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Author(s): Janet Coleman

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MEDIEVAL DISCUSSIONS OF PROPERTY: *RATIO* AND *DOMINIUM* ACCORDING TO JOHN OF PARIS AND MARSILIUS OF PADUA

Janet Coleman

It is well known that John of Paris was a major publicist who, at the turn of the fourteenth century, offered his contribution to the debate over the boundaries of sovereignty. This was a debate that had taken a particularly vicious and explosive turn in the polemic between Philip the Fair and Boniface VIII. John of Paris's *De Potestate Regia et Papali* is taken to be a *via media* in the then current argument over sacerdotal and royal power, a debate that had in one way or another been a continuous part of the political scenario throughout the middle ages. I believe his treatise to be even more significant because of its narrowing of the definition of *potestas* to mean, specifically, lordship over material property, *dominium in rebus*.[1] This understanding of *potestas* is one of the most far-reaching contributions to our understanding of the evolution of the theory and practice of *dominium/proprietas* in the later middle ages. Furthermore, I want to argue that it is John of Paris's narrowed definition of *potestas* as *dominium in rebus*, its mode of acquisition, its characteristics and potentials, that show him to be actively drawing upon a subtle and comprehensive understanding of customary and especially Roman law which had already influenced Canon Law.[2] In his attempt to apply the highly formalized legal discipline to current issues and to justify what can be shown to be the already well-developed customary practices in the field of land law, I want to suggest that John illuminated not only thirteenth- and early fourteenth-century rights over buying and selling one's private property; but perhaps more importantly he informs us as to contemporary attitudes to the more general concept of individual rights of men exercisable in the world and over their world. A brief comparison with Marsilius of Padua's use of *dominium* in his *Defensor Pacis*, shows how both theorists understood the theory and practice of contemporary property law, but that John was the more faithful to current practice and therefore, the more radical. I have

[1] *Prologue, De Potestate Regia et Papali*, ed. Fritz Bleienstein, in *Johannes Quidort von Paris. Über kanigliche und papstliche Gewalt*, Frankfurter Studien zur Wissenschaft von der Politik (Stuttgart, 1969), p. 71.

[2] Brian Tierney, *Foundations of the Conciliar Theory* (Cambridge, 1955), Part three, chapter 1, argues that the *De Potestate* shows mainly Canonists' influence.

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recently argued elsewhere[3] that it is precisely the understanding and defence of *dominium in rebus* as presented by John of Paris that was taken up in the subsequent fifteenth, sixteenth and seventeenth centuries, in France and in England, and most specifically by John Locke in his *Second Treatise of Government*.[4] John of Paris should, therefore, be acknowledged less for having elaborated a *via media*, offering a picture of two realms of jurisdiction for church and state in society; and should be far better known for providing the early modern and modern worlds with their defence of private property as a man's natural and inalienable right.

We know of no reason why John of Paris, a Dominican and avid follower of St Thomas, should have put his pen at the service of his king against Pope Boniface VIII. His name appears along with his Dominican confrères and most of the French clergy on a petition urging the king to arraign Boniface before a general council for the pope's alleged misdeeds.[5] Any other connections with the French court are unknown. But his *De Potestate Regia et Papali* contributed to *l'esprit laique*, *c.*1302, in that it argued for separation a of politics from theology by insisting that civil authority was autonomous, sovereign in the realm of temporal property, free of ecclesiastical coercion, because the origins of the state were natural and the origins of property were prior to the state. In his arguments that the community have the ultimate sanction of authority, he develops a line of thought that would reach a temporary terminus in Marsilius of Padua's *Defensor Pacis*. But John's 'moderation' lay in his separating the ecclesiastical and secular realms of jurisdiction regarding the different, respective internal structures of church and state, the differing relationship of each to property, and the separate moral influence of each. He did not choose, as did Marsilius, to represent the church as an organ of state where the state alone possesses all real power. For Marsilius, the church is incapable—either corporately or through individual members—of *dominium in rebus*. It must usually rely on laymen as dispen-

[3] At the Oxford Political Thought conference, January 1981; Hull Political Studies Association conference, April 1981.

