Ibid.}, axioma 31, col. 39. Loriotus’ difficulty to provide a neat definition of \textit{mixtum imperium} might derive from the complex efforts to disentangle \textit{cognitio} from \textit{sententia}.
  \item \textsuperscript{40} \textit{Ibid.}, axioma 38, col. 41.
  \item \textsuperscript{41} More specifically: \textit{bonorum possessio, missio in possessionem, restitutio, emancipatio, adoptio, interdicta prohibitoria} and \textit{fideicommissa}; \textit{ibid.}, axioma 33, cols. 39-40.
  \item \textsuperscript{42} Franciscus Duarenus, \textit{Disputationes anniversariae Liber primus}, Ludguni, apud Seb. Gryphiun, 1547, ch. 53, p. 128-132.
  \item \textsuperscript{43} \textit{Ibid.}, p. 129-130: ‘\textit{Praetorem Romae creatum fuisse, ut ius diceret in urbe de causis negotiisque privatis, non ut animadverteret in facinoros homines […] Papulus enim, cujus summa potestas erat, quoties animadversio necessaria videbatur, Quaesitores sive Quaestores constituebat, qui adversus facinoros inquirerent, idque extra ordinem, cum nullio magistratu fungerentur}’.
  \item \textsuperscript{44} Antonius Goveanus, \textit{ad Legem III D. Imperium, De iurisdictione omnium judicium}, Tolosae, 1545. I have used the later edition of Goveanus’ work edited by Meerman, \textit{Antonii Goveani opera iuridica, philologica, philosophica. Ex bibliotheca viri nobilis Gerardi Meerman edidit}, vitamque auctoris
\end{itemize}
merum imperium related exclusively to capital punishment and that it belonged to 'caeteri praetores' - mainly the quaestores - and not to the praetor urbanus. But in turn Gouvea offered a new interpretation on the division between iurisdictio, mixtum and merum imperium based on the prerogatives of each magistrate. While it is clear that the praetor urbanus lacked merum imperium and had both mixtum imperium and iurisdictio, the praeses provinciae enjoyed all three. The treatise of Ioannis Corasius (Jean de Coras, 1512-1572) followed. Although he did not refer explicitly to either Duarenus or Gouveas, Corasius agreed with them on the main points, especially on the division of prerogatives between praetor and quaestor. The main difference with his two colleagues lay in Corasius’ interpretation of mixtum imperium. To some extent, Corasius again proposed Gillotu’s all-encompassing notion of mixtum imperium. Moving from the separation of prerogatives between praetor and quaestor, Corasius reasoned, Gillotu’s shortcomings could be easily avoided. In any matter in which the praetor has cognitio, he also enjoys executio. Although in theory functional to the exercise of iurisdictio, in Corasius’ analysis mixtum imperium stretched beyond the scope of jurisdictional prerogatives. This allowed him to include in mixtum imperium also prerogatives more authoritative than strictly jurisdictional in their nature, such as in integrum restituere. In between the publication of these treatises, Eguinarius Baro (François Eguinaire, Baron du Kerlouan, 1495-1550) sent to the press two works on the same subject, triggering one of the harshest disputes among legal humanists. Baro's theory resembled those of other humanist jurists only in the summa divisio between iurisdictio and mixtum imperium on the one hand and imperium merum on the other. Beyond that, it was sui generis. He used the lack of iurisdictio so characteristic of merum imperium to extend its scope - at the expenses of mixtum imperium. Thus, for Baro merum imperium does not consist solely in animadversio. Rather, what lacks iurisdictio is to be considered as merum imperium, and not as mixtum. Further, and moreover, he argued for a two-fold notion of iurisdictio. In its narrower sense, iurisdictio describes the prerogatives of the iudices pedanei (whereas the powers of the praetor are grouped together in mixtum imperium). In its broader meaning, much to the contrary,

praemisisit Iacobus van Vaassen, iurisconsulvs, Roterodami, apud Henricum Beman, 1766, p. 3-6. Gouveas’ treatise was published in 1545, and so two years before Duarenus'. However the treatise of Duarenus must have circulated earlier, for Gouveas dedicated his treatise to Duarenus as a comment on his friend's work.

Ibid., p. 5.

Ibid., p. 5-6.


Specifically: iurisdictio and mixtum imperium were bound together, and iurisdictio was completely separated from merum imperium, ibid., n. 1-2, p. 272-273 and n. 4, p. 275, respectively. On merum imperium see further ibid., n. 10, p. 277.

Ibid., n. 5, p. 276.


Ibid., n. 17-18, p. 279-280.


Ibid., Ad τα πρώτα Digestorum, cit., tit. 1, l. 4, fol. 68v. An example is the cautio praetoria, which for Baro does not belong to mixtum but to merum imperium (ibid.).

Ibid., Ad digesta iuris civilis l. de iurisdictione, cit., p. 138.
\textit{iurisdictionio} represents the entire jurisdictional power. It follows that, in this second and general sense, \textit{iurisdictionio} is the genus encompassing also \textit{mixtum imperium}.\textsuperscript{55} In this broader meaning, \textit{iurisdictionio} resembles more a general power than the limited task of settling a dispute. Looking back at the three-fold division between \textit{cognitio}, \textit{sententia} and \textit{executio}, Baro argued that \textit{iurisdictionio} encompasses both \textit{sententia} and \textit{executio}, but not really \textit{cognitio} - that is up to the delegated judge.\textsuperscript{56} At this juncture, it is hard to see any substantive difference with the old Bartolian 'tree of jurisdiction'. Indeed, in his apostasy, Baro arrived to speak the unspeakable: as a matter of fact, Bartolus was quite right, though he should have left out \textit{merum imperium}.$^{57}$

The answer of Duarenus and Goveanus came at once.\textsuperscript{58} What is interesting for our purposes is that both replies went even deeper in their textual analysis than the original treatises, studiously avoiding any general overview. For it was precisely when an author sought to draw general conclusions that his argument detached from the Roman texts - and so it became most vulnerable.

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\textsuperscript{55} Ibid., p. 106, 'Iurisdictionio enim dicitur generaliter, et cum decernit, et cum iudicat qui iurisdictionem habet: Misto imperium, quod magis est imperij quam iurisdictionis, species est eius iurisdictionis'; ibid., p. 83: 'Consequens est igitur ut iurisdictionio, quae misto imperio inest, de re privata iurisdictionio sit, quae decretis omnibus inesse recte dicitur'; ibid., p. 156: 'Quisquis habet iurisdictionem, idem hoc quoque imperium habet, de habente generalia iurisdictionem accepit: qualis est Praetor urbanus Romae, et Praeses in provincia'. Cf. ibid., p. 136.

