

OUTLINE — LECTURE 13

POLITICAL THEORY IN THE GLOSSATORS

The Emperor, the Jurists and the Horse

[The numbering system added in brackets shows the order in which we will discuss these texts in the lecture. Missing numbers indicate that the supporting texts are in the *Materials* but not here.]

1. [1a-1b] Continuator of Otto of Morena (c. 1220)—the story of the horse.

When the lord Frederick the emperor was once riding on a palfrey between Sirs Bulgarus and Martinus, he asked them whether he was lord [*dominus*, the word also means “owner”] of the world. And Sir Bulgarus replied that **he was not owner (*dominus*) so far as property was concerned**. Sir Martinus, however, replied that he was lord (*dominus*). And then the lord emperor, when he got down off the palfrey, had it presented to the said Sir Martinus. Sir Bulgarus, however, when he heard this, concocted this elegant turn of phrase: **“I lost an equine, because I upheld equity—which was not equitable.” “Amisi equum, quia dixi equum, quod non fuit equum.”**

2. [1c, 2b] Accursius on C.7.37.3 v. *everything to the prince*

Everything to the prince. Even as to property, as M. said to the prince at Roncaglia, through fear or favor. ... And explain it this way: **so far as protection and jurisdiction [are concerned everything is the prince’s]**. ... Whence my book does not belong to the prince, but **direct action for vindication is given to me not to the prince**.
Accursius.

3. [2a] D.14.2.9—where the phrase *dominus mundi* comes from

Volusius Maecianus, *From the Rhodian law*. Petition of Eudaemon of Nicomedia to the Emperor Antoninus: “Antoninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades.” Antoninus replied to Eudaemon: **“I am master of the world [*tou kosmou kyrios, dominus mundi* in the translation that Accursius was using]**, but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it.” Augustus, now deified, decided likewise.

Must be judged. That is, it is to be observed in judgments in such a way that no law can be cited in opposition to the custom of seafarers, as some say ... but badly. You however say that the aforesaid law is to be followed, that is **the sea-law and their custom, only in those things in which it does not contradict our law**, for the goods of those shipwrecked are to be restored to them, as [D.14.2.8; D.47.9.12].

4. [2b] C.7.37.3—the startling proposition about everything belonging to the emperor
for why should such a difference be established when **everything is understood to belong to the prince**, whether what is alienated is derived from his private property, or from that belonging to the treasury?

5. [1c, 2b] Odofredus C.7.37.3.

Everything to the prince. Here Sir Martinus wanted to gather that the emperor is owner of every single thing. Again for his opinion he cited the law which says that the emperor can give our lands to soldiers for their support, as [D.6.1.15; D.21.2.11] and because in the book of Kings it says ‘our daughters’ [1 Sam. 8:13]. Again for his

opinion he cited [D.1.14.3] and thus he responded to Frederick I when he was at Roncaglia, through fear or favor.

But Bulgarus said to the contrary in the same place. But we say to the contrary, because since someone has an action to vindicate his thing, as [C.3.29.9], therefore the emperor does not have the action to vindicate, because two people cannot be completely [*in solidum*] the owner of one thing [D.13.6.5.15 (a famous text denying the possibility of two ownership interests in one thing; co-owners, properly speaking, each own an “undivided share” (*pro indiviso*)). And Sir Bulgarus understood what is said here “all to the prince” to apply to protection or jurisdiction, or, more truly, things belonging to the treasury and things belonging to his patrimony.

6. [2b] D.6.3.1.1—Accursius on *dominium directum* and *dominium utile*

D.6.3.1.1: Those who are leased land to enjoy in perpetuity by cities, although they are not made owners, nonetheless it is held that they have an action *in rem* against any possessor, but also against the cities themselves.

Accursius on *Owners*. That is to say, directly.

Accursius on *In rem*: An *actio utilis*, as in [citations omitted], and this action is discussed in [citation omitted]. And note according to Joh[annes Bassianus] that it doesn't say here that he also has *dominium utile*, but that be said quite easily. Truly, the law does not call him heir or owner who has the *utiles actiones*. [Citation omitted.]