[4] Richard Tuck, *Natural Rights Theories, their origin and development* (Cambridge, 1979) argues that Locke extended the early views of Grotius, but the distinctly Lockean language of property acquired through labour as opposed to Grotius's means of acquisition 'per applicationem' is closer to the language of John of Paris. See below. Some of the more radical natural rights theorists like the lawyer Henry Parker in his justly famous *Observations* (1642) and his *Jus populi* (1644), and the even more radical William Ball's *Tractatus de Jure Regnandi et Regni* (1645), show some striking similarities with John of Paris. See Tuck, pp. 146 f for a discussion of these radical rights theorists.

[5] Introductory essay by J.A. Watt, to his translation of John of Paris, *On Royal and Papal Power* (Pontifical Institute of Mediaeval Studies, Toronto, 1971), p. 11.

sators or stewards who have custody to distribute the property or gifts given for the use of the ecclesiastical community. For Marsilius, the lay human legislator has all *dominium in rebus*, ownership of all temporal goods, but it can give *custody* to an ecclesiastic, if he is a 'perfect person', that is, living in supreme poverty.[6] As we will see, John of Paris's view allows the church, corporately, to possess *dominium* with the pope as dispensator or steward. The *dominium* of the corporate church or of individual priests does not, however, come to them *because* they are vicars of Christ and successors of the apostles. Rather, they have *dominium* over temporal things by virtue of the concession and permission granted them by pious rulers or from the donations of the pious.[7]

John presents the much wider current debate about temporal sovereignty regarding the church's and state's respective temporal affairs as an aspect of the much narrower legal question concerning the theory and practice, the conceptual and the substantive meaning of *dominium* over things—property rights. He establishes that the traditional and *de facto* independence of the monarch **and** the independence of the property-holding individual could, indeed, be vindicated *de iure*.[8] This I take to be a convenient manipulation of Roman law and it is precisely the kind of argument used a bit later by the Roman civilian commentator Bartolus when he defends the *de facto* sovereignty of the city republics in Italy against the *de iure* power of the Holy Roman empire.[9] A *de facto* independence can be vindicated before the law, *de iure*, and in property law the parallel is with various kinds of *possessio*—e.g. *usucapio* and what became of the notion of *usufruct*.

In fact, if one were to examine the evolution of what is called 'West Roman Vulgar law', that is, the 'degenerate' Roman law practised between the periods of Diocletian and Justinian, one could draw parallels especially in the field of property and obligations (which were substantially changed from classical Roman law), with apparent alterations in this field during the twelfth century and thereafter. For instance, the clear classical notion of *dominium* as a positive and total mastery over a thing, with its own legal 'remedy' distinct from possession, disappeared in the post-classical period. Various kinds of limited *dominium* came to be recognized; in fact, *usufruct* came to be treated

[6] Marsilius of Padua, *Defensor Pacis*, Discourse II, c. xiv, 7, 8, 14, 18.

[7] John of Paris, *De Potestate Regia et Papali*, *Prologue* (proemium).

[8] Introduction to John of Paris, *Royal and Papal Power*, trans. Watt, p. 63.

[9] Quentin Skinner, *The Foundations of Modern Political Thought*, Vol. I (Cambridge, 1978), pp. 9 f.

as a form of *dominium* and was regarded, essentially, as the best right to possession. This is a similar *de facto* to *de iure* shift observed in the writings of John of Paris. It is interesting that Marsilius wants to *maintain* the older distinction between ownership and use in order to support the Fransciscan view of perfect poverty against John XXII. John of Paris, on the other hand, argues for a conflation of *dominium* and *possessio* or *usufruct*. Indeed, the evolution of West Roman Vulgar law points to the distinction between an owner's and possessor's legal remedies in the courts as having disappeared; emphasis was placed more on the possessor's 'dominium'.[10] I shall have more to say about the use of Roman law to support customary French and English developments of the later thirteenth and fourteenth centuries at the end of the paper. But to begin with the text central to our discussion, let me provide a brief setting for John of Paris's discussion of *dominium* by commenting on the fate of the concept of *dominium* in the writings of twelfth- and thirteenth-century Canon lawyers.