\textsuperscript{56} Ibid., p. 154-155: 'Non enim ius dicit proprie qui decernit iudicium, sed imperat, ut per alium iudicantem, ipse ius dixisse videatur. Nam nec ipsa cognitio causae, iurisdictionio est: sed ipsa pronuntiatio, et sententia magistratus, aut eius cui mandavit iurisdictionem: et hoc in civili negotio, quod propria legis actione ordinatur d. l. notionem de verb. sign. [D.50.16.99] Deinde ait [Cicero, ad Heren. I.11] de imperio misto. Et hoc quidem imperium ideo mistum dicitur, quia iurisdictioni admistum, et coniunctum est, pertinenteque omnino ad officium ius dicentis: adeo ut quisquis habet iurisdictionem, hoc quoque imperium habet; et qui hoc imperium utitur, ius dicentis officio fungi existimetur'. See also ibid., p. 161, 'Quod vero executionem sententiae, negat extremum esse iurisdictionis, supra a nobis refellitur: ubi ius imperij ea particula, quae in cognoscendo, diiudicando causas privatas, et exequendo dictas iam sententias, ostendimus.'

\textsuperscript{57} Ibid., p. 122: 'Bartolus iurisdictionem misto imperio inesse, ut genus inest speciei, non male scriptis: sed male tam generaliter accepti iurisdictionem, ut merum quoque imperium complectatur in misti imperij definitione'. Cf. ibid., p. 156. On the contrary, when considered in its narrow sense, for Bartolus iurisdictionio was precisely Bartolus' iurisdictionio simplex: 'huius imperij ea particula, quae in cognoscendis, iudicandisque privatis causis, et civilibus versatur, iurisdictionio angustissima verbi huius significacione, appellata est' (ibid., p. 68; cf. also p. 71-72).

\textsuperscript{58} The structure of the two works against Baro provides an interesting example of different approaches to the refined art of invective. Published in 1549, Duarenus’ (short) reply commences with his reconstruction of \textit{iurisdictionio} and \textit{imperium}. Each attack on Baro is aimed at strengthening his own theory, so that attack and defence are developed together. Once both are fully laid down, Duarenus focuses on the adversary in a crescendo of abuses (first on his Bartolian sympathies, then quite in general, just in case), \textit{De iurisdictione et imperio apologia Fr. Duareni iur. adv. Eg. Baronem iurisconsultum}, in Id., \textit{Opera Omnia}, Ludgini, apud Guliel. Rovillium, 1554, n. 18, fol. 73v-74r, and n. 19-20, fol. 74r-v respectively. By contrast, in his (remarkably long) \textit{De Iurisdictione libri II}, \textit{adversus Eguinarium Baronem}, Tolosae, apud Ioamm. Molinerium, 1551, Goveanus neatly separates attack from defence. The first (and shorter) of his two books reports the most salient passages of Baro’s work, in order to demolish every single line of it (ibid., p. 1-12). The second (and considerably longer) book (p. 13-46) on the contrary focuses exclusively on Goveanus’ own theory (see esp. ad l. 3 [D.2.1.3], p. 23-24). Regrettably, Baro was indelicate enough to die during all this fun, so it fell to his disciple Edward Henryson to answer on his behalf, reaffirming Baro’s views and detracting his opponents’ (\textit{Eduardi Herysonis, Pro Eg. Barone Adversus A. Goveanum de iurisdictione libri II}, Parisiis, apud Vincentium Sertenas, 1555).
Although he wrote his treatise while the controversy between Baro, Duarenus and Goveanus was at its apex,⁵⁹ Ludovicus Charondas (Louis Le Caron, 1534-1613) was careful not to take sides - at least openly. Probably, because he did not entirely agree with either of them. As usual, he argued that iurisdiction and merum imperium should be kept separate,⁶⁰ and that iurisdiction formed a unitary category with mixtum imperium.⁶¹ However, unlike Baro, he did not qualify mixtum imperium as a species of the genus iurisdiction,⁶² and unlike Duarenus and Goveanus he ascribed merum imperium to the dictator – not to the praeses.⁶³ The last point was particularly important: no magistrate holding merum imperium (that is, coercive powers) may also have iurisdiction.⁶⁴ Opting for the dictator instead of the praeses had its advantages. Ironically, Baro affirmed openly what both Duarenus and Goveanus had prudently left unsaid. So long as we focus on the praetor urbanus, then the distinction between iurisdiction and merum imperium holds. But if we look at the praeses provinciae, it is clear that he enjoys both.⁶⁵ Systematic expositions and strict adherence to the Roman sources have always proved to be poor bedfellows. Baro was attacked for his Bartolian deviations as much as for his efforts to systematise the unsystematisable.⁶⁶ Charondas simply avoided any generalisation, and so escaped much criticism.

Systematisation was dangerous and open to fierce attacks, and increasingly fewer humanist jurists ventured into general categories. But when they did, they moved carefully around the debris of previous intellectual wars. Although somewhat later than the group of legal humanist so far considered, Hugo Donellus (Hugues Doneau, 1527-1591) provides an excellent example of this, and of how attempts at laying out a general structure to our subject were not completely abandoned by authors lato sensu.