7. [2c–3] Ulpian (D.2.1.3)— the problem of *merum imperium*

Ulpian, *On the office of the quaestor*, book 1. *Imperium is pure (merum) or mixed (mixtum)*. To have pure *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas*. *Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio*. Such jurisdiction also includes the power to appoint a judge.

8. [3–4] Azo on the topic of *merum imperium* (in his *Summa Codicis* 3.13 [‘On the jurisdiction of all judges’]):

Does this pure power (*merum imperium*) pertain only to the prince? And some say that he alone has it. And it is said to be pure in him because he has it without any magistrate over him (*sine prelatura alicuius*). But certainly exalted magistrates also have pure power if the definition of the law that I have just given is good. For even the governors of provinces have the power of the sword, as [D.1.18.6.8]. Municipal magistrates, however, do not have it, as [(probably) D.2.1.12]. I say, however, that full or most full jurisdiction pertains to the prince alone, but pure power also to other exalted *podestà*, although on account of this I lost [one early MS. says “he lost”] a horse, which was not equitable.

9. [4] Odofredus on the problem of *imperium*:

He essentially repeats what Azo had said more succinctly. I include it basically because of the gossip nature of Odofredus.

Although Sir Lotarius was a better knight, nonetheless, Azo was better in our law. (And you ought to know that Sir Lotarius greatly loved the ladies, and gazed on them freely, although afterwards he was made archbishop of Pisa, and on account of

him two decretals were written [X 2.2.12; X 2.26.17 (neither of which has anything to do with scandalous behavior of the archbishop)].)

10. [5] Johannes Teutonicus on X 1.6.34 (Innocent III) on the power of emperor

X 1.6.34: Truly, we recognize that the right and power of electing a king to be promoted afterwards to emperor belongs to those princes to whom by law and ancient custom it is known to pertain, especially since this right and power came to them through the apostolic see which transferred the Roman empire from the Greeks to the Germans in the person of that distinguished man Charlemagne.

Johannes Teutonicus on *To the Germans*. The emperor is over all kings, as [C.7 q.1 c.41] and all nations are under him, as [C.11 q.1 c.37], for he is lord of the world [D.14.2.9]. Even the Jews are under him [C.1.9(12).8] and all provinces are under him [D.63 c.22], unless they can show themselves to be exempt [D.50.15.8]. None of the kings can have prescribed an exemption, since prescription has no place in this [X 2.26.17]. A kingdom cannot have been exempted from imperial authority, since it would be without a head [D.21 c.8] and it would be a monster without a head. Rather all must give the emperor tribute, unless they are exempt [D.50.15.8]. All things are in the power of the emperor. [C.23 q.8 c.21; C.7.37.3].

11. [6] *Princeps legibus solutus*

Ulpian, *Lex Julia et Papia*, book 5. The emperor is not bound by statutes (*princeps legibus solutus*). And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves.

12. [6] *Quod principi placuit legis habet vigorem*

Institutes 1.2.6: Again, what pleases the prince has the force of law (*quod principi placuit legis habet vigorem*), the people having conferred on him and in him all their *imperium* and power by the *lex regia*.

13. [7b] The contribution of the canonists (to be discussed in section after the break)

14. Attempts to find limits

- a. [8a] Odofredus C.7.37.3, with the suggestion of expropriation,

It is no objection that there are laws which say that the emperor may give our lands to soldiers for support, because this is true [only] when the price is given to us, as [C.7.13.4].

- b. [8b] *Institutes* 1.2.6: Again, what pleases the prince has the force of law (*quod principi placuit legis habet vigorem*), the people having conferred on him and in him all their *imperium* and power by the *lex regia*.

Conferred. That is, handed over, so that the people itself no longer has this right, as [C.1.17.2.21; C.1.14.12]. But others say that even now the people can make laws, and that it is said that the prince alone can do this, this is true, “alone” being understood as no one else can do it alone, according to Azo. [Some manuscripts add:] And these things were true so long as *imperium* was with the Romans; today, however, it can be said to the contrary, according to everyone.