In the twelfth and thirteenth centuries there was a blurring of a distinction that had been crucial to the Romans, between holding office and owning property.[11] This confusion of office and ownership paralleled a comparable development in secular political life and is reflected in their use of the single word—*dominium*—to denote *both* proprietary right and governmental authority. Please note that Roman lawyers used the word *dominium* to denote proprietary right alone and it is significant that in English we use the derivative 'dominion' to denote governmental authority. Now the benefice (*beneficium*) in the tenth century, had come to mean a spiritual office; but this developed further where churches conceived of benefices as pieces of real property, bought and sold, inherited or granted as fiefs. By the end of the twelfth century, Canon lawyers, who were then involved in classifying—according to rivived Roman law categories—the accumulations of rules relating to the disposition of benefices, classified the benefice as belonging to private law—which is precisely how Roman law saw *dominium*/property. (Private law pertains to persons, *things* and actions.) No longer is the benefice to be categorized as belonging to public law, concerned with the public welfare with enforceable interests for the common profit or good. Now the benefice, under private law, is protected as a proprietary right in the interest of the private possessor. The benefice, at least from the time of Alexander

[10] E. Levy, *West Roman Vulgar Law, the Law of Property* (1951), summarized from W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 3rd edn., revised Peter Stein, pp. xix, xx. Also J. Gaudemet, *Le Droit Privé Romain* (Paris, 1974), pp. 76 f.

[11] Francis Oakley, *The Western Church in the Later Middle Ages* (Cornell, Ithaca, 1979), pp. 30 f.

III[12] is understood by clergy and laity alike in material terms, as property defended at law. The ecclesiastical office was less a focus of duty than an object of proprietary right and a source of income.[13] Already then, Canon law itself was heavily imbued with Roman property law where even spiritual categories were 'translated', as it were, into *ius rerum*, the law of private, patrimonial rights, all those rights known to the law which are looked on as capable of being estimated in money, an element of wealth, an asset, an economic entity with a legally guaranteeable value.[14] Let us turn, now, to examine John of Paris's understanding of *dominium*.

Firstly, what is the structure of his tract and how can we relate its form to its content? There are twenty-five loosely connected chapters united by the form in which one discussed the current issues of restricted sovereignty. I do not see a programmed development of the argument as one reads chapters one to twenty-five. Rather, the *De Potestate* reads like a developed *determinatio* of a quodlibetal debate of the theology faculty of the university of Paris for the end of the thirteenth early fourteenth centuries. In other words, it is a magisterial presentation of a selection of debated issues with a contemporary socio-political focus.[15] The chapters comprise a series of related issues argued with citations from the Bible, Canon law, and implicitly, Roman law texts, arranged in a scissors-and-paste fashion. The Prologue tells us that *potestas* in temporal affairs is to be defined as lordship over material property, *dominium in rebus*. Other foci of related interest arise in part as responses to the Bull *Unam Sanctam* which, Ullmann has recently argued, established this genre of publicist tract and served as the beginning of the line of such works. *Unam Sanctam* was a papal chancery composition designed as a magisterial, systematic and logical summary of the points made in favour of the papal *plenitudo potestatis* by the Augustinian Aegidius Romanus in his *De Ecclesiastica Potestate* (*c.*1300).[16] Aegidius cited biblical, theological and legal texts to support the papal understanding of the origins and legitimacy of property, contract, the state, and specifically *dominium* and jurisdiction. John of Paris

[12] Geoffrey Barraclough, *Papal Provisions* (Oxford, 1935), p. 83; and *Corpus Juris Canonici*, ed. A. Friedberg (Lipsiae, 1879), *X*, 2, 13 c.7, Vol. I, pp. 282–3.

[13] Oakley, *The Western Church*, p. 31.

[14] Buckland, *Textbook of Roman Law*, ch. V, p. 182.

[15] P. Glorieux, *La Litterature Quodlibétique de 1260 à 1320* (Kain, 1925), pp. 20 f.

[16] *Aegidius Romanus: De Ecclesiastica Potestate*, ed. Richard Scholz (Leipzig, 1929, reprint Aalen, 1961); Walter Ullmann, 'Die Bulle Unam Sanctam: Rückblick und Ausblick', *Römische Hist. Mitteilungen*, XVI (1974), pp. 45 f, and Walter Ullmann, 'Boniface VIII and his Contemporary Scholarship', *Journal of Theological Studies 27* (1976), pp. 58–87.

countered with an exploitation of some of the same texts, showing their origins to be Roman law and its context—civil society—to justify the civil jurisdiction over inalienable private property rights. To oversimplify for the sake of brevity here, we can say that John of Paris counters Giles of Rome by means of a confrontation of the *ratio* of Roman, civil law, versus Canon law and theology.