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⁵⁹ Ludovicus Charondas, Charondae Iurisconsulti Parisiensis ... de iurisdictione et imperio libellus, Parisius, apud Ioannem Foucherium, 1553.
⁶⁰ Charondas accepted wholeheartedly the main tenets of Alciatus' reading and brought them to their ultimate consequences. The starting point was the summa divisio between merum imperium and iurisdiction (Charondas, de iurisdictione et imperio libellus, cit., n. 3-4, fols. 47v-48v). As merum imperium is exclusively concerned with animadversio, it may not take part in iurisdiction. By contrast, and simply enough, iurisdiction is ‘licentia iuris dicundi’ (ibid., n. 5, fol. 48v). Iurisdiction therefore stretches from the hearing of the controversy to its adjudication (ibid., n. 8, fol. 51v). It follows that there is no need to neatly separate cognitio from sententia, for iurisdiction and mixtum imperium form a unitary and indivisible category (ibid., n. 3-4, fols. 47v-48v). Even more, mixtum imperium is somewhat instrumental to ius dicere (ibid., n. 20, fol. 59r). The old adage that 'iurisdiction sine modica coercitio nulla est' does not imply the subordination of iurisdiction to imperium. Rather, it strengthens the indivisibility of iurisdiction and mixtum imperium (ibid., n. 20, fols. 58r-59r). Also, the same principle further separates them from merum imperium: the kind of coercion which merum imperium requires is structurally different from the 'modica coercitio' of mixtum imperium. Missio in possessionem et gladii potestas perfectly represent such a difference (ibid., n. 22, fol. 60r).
⁶¹ Ibid., n. 15, fols. 55v-56r.
⁶² Rather - although never openly - Charondas argued for the very opposite. He was particularly adamant in that mixtum imperium was not just the modica coercitio instrumental to the exercise of iurisdiction, but the sum of the standard jurisdictional prerogatives: ibid., n. 17, fol. 56v and esp. n. 19-20, fols. 57v-59r. While formally distanciating himself from Baro (e.g. ibid., n. 4, fol. 48r-v), substantially Charondas reached similar conclusions. Just, for Charondas the general category was mixtum imperium and not, as in Baro, iurisdiction. But Charondas was prudent enough not to state as much openly.
⁶³ Ibid., n. 14, fol. 54r-v.
⁶⁴ Ibid., n. 15, fol. 55r-v.
⁶⁵ Baro, Ad digesta iuris civilis l. de iurisdictione, cit., p. 41.
⁶⁶ Even with regard to the prerogatives of the praetor, which in theory encompassed all mixtum imperium, Baro had to make an exception for fidei commissa, which belonged exclusively to the consul. Baro, Ad τα ζπόρτα Digestorum, cit., tit. 1, ad l. 11 [D 2.1.11], fol. 69v.
considered as legal humanists. Unlike Baro, Donellus' work did not receive harsh critiques. And not just as his comment on imperium and iurisdictio was published posthumously. But because Donellus looked exclusively at their application in Roman history - especially the Classical period. Nonetheless, it is easy to detect interesting parallels in between Donellus and some of the humanist jurists so far mentioned. After the usual definition of merum imperium and the statements on the indivisibility of iurisdictio and mixtum imperium, Donellus argued that, by and large, any form of imperium is executio. If iurisdictio could not be divided from mixtum imperium, and mixtum imperium is ultimately executio, it follows that the magistrate with iurisdictio (the praetor first of all) has both cognitio and executio. Further, while iurisdictio and mixtum imperium may not be separated, the ancillary function of the latter makes iurisdictio as the principal category among the two. The dichotomy, observed Donellus, is between iurisdictio and merum imperium. But their structural difference does not necessarily entail their incompatibility: the same magistrate may well have both, as - he argued - it is the case of the praetor.

Later humanist jurists did not add much to the debate, which progressively became a highly specialised historical disquisition on magistrates in ancient Rome. Before this happened, however, the main features of the legal humanistic interpretation of jurisdiction were already neatly defined, and they might be summed up in broad terms. Merum imperium was utterly marginalised, largely to the benefit of mixtum imperium. The same mixtum imperium was increasingly considered as inseparable from iurisdictio, for without some degree of coercion ius dicere non potest. The distinction between private and public utility was largely rejected, as well as that between iudex nobilis and mercenarius. As such, the hierarchy among the three components of the

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67 Donellus is a fine example of the plurality of distinct scholarships grouped together under the mos gallicus umbrella. Donellus' work was probably the first great systematic re-arrangement of all Civil law. In order to include him among legal humanists, it was necessary to add systematisation to the main aims of humanist jurists. As it happens, few things are more remote from legal humanism than systematisation. Donellus' work on iurisdictio and imperium was published only in 1596 as part of the seventeenth book of his Commentarii by Scipio Gentili. I have however opted for Hilliger's edition (Donellus Enucleatus, originally published in two volumes, the first in 1611 and the second in 1613, both at Jena) in the neat and carefully edited edition printed at Lucca in between 1762 and 1777.

68 Hugo Donellus, Opera Omnia, vol. IV, Luccae, 1764, lib. 17, ch. 8, n. 20-21, cols. 1142-1149.
70 Ibid., book 17, ch. 8, n. 21, col. 1146: 'imperium in universum dici exsequendi potestatem, efficiendique, ut ratum sit, quod magistratus statuerit.' Cf. also ibid., n. 15, col. 1133.
71 Ibid., book 17, ch. 6, n. 5-7, cols. 1087-90; cf. ibid., ch. 7, n. 7, cols. 1103-1105, and n. 15-16, cols. 1113-1116.
72 Sed quia iurisdictio natura prior est, quam imperio adiuncto confirmari oportet, idem, magis imperium iurisdictioni accedere, eisque cohæure, et misceri videtur,' ibid., book 17, ch. 8, n. 14, col. 1131. Cf. more broadly the whole cols. 1130-1134.
73 Visto modo et merum imperium dictum, quod alterius rei misturam non habet, solum et per se imperium. Sed nondum id dicimus; quod res est. Nam si id ista infinite et generaliter dicatur, certe falsum sit potestatem animadvertendi in facinorosse esse imperium merum, seu non mistum. Quaecumque enim haec potestus est, coniuncta est cum cognitione,' ibid., book 17, ch. 8, n. 21, cols. 1146-1148.
74 Ibid., ch. 8, n. 23, col. 1151.
75 Even those jurists, such as Donellus, who retained it did so within an entirely different framework from the traditional ius commune one: ibid, ch. 7, n. 5, col. 1101.
76 While rejecting it in principle, this division often resurfaced among legal humanists, chiefly because of the temptation to identify the iudex nobilis with the praetor, and the mercenarius with the iudex pedaneus. But this simply added fuel to the scholarly debate, for it triggered endless disputes on whether the iurisdictio of the praetor had to be narrowed down to the simple datio iudicis, or whether the praetor...
Accursian notion of *ius commune* was turned entirely upside-down. *Mixtum imperium*, inextricably linked to *ius dictio*, was now the most important of the three categories, encompassing the vast majority of jurisdictional functions. Beyond this, each legal humanist had different ideas on both definition and scope of the three categories, especially *ius dictio* and *mixtum imperium*. ‘Pure’ *ius dictio* was especially tantalising, as well as the issue of which specific prerogatives should fall into *mixtum imperium*, and why.

iv. In the Euripidean tragedy, the gods had the good sense of intervening one at time. Legal humanism suffered from an overpopulated Olympus. All of a sudden, lawyers were faced with a number of different and mutually-contradicting theories, all of which could however claim stronger links with the Roman sources than the traditional *ius commune* one. Whatever the defects of the tradition, the avalanche of new theories had a deeply destabilising effect. In a few decades, the entire subject of *ius dictio* became extremely confusing. In the words of Ioannis Bologneti (Giovanni Bolognetti, 1506-1575), ‘such a variety of opinions created a huge confusion in the meaning of the law’.

Similar comments became so frequent that it would be pointless (and probably impossible) to list them in full.

The later *ius commune* production is typically considered as exceedingly practical-minded and hardly interested in general and theoretical discussions. This is true to some extent. For even the most pragmatically-oriented (or plainly casuistic) lawyers clearly relied on the Bartolian scheme. To give an extreme example, in the 252 pages of his *Consilia* devoted to *ius dictio*, the famed jurist De Luca never once discussed the Bartolian categories. But he always presupposed them.

Commentators had always tested the Bartolian jurisdictional scheme, from Baldus to the very eve of the legal humanist attack. But those discussions always occurred could actually hear the case and pronounce the judgment by himself and, in such a case, whether the *index pedaneus* could be said to *ius dicere* at all and, if not, how to define his jurisdictional role.