- c. [8c] C.1.14(17).4

It is a cry worthy of the majesty of the one who reigns for the prince to profess

himself bound by the laws, so much does our authority depend on the authority of the law. And in truth it is greater in *imperium* to submit the principate to the laws. And by the oracle of the present edict we indicate that we will not tolerate what we do not allow to ourselves.

d. **[8c]** Bracton on Kingship (fol. 7a)

The king must not be under man but under God and under the law, because law makes the king And that he ought to be under the law appears by the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption the human race, the true mercy of God chose this most powerful way to destroy the devil's work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. [Cf. Gal. 4:5.]

e. **[5, 8c, 9]** Pierre de Mornay, *Quaestio*

There was a custom in Brittany that if anyone of the jurisdiction of the count [?duke] of Brittany was called before the count in either a civil or a criminal case, he could complain or appeal to the king of France, and thus the count could not further lay hands on the matter. Then the king of France wished to remit this right to the count, indeed we put it that he did so *de facto*, without calling the barons. Query whether this remission is valid or not? And the doctor [Pierre de Mornay] discussed this question briefly. First, he argued that is valid according to the law, [C.1.19(22).2]. Since the king of France is reputed not to have a superior to himself in his lands, and hence by a certain error he reputes himself to be the prince. He can grant whatever rescript he wishes to in his subordinates, so long as the right of an adversary is not totally damaged or taken away. By this remission the right of the barons was not taken away entirely nor that of any other subordinates, therefore, etc. But the doctor in determining to the contrary said: Now something which would be tolerated in the persons of other lesser persons is reputed a great error and great iniquity [when done to] many persons or those of a given province.

f. **[8d]** Guido of Suzzara on D.1.3.31(30)

Again, when he submits himself to the laws as is proved in the laws now alleged, which at the beginning is a matter of will, to wit that he submit himself to the laws, becomes afterwards a matter of necessity. As we say in a compromise, what in the beginning is voluntary, afterwards is of necessity, as [D.4.8.3.1], so [also] is it apparent in *commodatum* [D.13.6.17?] and in like matters [C.4.10.5]. Who will be the judge in such a question? I reply: the proctor of Caesar, as in [C.3.26.5] and [C.2.36(37).2]

g. **[5, 8e]** Marinus de Caramanico on the *Liber Augustalis* (c. 1278)

This constitution of the prince is law and is observed as law in our kingdom of Sicily, as [D.1.2.2.12; I.1.2.6.] § 2. And no one should think that the aforesaid Roman laws only apply to the prince, that is the Roman emperor, as [Nov. 143; C.1.14.12; C.1.17.2]. ... § 3. But we say the same thing about a free king, who is subject to the power of no one, to wit, that the king himself can make law, as [D.49.15.7.1], such as the king of Sicily, as we shall expound below. Therefore we say boldly that a king can make a constitution for the subjects of his kingdom, and that he can even make law contrary to the common Roman law,

as appears in [D.49.15.19].

15. [10] Johannes Monachus on *Rem non novam* (Extrav. com. 2.3.1, Boniface VIII)

Extrav. com. 2.3.1: A matter not new do we approach, nor are walking on an unaccustomed road, but one trod with the footprints of preceding law, we confirm with the undoubted strength of this present constitution, [and] we make it stable with unbroken strength. . . . [I]n like manner on the example of the aforesaid edicts put forward in the album of the praetor, even outside the solemn days in which the Roman pontiffs are accustomed to make general processes, citations publicly made by our special and knowing order in the audience of our letters or in the hall of our palace to be affixed to the doors of the church of the place in which the common Roman curia of all nations of Christian people resides, so that they can be apparent to all and thus brought to those cited shall be so valid and so bind those cited after the lapse of a term (a competent one of which we wish to be placed on the citations themselves, considering the distance of the places) as if they had come to them personally, notwithstanding any privileges, indulgences and letters apostolic both general and specific, granted to whatsoever persons endowed with pontifical, imperial, royal or other ecclesiastical or worldly dignity or to other inferior churches, monasteries, places, colleges and corporations in whatever form of words, even if it is necessary that special mention be made in our letters by which they are granted of them or of their entire contents word for word, or of the specific names of their persons, monasteries, churches, or of those places.