Aegidius Romanus had argued as follows: before the people of faith had had kings, they were ruled by judges and these were constituted through priestly power, *per sacerdocium*. Afterwards, they were ruled by King Saul who was made *dominus* through the blessings of priests. Whoever was made *dominus in lege nature* were either bad and came to power through invasion and usurpation and were killers and oppressors of men, **or** they were good kings and were also priests like Melchisedech and Job. If we proceed further and analyse *potestas*, dividing it into its four genera, the fourth *potestas* is with regard to being a prince or governor of men. And this *potestas* of a prince is dependent on a rational ordering in the governing of men. In chapter VII he speaks more directly of *potestas* as *dominium* and its ramifications.

Primitive peoples were not *de iure* in possession of distinct things because one can only say *hoc est meum* from conventions and pacts between men. This conventional division of the earth was extended by Adam's sons and by means of such pacts they appropriated possessions. Suffice it to say that one cannot justly appropriate some part of the earth unless *ex pacto et convencione* with others.[17] Divisions of property thereafter got complicated: *secundum empcionem, donacionem, commutacionem vel aliis modis* . . . Thereafter, men began to rule the earth and make kings; laws made their pacts licit and legalized conventions and contracts and enabled one legally to say *hoc est meum*. 'Leges ergo et iura continent omnia per que potest quis dicere—hoc est meum, quia continent contractus licitos, convenciones et pacta . . . per que quis iudicatur iustus possessor rerum.'[18] **But** the very foundation of all this is *communicacio* of one man with another; if men had no means of mutual communication they would live alone and laws distinguishing just and unjust would not be necessary. The **church is the foundation of communicacio**, linking men one with another; excommunication destroys these basic links and in effect, makes one a non-person, without civil rights and casts one from all society. Without the church there would be no partitions, empcions, donations, commutations, no laws and no one could say something was his.[19]

[17] *Aegidius Romanus*, ed. Scholz, p. 103.

[18] *Ibid.*, p. 104.

[19] *Ibid.*, pp. 104–5.

Thus, only through baptismal rebirth *and* continuing membership in the church can anyone justly inherit, possess wealth, have *dominium* of things. The church 'habet dominium, cuiusquemque hereditatio et quarumcumque rerum et habet superius et excellencius huiusmodi dominium quam habeant ipsi fideles.' There is no rightful *dominium* over temporal things, *nisi habeat illud sub ecclesia et per ecclesiam*.[20] Baptism and penance as sacraments are the only direct 'remedy' to being recognized as having just *dominium*.[21] 'Excommunicatus ergo, quia privatus est communione fidelium, privatus est omnibus bonis que possidet, ut est fidelis et ut est inter fideles.'[22]

Aegidius goes on to draw arguments directly from Roman law principles and Roman law formulae which had already penetrated the terminology of thirteenth-century Canon law. He argues that there are indeed two powers, one spiritual and general, and this he lables *incorporale*, and the other is *corporale* and particular. The incorporeal, universal and general power is not a result of a contract because 'contracts can only extend to material things'. This emphasis on the *corporale* and its recognition through contract is, indeed, the civil law of *dominium*, *ius in rem* as defined in Gaius and the *Institutes*.[23] 'Potestas autem materialis et terrena est particularis et contracta, cum specialiter sit circa corporalia instituta . . . et non erit ergo ponere duas potestates, unam generalem, alteram particularem, nisi una sit sub alia, sit instituta per aliam et agat ex commissione alterius . . .'.[24]

To summarize, Aegidius's position is, in his own words: 'non sufficit quod quicumque sit generatus carnaliter nisi sit per ecclesiam regeneratus quod possit cum iustitia rei alicui dominari nec rem aliquam possidere.'[25]

Turning to John of Paris we see him tackling the same series of issues but drawing more directly on the law that supports an autonomous civil sovereign. He begins with eclectic citations from Aristotle's *Politics* saying that it is necessary and advantageous for man to live in society such as a city or kingdom which is self-sufficient in everything that pertains to the whole of life, and under the government of one who rules for the common good. It is

[20] *Ibid.*, pp. 70–3.

[21] *Ibid.*, p. 79.

[22] *Ibid.*, ch. xii.