81 E.g. Filippo Decio, *Commentaria in Digesti Vet[eris] et Cod[icis]*, Ludgini, 1567 (1r edn. 1523, Venice), ad D.2.1.1. § *ius dicentis*, n. 10, *fol.* 25r. Possibly one of the last authors who questioned the Bartolian scheme without mentioning the humanist jurists was Gian Girolamo Albani, *Lucubraciones ad
within the Accursian gloss, never against it. Now, for the first time, it became vital to defend the very grounds on which the entire jurisdictional framework was built. From the second half of the sixteenth century, when a work touched upon the subject of jurisdiction only in passim it usually adhered to the Bartolian scheme in a few lines and quickly moved on. Other times it simply avoided the whole issue. But when a treatise was devoted (in full or in part) to the subject of jurisdiction, it typically looked at the Bartolian scheme with a significant (humanistic) attention to the sources, in order to defend it.

**Bartolum, Venetiis, 1571, ad De iurisdictione omn. Iud., fols. 73r-75v, and ad summarium in l. imperium, fol. 76r.**


83 This attitude had apparently little to do with the importance of the work or of the author, for it is attested among some of the most celebrated writings as much as in the less known ones: e.g. Prospero Farinacci, *Praxis et Theoricae Criminalis*, Ludguni, sumptibus Iacobi Cardon, 1634, vol. I, pt. 1, q. 7, p. 58-75 (on the subject of the *index incompetens*); Marco Antonio Peregrino, *De iurisdictione Ordinaria et Delegata*, in Id., *Tractatus varii*, Venetiis, apud Nicolaum Polum, 1611; Cristopher Cappener, *Commentarii*, Francofurti, typis Matthiae Beckeri, 1605, p. 118-119; Erasmo di Chokier, *Tractatus Iurisdictionis Ordinariae in Exemptos*, Coloniae Agrippinae, apud Ioannem Kinckium, 1624, p. 355, n. 4.

A particularly vehement apology of the Bartolian categories was that of Hieronymus Muscornius (Hieronimo Muscormio). Muscornius allowed only for minor corrections to the traditional interpretation of the *lex imperium,* which he shielded with many 'counter-quotations' from classical sources, as well as with some new interpretations of Latin terms. In particular, he stressed that the verb ‘animadvertere’ is a neuter term, since it just means ‘vertere animum, atque mentem’. As such, it may not be used in a narrow sense. The *animadversio in facinorosos homines* of Ulpian in D.2.1.3, therefore, does not mean that *merum imperium* is confined to the execution of criminal punishments. Rather, and precisely after Bartolus, for Muscornius *merum imperium* is *suprema potestas.*

Muscornius’ somewhat drastic attempt was a relatively isolated case. Especially on *merum imperium,* most jurists tended to agree with legal humanists. 'Merum' meant 'purum,' not 'summum,' and as such it had to be relegated to criminal disputes. Complete repudiation of legal humanist critiques did not prove successful: some compromises had to be made. Significantly enough, narrowing *merum imperium* to criminal proceedings was the main concession to legal humanism that a jurist as important and representative of the later *ius commune* as Iacobus Menochius (Jacopo Menochio, 1532-1607) could allow. Menochius stated as much at the very beginning of his treatise on *iurisdictio.* Apart from that, however, he fully adhered to the traditional Bartolian scheme, stressing in particular the concept of *imperium* as a unitary category. No matter how Haloander’s edition of the Digest would read, for Menochius *iurisdictio* clearly came from *iuris-ditio,* as attested in a number of classical sources, ranging from Cicero to Virgil. Menochius’ use of classical texts is revealing of an extremely widespread attitude. On a superficial level, it betrays the effort of many lawyers to pay back legal humanists’ attacks in kind. More deeply, however, it attests representative of the market (and so of the interest of lawyers at large). They typically build on the Bartolian systematisation with significant openings to the new humanist interpretation.

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85 Hieronymus Muscornius, *Tractatus de Iurisdictione atque imperio,* Coloniae Agrippinae, in Officina Ioannis Gymnici, 1596. On the Bartolian scheme in general see esp. n. 12, p. 5, and n. 18, p. 8-9; on the distinction between private and public utility see n. 63-66, p. 56-68, and n. 78-79, p. 75-76; on the subject of *mixtum imperium* see in particular n. 31, p. 21-22, n. 145, p. 144, n. 149-156, p. 150-156, and n. 158-163, p. 156-161.

86 Ibid., esp. n. 4-16, p. 2-7; n. 33, p. 23, n. 36, p. 25, n. 38, p. 28.

87 Ibid., n. 44, p. 35.

88 Ibid., esp. n. 31, p. 21-22 and n. 38, p. 28. Cf. also n. 36, p. 25. The distinction between *cognitio* and *animadversio* is similarly dismissed through the example of the *quaestores,* who enjoyed both: *ibid.* n. 14, p. 7.


90 Iacobus Menochius, *De imperio et iurisdictione commentarii posthumi,* duobus libris expositi, Francofurti, sumptibus Danielis et Davidis Aubriorum, et Clementis Schleichii, 1622, lib. 1, ch. 1, p. 2. See further ch. 5, n. 4, and esp. n. 17, p. 53-54. Cf. also ch. 5, n. 18-20, p. 54-56 (on the scope of *merum imperium* in the Roman sources), ch. 15 [q. 8], n. 2-3, p. 134-135 (on fines), and ch. 16 [q. 9], n. 2-6, p. 145-147 (on confiscation).


92 Ibid., lib. 1, ch. 7, n. 2, p. 85.


94 One of the most draconian examples in this direction was the *Lexicon iuridicum* of Sichardus, who went as far as accusing Ulpian of having ‘usurped’ the concept of *iurisdiction* (‘iurisdictionis verbum ab Ulpiano in d. l. imperium [D.2.1.3] stricte et anguste usurpāt’), narrowing down a much broader
to the growing interest for a meticulous examination of the sources also among Bartolists (who otherwise would have not felt the need to answer to the humanist jurists’ critiques in the first place). If a word or a concept was attested in classical sources, legal and extra-legal alike, it gave weight to the legal argument. Even a Bartolist as orthodox as Muscornius insisted on the importance of interpreting Latin terms according to the sources, not to their modern usage.\textsuperscript{95} Thus, behind the courtain of endless debates on the exact meaning of legal terms in the classical sources, there lay practical consequences - not philological appetites.\textsuperscript{96} By the eve of the seventeenth century no systematic treatise dealing with jurisdictional issues could avoid long digressions into historical and philological discussions. Unfaithfulness to Roman sources became progressively a clear sign of being plainly wrong. As a consequence, many jurists paid increasing attention to the exact terminology used in Roman sources. Yet, attention to the sources always remained a means, not an end. The end was more practical: grounding current legal issues into \textit{ius commune} categories - and solving them accordingly.\textsuperscript{97}