Johannes Monachus on *Notwithstanding any privileges*: On the evidence of the foregoing, I ask whether the pope could proceed against someone without citation? And it would seem that he could, because he is above the law. [X 3.4.8] Again because the prince is freed from the laws. [D. 1.3.31(30).] Again the pope has plenitude of power. [C.2 q.6 c.11; X 5.38.14; X 1.8.4.] But on the other hand: The citation is the beginning of the judicial process, as is noted above, and as you find in [X 2.19.11], and it is not possible to proceed to the end of the judicial process, which is the sentence, without the beginning. ... No one can be above the law which he has not laid down, but [the law that the pope makes] presupposes what has been laid down. But the pope or a simple man laid down none of the said laws [*iurium*, perhaps “rights”] [C.25 q.1 c.6], therefore he has power over none of them. The major [premise] is apparent; the minor is also apparent so far as eternal law [*lex*], or eternal *ius*, or divine or natural, and so far human *ius* derived from natural [is concerned] The conclusion therefore follows, to wit, that the pope has power over only of the law that is said to be of the fifth mode, to wit law purely positive. It remains, however, to see if citation is of natural law or of human law derived from natural, so that the conclusion follows from the premise, since if the pope has no power over such laws as appears in what preceded, the consequence is that he can proceed against no one without having issued a citation Since it is not possible to understand or to know fully a fact or justice or injustice without the presence of the person against whom the judgment is to be rendered, [C.30 q.5 p.c.9; X 2.27.18; C.11 q.3 c.76], then it is necessary that he be cited or called. And the pope cannot omit this, nor any lesser judge, because thereby he would omit the *cognitio* [a play on words, literally “understanding,” but also the technical term for a judicial hearing], which is of necessity required for a judgment And thus both the second and the third appear at the same time, to wit, that citation is of the natural law, and by consequence that the pope cannot proceed against anyone without having issued

a citation. And this constitution proves this evidently. This is also plain in notorious matters in which, though the *iuris ordo* is not to be observed completely, it is to be observed in citation and sentencing. [X 2.24.21; C.2 q.1 c.7; X 4.19.13; C.2 q.1 c.15; note X 5.1.17] And Genesis 18, where the fact was notorious, nevertheless God wanted to proof before he judged. Nor does [X 5.1.9] stand in the way, for neither citation nor sentence is taken away there, because Genesis 3 proves them both necessary. Again, anyone is presumed innocent unless he is proved guilty. [X 2.23.16; X 1.12.1; D.40.4.20] And the law is quicker to absolve than to condemn. But perhaps you might say that the pope or another judge knows the cause and the truth of the matter in secret, in his capacity as a private person, but as a public person and therefore publicly the truth ought to be known to him, to wit by laws public, divine or human, together. ... To the third [objection; perhaps “second” is meant] it ought to be said that the will of the prince has the force of law if it is ruled by reason and comes about in the spirit of laying down law according to form of which it has been passed on, [C.1.14(17).8], for will is not a secure rule, as the Philosopher says in Politics 2. When moreover the prince judges or renders sentence without discussion and examination of the cause he does not have a will regulated according to the right judgment of reason. To the fourth [objection; perhaps “third” is meant] it ought to be said that according to the Philosopher in Politics 1 there are two kinds of principate, despotic and political. The first is of the owner over a slave who does not have the right to resist, because he is the slave of his owner entirely according to this manner. The second is the principate over children, who have [?no] right of resisting in anything, and such is the principate of the church over her subjects. It is not plausible that the principate of the church is despotic. We are not the children of the slave woman but of the free woman for which liberty Christ freed us, Galatians 4[:31, reading *nos* for *non*]. Johannes Monachus, Cardinal.