[23] Gaudemet, *Le Droit Privé Romain*, c. 3, 'la classification des choses', p. 69.

[24] *Aegidius Romanus*, ed. Scholz, pp. 113–14.

[25] *Ibid.*, p. 78, part II, c. 8.

also clear, he says, that this kind of government derives from natural law in that man is naturally a civil or political and social animal, and the kind of government we have been discussing, he notes, comes from natural law and the law of nations. Prior to the first kings who exercised government—Belus and Ninus—men lived without rule like beasts. They did not yet live 'the common life natural to them'. But once they did come together they were bound by definite laws to live communally and these laws are called the law of nature. Much of this is, of course, Aristotle mediated by John's *magister* St Thomas. There is also a supernatural end of man and rulership here belongs to Jesus. Two kings in separate spheres, two realms of nature and supernature have been outlined.[26]

It was necessary because of mankind's original sin against God to establish certain remedies through which Christ's sacrifice could benefit mankind and thus, the church's sacraments were instituted and the ministering priest is an intermediary between God and man. The church resulted from original sin; but society and government are natural and not seen as resulting from man's sin.[27]

In chapter three he compares the structure of the church and that of the secular realm: all priests are ordered in a hierarchy to one supreme head, Peter's successor, the pope, and this pyramidal ordering of the ecclesiastical structure came from Christ's own mouth and was not a decision of a council. But although God decided there is subordination of church ministers to one head, it does not follow that the ordinary faithful are commanded by divine law to be subject in temporalities to any single supreme monarch. Rather do they learn from natural instinct, which comes from God, that they should live as citizens in society and that in order to live well together, they should choose the sort of rulers appropriate for the sort of community in question. Neither man's natural tendencies nor divine law commands a single, supreme, temporal monarch for everyone. Nor is such a single monarch as suitable in the lay order as he is in the ecclesiastical.[28] Thus far we have: man is instinctively and naturally a creature who lives in society, comes together to live in common and communally, and his instinct can lead him, depending on contingencies, to choose a ruler who best benefits the ruled. And within the secular realm there is no divine or natural reason to have a universal unifier, i.e. an emperor. This is a general argument for the individual monarch, France's king Philip; a justification from God and through nature of what France is.

[26] John of Paris, *De Potestate*, ch. 1.

[27] *Ibid.*, ch. 2.

[28] *De Potestate Regia*, ed. Bleienstein, p. 81, ll. 27–p. 82, ll. 11.

Furthermore, John argues that secular powers are diverse because of the diversity of climate and differing physical constitutions of men: one man cannot possibly rule the world's *temporalia* because his authority, ultimately, is his sword and he cannot be everywhere at once.

John next compares the respective structures of church and state and argues that it is important to recall that temporalities of laymen are not—in the state—communal,[29] and therefore, each man is master of his own property as it was acquired through his own industry. Consequently, there is no need for administration of *temporalia* in common, for each is his own administrator: *cum quilibet rei suae sit ad libitum dispensator.*

Ecclesiastical property, on the other hand, was given to the community as a whole and it therefore requires a president, someone who presides over the community to hold and dispose of goods on the community's behalf. John means there is an apportionment of things to individuals prior to governments; lay property, discretely apportioned, results from individual labour alone in natural society. Since he has told us that society is natural, that the law of nations bound men to live communally and in common, then the particularization of common property is also natural. Significantly, he describes the heads of lay **and** spiritual communities as arbiters, and it is clear that adjudication is with respect to private property in secular society. In the church, adjudication is with respect to orthodox faith and heresy.

The state is chronologically prior, he argues, but the priestly order is prior in dignity. Each power has its special domain, each justifying its jurisdiction immediately from the one superior power above, God, and this is his two power schema, his *via media*. But jurisdiction is not *potestas*, and certainly not *potestas* as defined as *dominium* over exterior material goods, i.e. property. He turns to this issue, for church and state, in chapters six and seven, and it is these two chapters that borrow most heavily from the quodlibetal debates, the *determinationes*, of Godefroy of Fontaines, dated *c.*1294–6.[30] As I shall try to indicate later, Godefroy was a theologian well acquainted with Roman law principles which he tried, with some success, to apply in the vexed situation of his native Liège. He, like John of Paris, composed in the standard theoretical genres that, at that time, allowed for current socio-economic, legal and political issues to be aired—the quodlibetal *determinatio*, in its evolved form. The quodlibetal *determinatio* produced the genre of the publicist tract like the

[29] *Ibid.*, p. 81, l. 26.