Apart from Menochius and Muscornius, the most important (and quoted) among the treatises seeking to conciliate Bartolism with the main critiques of legal humanism opted for very elaborated schemes. While apparently detaching themselves from the Bartolian orthodoxy, such treatises ultimately aimed at protecting the traditional jurisdictional framework. Among them, mention should be made of at least three: those of Bologneti, Obrecht and Bocerus. Bologneti divided \textit{iurisdictio} and \textit{imperium} in three different categories (legislative, jurisdictional and equitable),\textsuperscript{98} according to their object.\textsuperscript{99} Then, he divided the jurisdictional category into \textit{actio} and \textit{persecutio}, \textit{actio} corresponding to (jurisdictional) \textit{iurisdictio}, and \textit{persecutio} to (jurisdictional) \textit{imperium}. In turn, and lastly, \textit{(jurisdictional) persecutio} was segmented into \textit{criminalis} and \textit{civilis} after the divide

category (i.e that of \textit{iuris-ditto}). Simon Sichardus, \textit{Lexicon iuridicum}, Coloniae Agrippinae, apud haeredes Iohannis Gymnici, 1600, \S{} \textit{imperium}, p. 437. \textsuperscript{95} Verba \textit{quando latine concipiunctur esse semper interpretanda secundum latinos, et non vulgares homines}. Muscornius, \textit{Tractatus de jurisdictione atque imperio}, cit., n. 22, p. 11. Muscornius’ insistence on the correct interpretation of the sources derived from his view of legal humanism as a degeneration of philology applied to the law. In his view, the fallacy of humanist jurists lay in their exasperate attention to the abstract meaning of a word, extrapolated from its broader – and legal – context.\textsuperscript{96} For example, one of such debates focused on the exact meaning of the key-word ‘\textit{animadvertere}’. In order to prove that \textit{merum imperium} consisted of both \textit{cognitio} and \textit{executivo}, Bologneti divided the phrase ‘\textit{animadverter(sio) in facinorosos homines}’ of D.2.1.3 in two parts. \textit{Animadversio} stood for \textit{cognitio}, whereas its application ‘\textit{in facinorosos homines}’ represented the \textit{executivo}. Bologneti, \textit{In primam Digesti veteres repetitiones}, cit., ad D.2.1.3, n. 26, fol. 190r. In order to achieve the same result with somewhat sounder arguments, Bocerus looked at many classical sources, and concluded that \textit{animadversio} was used both in the sense of \textit{cognoscere} and \textit{coercere}. Henricus Bocerus, \textit{Disputatio de jurisdictione}, Tubingae, typis Georgij Gruppenbachij, 1597, n. 14, let. a-c, p. 15. Such a conclusion was harshly criticised by Hunnius, \textit{De jurisdictione tractatus}, cit., pt. 1, ch. 1, q. 3, n. 3, p. 31-32, who pointed that in legal Roman sources (as opposed to extra-legal ones) its meaning was only that of \textit{coercere}.\textsuperscript{97} For instance, when commenting on \textit{de in ius vocando} (D.2.1.4) Petrus Costaliius (Pierre Coustau) introduced the subject with Duarenus’ definition. But then he moved on, perfidily (but lucidly) noting how ‘\textit{nos qui iure pro ratione utimur, opinor, tantam scrupulositatem non servamus}’ (Costaliius, \textit{Ad XCV Libros Priores Pandectarum Adversaria}, Coloniae, apud Ioannem Kreps, 1627, p. 76).\textsuperscript{98} More correctly, statutaria (\textit{iurisdictio condend iura quam ego appello statutarium}), iuditaria (\textit{iurisdictio redend iura vel ius dicendi seu administrandi iustitiam quam ego appello iuditaria}), and gratiosa (\textit{iurisdictio equitatis statuendi et gratias faciendi et dispensandi quam ego appello gratiosam}). As such, \textit{iurisdictio gratiosa} was somewhat broader than equitable jurisdiction, as it also encompassed pardons. Bologneti, \textit{In primam Digesti veteres repetitiones}, cit., ad D.2.1.3, n. 4, fol. 177r.\textsuperscript{99} Ibid., n. 4-6, and n. 10, \textit{fols.} 187r-188r.
between *merum* and *mixtum imperium*. This way (jurisdictional) *persecutio criminalis* would correspond to *merum imperium*, and (jurisdictional) *persecutio civilis* to *mixtum imperium*. In this new and complex scheme the old Accursian classification became more tenable, as Bologneti was effectively moving elsewhere any segment of medieval *iurisdictio* not attested in the sources. Moreover, Bologneti's scheme could better support the Bartolian division between private and public utility - which he felt was not close enough to the sources - and also that between noble and mercenary judges. For both divisions would now refer only to jurisdictional *iurisdictio* and *imperium* - and not also to the legislative and equitable ones.

Georgius Obrecht (Georg Obrecht, 1547-1612) sought to defend the Accursian notion of *iuris-ditio* by classifying *iurisdictio* as a conceptual category (*notio*), and not - as in Bartolus - a proper power (*potestas*). This way, *iurisdictio* could still be used in its broadest possible meaning but, in accordance with the sources, it was now wholly separated from *imperium* (which on the contrary remained *potestas*). The extreme breadth of the term 'notio' lent itself perfectly to both meanings in which Bartolus used *iurisdictio*, an all-encompassing genus and a narrow category. In order to further separate *iurisdictio* from *imperium*, Obrecht stressed the closeness between *imperium merum* and *mixtum*, naming them 'plenum' and 'minus plenum' respectively. Within *mixtum imperium*, Obrecht further distinguished between those prerogatives which were strictly instrumental to the exercise of *iurisdictio* and those which were not.

In comparison with Bologneti's and Obrecht's theories, that of Henrichus Bocerus (Heinrich Bocer, 1561-1630) might look disarmingly simple. Bocerus fully accepted the new interpretation of humanist jurists, but divided *iurisdictio* in two kinds - *ordinaria* and *specialis*. *Ordinaria iurisdictio* corresponded to Bartolus' *iurisdictio simplex* together with a few prerogatives traditionally pertaining to *mixtum imperium*, whereas *specialis iurisdictio* grouped all those prerogatives more strictly associated with *coercio* than *cognitio*. We will return to all these theories soon enough.