Bracton

[fol. 7a] [12] The king has no equal within his realm, <Subjects cannot be equals of the ruler [cf. D.4.7.3.pr], because he thereby lose his rule, since equal can have no authority over equal.> nor *a fortiori* a superior, because he would then be subject to those subjected to him. The king must not be under man but under God and under the law, because law makes the king, <Let him therefore bestow upon the law what the law bestows upon him, namely, rule and power.> for there is no *rex* where will rules rather than *lex*. Since he is the vicar of God, <And that he ought to be under the law appears by the analogy of Jesus Christ, whose vicegerent on earth he is, for though many ways were open to Him for his ineffable redemption the human race, the true mercy of God chose this most powerful way to destroy the devil’s work, he would use not the power of force but the reason of justice. Thus he willed himself to be under the law that he might redeem those who live under it. [Cf. Gal. 4:5.] For He did not wish to use force but judgment. [Cf. Leo the Great in P.L. 54:196.] And in that same way the Blessed Mother of God, the Virgin Mary, Mother of our Lord,, who by an extraordinary privilege was above law, nevertheless, in order to show an example of humility, did not refuse to be subjected to established law. Let the king, therefore, do the same, lest his power remain unbridled.> there ought to be no one in his kingdom who surpasses him in the doing of justice, but he ought to be the last, or almost so, to receive it, when he is plaintiff. If it is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend this act; if he does not, it is punishment enough for him that he await God’s

vengeance. No one may presume to question his acts, much less contravene them.

[fol. 107a–107b] Since nothing pertaining to the clerical estate is relevant to this treatise, we therefore must see who, in matters pertaining to the realm, [has ordinary jurisdiction, and then who] ought to act as judge. It is clear that it is the king himself and no other, could he do so unaided, for to that he is held bound by virtue of his oath. For at his coronation the king must swear, having taken an oath in the name of Jesus Christ, these three promises to the people subject to him: In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign. Secondly, that he will forbid rapacity to his subjects of all degrees. Thirdly, that he will cause all judgments to be given with equity and mercy, so that he may himself be shown the mercy of a clement and merciful God, in order that by his justice all men may enjoy unbroken peace. To this end is a king made and chosen, that he do justice to all men <that the Lord may dwell in him, and he by His judgments may separate> and sustain and uphold what he has rightly adjudged, for if there were no one to do justice peace might easily be driven away and it would be to no purpose to establish laws (and do justice) were there no one to enforce them. The king, since he is the vicar of God on earth, must distinguish *jus* from *injuria*, equity from iniquity [D.1.1.1.], that all his subjects may live uprightly, none injure another, and by a just award each to be restored to what which is his own [I.1.1.3;

D.1.1.10.1]. He must surpass in power all those subjected to him, <He ought to have no peer, much less a superior, especially in the doing of justice, that it may truly be said of him, ‘Great is our lord and great is his virtue etc.,’ [Ps. 146:5] though in suing for justice he ought not to rank above the lowliest of the kingdom.>

nevertheless, since the heart of a king ought to be in the hands of God, [Prov. 21:1; C.1.1.8.3] let him, that he be not unbridled, put on the bridle of temperance and the reins of moderation, lest being unbridled, he be drawn toward injustice. For the king, since he is the minister and vicar of God on earth, can do nothing save what he can do *de jure*, <despite the statement that the will of the prince has the force of law, [I.1.2.6; D.1.4.1pr] because there follows at the end of the *lex* the words ‘since by the *lex regia*, which was made with respect to his sovereignty’; nor is that anything rashly put forward of his own will, [I.1.2.6, gloss on *placuit* “not every word of a judge is a sentence just like not every word of the prince is law.”] what has been rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon, the king giving it *auctoritas*.> His power is that of *jus*, not *injuria* <and since it is he from whom *jus* proceeds, from the source whence *jus* takes its origin no instance of *injuria* ought to arise, [C.8.4.6] and also, what one is bound by virtue of his office to forbid to others, he ought not to do himself.

[D.8.5.15]> as vicar and minister of God on earth, for that power only is from God, <the power of *iniuria* however, is from the devil, not from God, and the king will be the minister of him whose work he performs,> whose work he performs. Therefore, as long as he does justice he is the vicar of the Eternal King, but the devil’s minister when he deviates into injustice. For he is called *rex* not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. [John of Salisbury, *Policraticus*, 8.17] Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, [D.2.2; D.2.2.1] and elsewhere in the same

source, it is a saying worthy of the majesty of a ruler that the prince acknowledge himself bound by the laws. [C.1.14.4] Nothing is more fitting to the sovereign than to live by the laws, [C.6.23.3] nor is there any greater sovereignty than to govern according to law, [C.1.14.4] and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.