[30] Jean Leclercq, *Jean de Paris et l'écclesiologie du XIIIe siècle* (Paris, 1942), noted the debt to Godefroy. Quodlibets XI (1294), XII (1295), XIII (1296) and XIV (1297) ed. J. Hoffmans, *Philosophes Belges*, V (1932).

De Potestate Regia et Papali. Some of Godefroy's earlier quodilbets show an especially close rapport with issues debated in the quodlibets of Aegidius Romanus (*c.*1285 sqq).

In chapter six John turns to discuss the relative superiority of monarchy in the order of causality. He says it remains to discuss in what way the pope has or has not got *potestas*, *dominium* over exterior material goods.

> Ubi primo ostendetur quomodo se habeat summus pontifex ad bona exteriora quoad dominium in rebus, et secundo, dato quod non sit verus dominus exteriorum bonorum sed dispensator simpliciter vel in casu, an saltem habeat radicalem et primariam auctoritatem ut superior et ut iurisdictionem exercens.

In what way does the pope have *dominium in rebus* regarding exterior goods, he asks. Secondly, it being given that he is not truly *dominus* of exterior goods but rather the administrator or dispensor both in principle and in practice, he asks whether the pope has at least the original and primary authority as superior and as one who exercises jurisdiction. The Roman legal terminology of *bona exteriora*, *dominium in rebus*, *jurisdictio*, is tossed off fairly lightly. It is used in the same familiar vein in Godefroy of Fontaine's quodlibets. Roman and Canon law concepts are extensively drawn upon by Godefroy, Aegidius and John. John marshalls them to show that in the church community which, as a community, is itself *dominus* because donations of laymen are meant to be gifts to the church and not to individuals, individual persons in the church community, whoever they may be, do not have *dominium*; rather, principal members have only stewardship (*dispensationem habeant*) except where they draw recompense (*faciunt fructos suos ex servitio*) from service and then only according to need and status. The pope, therefore, is a steward of communal property. Marsilius of Padua will not allow even the ecclesiastical community to be *dominus* or owner; rather the lay donor maintains ownership.[31] All this draws upon the complex Roman law of property involving *donatio* and *possessio*; it is also the Civil law pertaining to corporations so extensively developed in the thirteenth century by civilians and canonists alike.[32] The consequences are that the pope cannot *ad libitum* take away ecclesiastical goods claiming that what he ordains is valid, according to John, because he is not *dominus* and has no title to the property; he cannot have it alienated. As dispensator of the community's goods in whom good faith, *bona fides*, is required, he does not have power over goods except in cases of necessity or utility for the *ecclesia communis*.

[31] Marsilius of Padua, *Defensor Pacis*, Discourse II, c. xiv, 22.

[32] Buckland, *Text-Book of Roman Law*, pp. 253 f and pp. 196 f. Also see Tierney, *Foundations of the Conciliar Theory*, *passim*.

In sum: the pope is only a steward of the property given to the ecclesiastical community; he is instituted precisely as a steward for the good of the community; he has a relationship to these things only as administrator in the interests of the community; and if he betrays the community's trust by not acting in good faith, he must do penance by restoring the property which he has wrongly treated as his own. This is a Roman Civil law analysis of the situation and a Roman Civil law 'remedy'. The betrayal of trust, in fact, can and must lead to deposition, to forfeiture of the stewardship. It is not moral turpitude then, but misuse of *dominium* and property rights that is at issue.

Chapter seven expands the analysis to include an explanation of papal *potestas* regarding lay property. The difference here is that property or goods are not granted to the secular community as a whole, as is ecclesiastical property. Lay property, which John acknowledges to be prior chronologically to spiritual power and institutions, is acquired by the individual's skill, labour and own industry. The law of nations taught men to live communally; thereafter they acquired 'their own' and individuals as individuals have in these things *ius et potestatem et verum dominium*, right and power and valid lordship or sovereignty.

> Ad quod declarandum considerandum est quod exteriora bona laicorum non sunt collata communitati sicut bona ecclesiastica, sed sunt acquisita a singulis personis arte, labore vel industria propria, et personae singulares ut singulares sunt, habent in ipsis ius et potestatem et verum dominium. . . .