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100 Ibid., n. 14, fol. 188v.
101 Ibid., n. 2 and 8-9, fols. 187v-188r, and esp. 23-24, fol. 189v, n. 55-56, fol. 196r-v, n. 60-63, fols. 197r-198v.
102 Ibid., n. 11-13, fol. 188r-v.
103 Ibid., n. 15, fol. 188v. Having fully explained his new scheme, Bologneti used it to shield the Bartolian classification from the main critiques of humanist jurists, meticulously listed, explained and dismissed one by one: ibid., n. 45-116, fols. 194v-208v.
105 Ibid., esp. theses 182-185. Specifically, Obrecht defined *imperium* as 'the power to give orders, to which one must obey' (*imperium non male definiri videtur, iubendi potestas, cui parere necesse est*), ibid., thesis 193).
106 Ibid., thesis 74: 'dicitur notio: quia hoc vocabulum generale est, et tam cognitionem, quam iuris dictionem significat.' When this *notio* was considered in its broadest meaning, then it encompassed both *imperium* and *iurisdictio* (*simplex*): 'latissime considerata definiti potest notio criminalium et civilium causarum, quae vel lege vel lare magistratus competit, et cui interedium imperium cohaeret', ibid., thesis 73; cf. also thesis 36.
107 Ibid., theses 223-225.
108 Ibid., theses 351-352 and 353-356 respectively.
109 Mainly, *in integram restituture et bonorum possessio*: Bocerus, *Disputatio de iurisdictione*, cit., n. 4, let. a-e, p. 3.
110 'Specialis iurisdictio in iubendo consistere dicitur, quae ad dirimendum civilem controversiam, iubendo et imperando magis quam cognoscedo expeditur,' ibid., n. 7, p. 5. See further ibid., n. 6, let. a-f, p. 4-5, and n. 9, let. c, p. 7.
V. I have said earlier that many non-humanists considered historical and philological debates as important digressions which however were not the ultimate aim of their work. This seems to imply that 'proper' humanist jurists on the contrary regarded history and philology as an end to itself. Doubtless, some of them did. But the historian should always look with suspicion at 'purely' cultural struggles. The *lex imperium* was the cornerstone of the *ius commune* notion of authority. Deconstructing it, legal humanists attacked the legal foundations of centralised power. Just ten years after Alciatus' *Paradoxa*, the ultimate two consequences of the new approach were clearly outlined by Longovallius, and then shared by most humanist jurists.

First and foremost, *imperium* (be it *merum* or *mixtum*) was hardly the province of political authority. It pertained exclusively to the judge.\(^{111}\) *Merum imperium* was extremely narrow, just *mera coercio*, and its scope was limited to the execution of criminal judgments.\(^{112}\) The power to legislate (the highest example of *merum imperium* for the Bartolists) therefore could not be grounded on *merum imperium*.\(^{113}\) *Mixtum imperium* and *iurisdiction* on the other hand were to be interpreted with exclusive regard to the jurisdictional sphere. It followed that the prerogatives ascribed to *mixtum imperium* or *iurisdiction* did not compete to political authorities (first of all the prince), but only to the judges.\(^{114}\)

Secondly, and to our purposes even more importantly, the new approach had profound repercussions on delegated jurisdiction. The Digest was quite clear in that jurisdictional prerogatives pertaining to private controversies could be delegated, whereas any prerogative especially conferred by the law could not.\(^ {115}\) As such, it was not possible to delegate *merum imperium*, whereas *mixtum imperium* (since *iurisdiction* coaeherens) could be freely delegated.\(^ {116}\) At this point the insistence of most legal humanists on *mixtum imperium* as an all-encompassing category and on the marginality of *merum imperium* may be fully appreciated. The Accursian Gloss interpreted the Roman text as allowing to delegate only *iurisdiction* (*simplex*) and what parts of *mixtum imperium* were instrumental to its exercise.\(^ {117}\) Bartolus’ systematisation added weight to this, for an obvious corollary of the basic distinction between *iudex nobilis* and *mercenario* was that no prerogative belonging to the *nobilis* could be entrusted to the latter.\(^ {118}\)


113 ‘*Meo iudicio non longe abest a veritate, nimium, statuta condere, legitimare et multa alia non esse imperii, aut iurisdictionis, quia a non habentibus imperium aut iurisdictionem possunt exerceri*, ibid., pt. 3, fol. 23v. Cf. Gillotus, *De iurisdictione et imperio libri duo*, cit., pt. 2, ch. 20, n. 2, fol. 15v, and esp. ch. 21, n. 1, fol. 16r; Charondas, *de iurisdictione et imperio libellius*, cit., n. 11 and 13-15, fols. 53r-56r.

114 Longovallius, *Nova et facilis declaratio*, cit., pt. 3, fol. 22v. Cf. Loriotus, *De iurisdictione et imperio*, cit., axioma 4, col. 4; Charondas, *de iurisdictione et imperio libellius*, cit., n. 7-8 and 10, fols. 50r-52r respectively.

115 D.1.21.1pr.


117 Accursius, *Digestum vetus*, cit., ad D.2.1.3, § Mixtum, cols. 164-165.

118 Bartolus de Sassoferrato, *Super prima et secunda parte Digesti veteris*, cit., ad D.1.21, § Quecunque, n. 1-8, p. 101-102, and ad D.2.1.3, § Imperium, n. 1, p. 111-112. Bartolus’ reading of the Accursian Gloss reduced even more the (already narrow) scope of *iurisdiction delegata*. Now, only the lowest kinds of *imperium* could be delegated to *magistratus municipales*: ibid., § Imperium, n. 12 and n. 21 and 22, p. 113. Not even the whole *iurisdiction simplex* (or rather, those kinds which could be heard by a *iudex mercenario*: supra, note 10) could be delegated, but only the lower groups of its six-fold division: ibid., § Imperium, n. 25-26, p. 113-114.
magistratus municipales, therefore, had neither merum nor mixtum imperium, so that they could judge only about the lowest cases.\(^{119}\) By the eve of the sixteenth century, the orthodox position had not changed among jurists. It was not possible to delegate to the magistratus civiles even those prerogatives which pertained to the iudex nobilis for the sake of private utility - let alone public.\(^{120}\) It may be recalled how legal humanists agreed with Alciatus in dismissing the distinction between iudex nobilis and mercenarius and that between private and public utility, as well as in relegating merum imperium to capital punishments. The assimilation of mixtum imperium with iurisdicctio (or rather their inseparability) was the last step towards the full delegability of judicial prerogatives to lower magistrates.\(^{121}\) Also in this respect it was Longovallius who first brought Alciatus' arguments to their ultimate consequences: unlike merum, mixtum imperium may be fully delegated.\(^{122}\) For once, most of legal humanists wholeheartedly agreed.\(^{123}\)

\(^{119}\) 'Magistratus municipales cognoscentur de vilibus tantum causis', ibid., n. 1, p. 101.

\(^{120}\) E.g. Jason de Mayno, Commentaria in primam partem Digesti veteris, Papiae, 1500, ad D.2.1.2, § Cui iurisdiction, and especially his ponderosus lectura ad D.2.1.3, § Imperium.

\(^{121}\) It is interesting to observe how the same statement of Paul (as reported by Papinian in D.1.2.1.1 - mixtum imperium may be delegated so long as instrumental to the exercise of iurisdiction) was the basis for two completely different interpretations. Of the two, perhaps the Commentators' one was more faithful to the text - though not entirely so. Moving from the Accursian Gloss, they looked at those aspects of mixtum imperium strictly instrumental to iurisdiction simplex. The obvious conclusion was that only a little part of the prerogatives of mixtum imperium could be delegated. Yet, when summing up their conclusions, they detached themselves from the text: the only prerogatives fully delegable were those of the iudex mercenarius. By contrast, legal humanists stressed the link between iurisdiction and mixtum imperium so to insist on the latter's full delegability. But, apart from Baro, they typically shunned the full assimilation of iurisdiction with mixtum imperium. As a consequence, they usually jumped to the conclusion that, since mixtum imperium contained the modica coercitio needed to exercise iurisdiction, it was fully delegable. Clearly, this leap forward entirely begged the question: does all mixtum imperium consist of modica coercitio instrumental to the exercise of iurisdiction? The answer was obviously negative. Hence, after having boldly stated that all mixtum imperium may be delegated (as iurisdictioni coaeherens), they hastily went back a step or two and identified some kinds of mixtum imperium totally unrelated to iurisdiction, singling them out as exceptions to the rule. A remarkable exception to this modus operandi, however, may be found in Donellus. To distinguish between the cases in which jurisdiction on private disputes could be delegated and those in which it could not, Donellus added a third category, an 'intermedium genus iurisdictionis', to the usual contentious and non-contentious ones ('contentiosa' and 'voluntaria' iurisdiction, on whose delegability see his Commentarii de iure civili, cit., lib. 17, ch. 8, n. 11-12, cols. 1128-1129, and ch. 10, n. 9-12, cols. 1192-1197 respectively). While methodologically important, Donellus' third genus was of lesser practical relevance, consisting mainly in datio tutoris (ibid., ch. 8, n. 7, col. 1125, n. 14, col. 1132, and esp. ch. 9, n. 11, cols. 1174-1175), and three other somewhat minor prerogatives (transactio alimentorum testamento relictorum; praediorium minoris alienatio; consilli exercitio, ibid., ch. 8, n. 17, cols. 1136-1137). Having thus excluded those prerogatives of mixtum imperium which had no connection with iurisdiction and could not therefore be delegated, Donellus then used an implied argumentum a contrario so to include in the delegable prerogatives also those with very loose connection with iurisdiction, such as praetoria stipulatio and missio in possessionem (ibid., ch. 8, n. 11, cols. 1128-1129). The point was perhaps worth mentioning in full because it seems to strengthen the centrality of the delegability of mixtum imperium in most of the legal humanists mentioned in this essay. Had it been just a peripheral point, they would have probably devoted less attention to it and possibly also avoided to structure their argument in such a dangerous way.

\(^{122}\) Longovallius, Nova et facilis declaratio, cit., pt. 4, fols. 25r-26r and 30v-32r (on merum imperium), and ibid., fols. 24v-25r, 26v-27r and 28r-29v (on mixtum imperium).

\(^{123}\) Loriotus, De iurisdictione et imperio, cit., axioma 22 and 24, cols. 35-36, and axioma 31, col. 39; Goveanus, ad Legem III D. Imperium, De iurisdictione omnium iudicium, cit., p. 5-6, and De iurisdictione libri II, adversus Eguinarius Baronem, cit., p. 23, 29, 40-41 and 44; Charondas, de iurisdictione et imperio libellius, cit., n. 18, fol. 55r-v, and esp. n. 25-26, fol. 63r; Donellus, Commentarii de iure civili, cit., lib. 17, esp. ch. 8, n. 6, cols. 1123-1124. Gillotus went even further, fully equating ordinary judges to higher ones given that they shared the same potestas iurisdictionis: Gillotus, De
At first sight, the whole debate might appear hardly relevant to contemporary issues. But if we look slightly beyond the Roman facade, the message was pretty clear. As openly stated by Baro with his usual bluntness, if *iurisdictionio* is *basse justice*, *mixtum imperium* is *moyenne justice* and *merum imperium* is *haute justice*, it follows that local judges (*magistratus municipales*) enjoy not only *basse*, but also (and moreover) *moyenne justice*. But in the sixteenth century none of the three categories corresponded perfectly to its Roman equivalent. In particular, *haute justice* was not coterminous with *merum imperium* but it was somewhat broader, encompassing also some prerogatives of Roman *mixtum imperium*. If local magistrates enjoyed *mixtum imperium* in full, then they would also have some prerogatives pertaining to *haute justice*.125

If we look back at the main (and most quoted) defences of the Bartolian jurisdictional categories in the light of such observations, those apparently abstract (and abstruse) discussions might look quite different. Menochius' insistence on the unity of *imperium*, which could be considered both as species and genus,126 was aimed at detaching *mixtum imperium* from *iurisdictionio*. The more *mixtum imperium* was considered under the genus of *imperium*, the less it would have in common with *iurisdictionio*. Far from being a dogmatic digression, Menochius' theory had serious repercussions on the scope of delegated *iurisdictionio*. Being two different categories, *mixtum imperium* was not merely instrumental to the exercise of *iurisdictionio*. When *iurisdictionio* was delegated, therefore, only a few prerogatives pertaining to *mixtum imperium* could accompany it.127 While studiously avoiding to state as much too openly, Menochius considerably narrowed the powers of the delegated judge in practice.128 Similarly, Bologneti's division between *actio* and *persecutio* allowed to distinguish fully *mixtum imperium* from *iurisdictionio*.129

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124 Baro, *Ad digesta iuris civilis l. de iurisdictione*, cit., p. 162. See more broadly also *ibid.*, p. 162-165.

125 Id., *Ad ta πρώτα Digestorum*, cit., tit. 1, fol. 71r-v.

126 Menochius, *De imperio et iurisdictione commentarii*, cit., lib. 1, ch. 7, n. 2, p. 85: 'Hae opiniones; quae verbis, non sensu differunt, conciliari sic possunt. Mixtum imperium componitur ex Imperio, quod alias, dempita iurisdictione remanet merum, atque ita si consideratur, ut Imperium, sub nomine generis, dicitur simpliciter Imperium: si vero sub nomine speciei, dicitur sublatà iurisdictione merum; adiecta autem iurisdictione appellatà mixtum. Et horum sententia mihi etiam probatur.'

127 *Ibid.*, esp. lib. 1, ch. 24 (q. 17), n. 3 and 5-6, p. 180-183.