Consequently, each person may order his own, dispose of, administer, hold or alienate as he wishes without injury to any other since he is *dominus . . . et potest quilibet de suo ordinare, disponere, dispensare, retinere, alienare pro libito sine alterius iniuria, cum sit dominus.* Property is, in the lay world, distributed discretely through a process of acquisition from what was communal, a process of acquisition characterized by individual labour, and the right one acquires over goods for which one has laboured is such that one can use or alienate such goods, presumably in exchange for other goods or money. This is the Roman Civil law understanding of *ius in rem* and the modes of acquisition of property. Where is the mutuality of feudalism we well may ask? Not only does this fit into the formal descriptions of Roman law proceedings. To modern ears it also sounds like the possessive individualism of English seventeenth-century thinkers like John Locke.[33]

[33] See Tuck, *Natural Rights Theories*, on Locke's *Two Treatises of Government* (1679–80), and Tyrrell's *Patriarcha non Monarcha*, (1681), pp. 169–73. See John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1963). Some of the major property statements of John of Paris from the prologue and chapters six and seven of the *De Potestate Regia et Papali* were taken over completely by Pierre d'Ailly and published as part of Gerson's *Opera* in the

Furthermore, John of Paris says that such goods or property, once acquired through the labour of the individual, have neither interconnections with other men in society of whatever status (and thus do not depend on Aegidius' contracts and *communicatio*) nor are they mutually interordered. And there is no common head who may dispose of or administer such property since whose ever they are may arrange for his property as he wishes. Therefore, **niether prince nor pope has dominium or stewardship in the lay world**. Individual property rights are inalienable; the purpose of civil government is subsequently to preserve and protect private property. For the reason that sometimes the peace of everyone is disturbed because of such *bona exteriora* when someone usurps what is another's, and also because at times, some men through excessive love of their own do not communicate their property to others or place it at the service of the common welfare, a ruler or prince has been established by the people who is then to take charge of such situations, acting as judge, and discerning between just and unjust, and as a punisher of injustice or injuries, a measurer of the just proportion owed by each to the common good. In chapter thirteen he extends this and argues that the civil judge judges according to those human civil laws which regulate the buying and selling of property in order to ensure that property is put to those proper human uses which would be neglected if everyone continued to hold everything in common. For if things were held unreservedly in common, it would not be easy to keep the peace among men.[34] For this reason, he adds, private possession of property was 'introduced' by the emperors. In natural law, he notes, there is equal freedom and common possession for everyone in everything. Thus, men were given the earth in common but came to differentiate private property through labour. Their rights to particularized property existed prior to the prince and the ruler was established by the people to

edition prepared by Ellies du Pin, *Nouvelle Bibliothèque des Auteurs Ecclésiastiques* (Paris and Mons), t. I (*Gersonii Opera*), col. 914–17 (printing d'Ailly's *De ecclesiae et cardinalium auctoritate*, Constance, 1416, complete transcription—without revealing authorship of John of Paris—of chapters six and seven; col. 896–7 reproduces John's prologue; and col. 898–9 selects texts from chapter thirteen). In Locke's library is listed t. I (1690) of the du Pin edition. Locke may well have read treatises collected together in the du Pin volumes during his continental journeys during the 1660s. John of Paris and d'Ailly/Gerson were read and republished for the Gallican cause numerous times during the sixteenth and seventeenth centuries. For Locke's library contents see John Harrison and Peter Laslett, *The Library of John Locke* (Oxford, 2nd edn., 1971), p. 209 number 2306.

[34] Here he cites the *Decretum*, D. 8, c. 1, *quo jure*. Verum quia ob talis bona exteriora contingit interdum pacem communem turbari dum aliquis quod est alterius usurpat, quia etiam interdum homines quae sunt nimis amantes ea non communicant prout necessitati vel utilitati patriae expedit, idea positus est princeps a populo qui in talibus praeest ut iudex decernens iustum et iniustum, et ut vindex iniuriam, et ut mensura in accipiendo bona a singulis secundum proportionem pro necessitate vel utilitate communi. *De Potestate Regia*, ed. Bleienstein, ch. 7, p. 97.

prevent the discomforts of not having an impartial arbiter when their property was usurped by those who would take what was not their own (presumably because they had not 'mixed their labour' with it), and who thereby had no just title to *dominium* or its derivatives. Thus, each individual person may dispose of his own as he wishes except in times of necessity when the prince may dispose of the individual's goods in the interest of the common temporal good. So too the pope may tax the faithful *in extremis*, for defence of the faith.