128 The second - and considerably shorter - book of Menochius' treatise is entirely devoted to the distinction between *ordinaria* and *delegata iurisdictionio* (*ibid.*, lib. 2, p. 193-214, esp. ch. 5, p. 201-205, ch. 8, p. 209-210, ch. 11, p. 212, and ch. 12, p. 212-214). The approach of Menochius is significantly restrictive on both nature and scope of the powers of the delegated judge (*ibid.*, esp. ch. 4 [q. 4], n. 3-4 and 6, p. 204-205; ch. 10 [q. 10], p. 211; ch. 11 [q. 11], p. 212). And yet he is conspicuously silent on the most debated issue, namely whether *merum imperium* may be delegated and, if so, whether it should automatically follow *iurisdictionio delegata* (*ibid.*, esp. ch. 13-15, p. 214-221, the obvious *sedes materiae* for such a discussion). The omission is all the more remarkable for two reasons. First, because Menochius was the only author dealing extensively with the subject to avoid the issue. Second, given that the omission itself was just partial, for immediately before he had clearly excluded the delegation of *merum imperium* (*ibid.*, ch. 12 [q. 12], n. 1, p. 213-214), therefore begging the issue when it came to *mixtum imperium*, an omission so remarkable to appear voluntary, all the more given his insistence on the unitary nature of *imperium*.

129 Bologneti, *In primam Digesti veteris repetitio*, cit., n. 49, fol. 195v: 'imperium sit iurisdictionio quae ex solo motu iudicis vel super persecutionibus (sic) expeditur, et verbum persecutionibus ponit differentiam cum iurisdictione quae expeditur solum super actionibus quae sunt ius formatum in iure
It followed that *mixtum imperium* was not (to borrow a theological term) 'consubstantial' with *iurisdictio*: their *substantia* was different, both on a procedural level and on a theoretical one. As such, and crucially, *mixtum imperium* did not follow *iurisdictio*, and when *iurisdictio* was delegated *mixtum imperium* was not. Ultimately, Bologneti’s three-fold division of both *iurisdictio* and *imperium* (legislative, jurisdictional and equitable) was aimed at structurally preventing any issue on delegation, for the very power to delegate (*potestas delegandi*) did not pertain to judicial *iurisdictio* (*iurisdictio iudiciaria*), but rather to equitable *iurisdictio* (*iurisdictio gratiosa*). Delegating *iurisdictio* was therefore a matter way beyond the reach of ordinary judges. By the same token, the apparently specious classifications of Obrecht - opposing the *notio de iurisdictio* to the *potestas de imperium*, stressing the unity of *imperium* and dividing the prerogatives of *mixtum imperium* according to their instrumentality to the exercise of *iurisdictio* - were in fact aimed at detaching *mixtum imperium* from *iurisdictio*, so to narrow as much as possible the prerogatives pertaining to *mixtum imperium* which could be delegated together with *iurisdictio*. Even Bocerus’ division between *iurisdictio ordinaria* and *specialis* (or *extraordinaria*) allowed him to keep the vast majority of prerogatives pertaining to *mixtum imperium* away from *iurisdictio*, and therefore to prevent their delegability. In short, far from being convoluted byzantinisms, such re-classifications of the Bartolian scheme were in fact a set of counter-measures to avoid the institutional devolution of *mixtum imperium* to lower judges.

Even if we were to conclude, as any sensible scholar is apparently expected to, that legal humanism was a renaissance of legal culture, selflessly aiming to restore the purity of Roman law for its own sake, some doubts might still linger. Here, we have briefly glimpsed two in particular. Firstly, the effect of those learned observations was consistent. *Ibid.*, n. 91, *fol.* 203v-204r: "[*mixtum imperium*] mixtura consideratur quia ab imperio capit quod ab authoritate dependet, et non fundatur in iure partis principaliter, et a iurisdictione capit quod consistat in causis civilibus. Et ex ista mixtura causantur postea persequiones (sic) quae sunt medium inter actiones et imperium merum'.


132 *Ibid.*, n. 43-44, *fol.* 193v-194v. Cf. also n. 85, *fol.* 202r. To be safe, Bologneti used the division between *actio* and *persecutio* to prevent the other possible way to broaden the scope of the jurisdiction of lower judges: the appeal. On the subject, the common understanding was that the competence to hear appellate cases depended on the subject matter. As the court of appeal would hear the same controversy discussed before that of first instance, it did not need broader competences. So, if the subject matter fell within the scope of *iurisdictio*, then (at least in principle) the appellate judge did not need *imperium*. To prevent a delegated judge from being entrusted with the appeal, Bologneti looked at the act of appealing (*admissio appellations*) and considered it to be beyond the scope of *actio* (i.e. *iurisdictio*) and so within that of *persecutio* (typically, *civils*), hence requiring *mixtum imperium*. Since lower judges neither had *mixtum imperium* nor could receive it (by delegation), it followed that they could not hear any appeal either. *Ibid.*, esp. n. 101, *fol.* 206r.

133 Obrecht, *Disputatio de iurisdictionis et Imperii Principiis*, cit., theses 227 and 370. Further, the distinction between *notio* and *potestas* allowed Obrecht to insist on the instrumentality of *iurisdictio* to *imperium mixtum* and not vice-versa, as most legal humanists held: *ibid.*, thesis 322.

134 Bocerus, *Disputatio de iurisdictione*, cit., n. 3 let. b, p. 3, and n. 5, let. a-b, p. 4. Once excluded the delegability of the largest part of *mixtum imperium*, Bocerus happily agreed with legal humanists on the instrumentality of *coercitio* to *iurisdictio* and its delegability, in a *crescendo* of lip-service (*ibid.*, esp. n. 10, let. a-b, p. 7-8, n. 12, let. a-f, p. 9-12, n. 13, let. a-g, p. 12-14). Among the (many) other authors who did substantially as much see e.g. Borrello, *De Magistratuam editis*, cit., lib. 1, ch. 1, n. 114, p. 26-27, and Vulteius, *Commentarius at tit. Codicis*, cit., *ad* C.3.13, n. 84, p. 50, n. 91, p. 52.
potentially of momentous impact. For their target was a stratified system built on the Accursian Gloss and its Bartolian interpretation, a centuries-old system ultimately still stemming from the very trunk which the humanist jurists were trying so industriously to fell. Secondly, and more specifically, many attacks of legal humanists often had a centrifugal purpose, for they targeted the judicial structure of centralised power.

Even so, all this remains speculation. It is of course possible that all the above debate was a genuine protest led by erudite and accomplished scholars against the great liberties the Bartolists had taken in respect to the Roman texts. And that Civilians were just indulging in tedious, useless and abstract speculations - their speciality, after all. Divesting imperium of any legislative and authoritative meaning might appear a harsh attack on a political level, but it may well be a coincidence that the same arguments were pushed to their extreme consequences shortly thereafter by those legal humanists often known as Monarchomacs. Similarly, the fact that the largest portion of nearly all humanistic treatises on our subject focused on delegated jurisdiction and implied the effective freedom of lower tribunals from Royal courts could just be an over-analysis. After all, no Kulturkampf has ever had political ends.