In chapter eight, John notes that having proprietary rights and lordship over property is *not* the same as having jurisdiction over it: jurisdiction is the right to decide what is just and unjust in matters pertaining to property. The prince has this power of jurisdiction although he does not himself possess the property in question. In Roman law terms the prince is like a municipal civil magistrate with restricted *iurisdictio* but without *imperium*.[35]

> Et quia non est idem habere proprietatem et dominium in bonis exterioribus et habere iurisdictionem, id est ius discernendi quid sit iustum vel iniustum in ipsis, sicut habet principes potestatem iudicandi et discernendi in bonis subditorum licet non habeant dominium in re ipsa.

This is an extraordinary view for a pro-monarchical publicist to maintain, for in effect, John has diminished royal powers to those of mere jurisdictional arbitration in private 'property' disputes. It appears to be an even more radical statement than Edward I's *Confirmatio Cartarum* (1297) where the king acknowledged that his subjects' goods were their own and he could enjoy a share in them only by 'the common assent of the whole kingdom and for the common benefit of the same kingdom'.[36]

In sum we have the distinction between *dominium* and jurisdiction; we have an argument for exclusive private property as natural for each individual whose skill and industry enable him to acquire his own; the acquisition of one's own is prior to the establishment of government; we have a notion that rulers are fiduciary powers, elected by the consent of the people to act as arbiters in property disputes; rulers are given jurisdiction without the individual alienating either his rights to or in property or his substantially discrete property to the government; the secular state keeps order and order is disturbed by disputes over property. Rulers, here including the pope, may tax

[35] See Buckland, *Text-Book of Roman Law*, pp. 647 f and pp. 668 f.

[36] See Carl Stephenson and Frederick Marcham, *Sources of English Constitutional History*, a selection of documents, Vol. I (London, revised edition, 1972), p. 165 from Stubbs, *Select Charters*, pp. 490 f; the original document is in Anglo-Norman French.

the community (of the faithful) *in extremis*, for defence, but this ought to be calculated according to one's means—a taxation by property qualification in effect. Deposition is not only possible but obligatory when the relation of faith or trust is destroyed by the ruler not representing the common welfare but his own. In a later chapter John of Paris argues for the will of the council being sovereign where it is made up of the whole church.

* * *

It is not enough to explain the radical nature of this tract on *potestas*, civil and papal, by referring to its successful attempt to employ Roman law 'theory' in the face of Canon law and theological arguments. In the past two decades research has shown the degree to which Canon law itself, in form and content, owed a great deal to the revival of Roman law; not only did Roman law become an integral part of thirteenth-century secular government machinery and the ruler's 'public' law. Because the financial and commercial ventures of the thirteenth century actively materialized *res incorporales*, setting a price on abstract concepts like duty (as I noted earlier, for instance, with the change in *beneficium* from office to property), the Roman law of property and of commercial transaction, a law notably deficient in theory but abundant in cases and examples (viz. Vulgar Roman law), served the economic developments that helped to change a society based on the mutuality of feudal duties to one in which individual rights, defensible at law, obtained. Elizabeth Vodola[37] has recently pointed out how theological conceptions like faith and belief, and rituals like baptism and penance, were penetrated by Roman law concepts. In this way the church was able to establish itself as authoritative in the public sphere. At the beginning of the thirteenth century, she notes, theologians had only begun to debate the psychological effects of baptism whilst the jurists had already assimilated baptism into the field of law.[38] *Sacramentum* was itself a Roman legal term which referred to the act of sealing an oath; and the ritual of baptism incorporated a profession of faith that was formally modelled on the Roman law verbal contract—*stipulatio*. The *Decretum* of Gratian and its succession of glossators were not unaware of these Roman law origins: Huguccio's *Summa* (1188) consciously took into account the legal terms used in the canons, and early in the thirteenth century glosses by Alanus Anglicus included direct legal citations. Nor was the influence of Roman law limited to Canon law: simultaneously it served Bracton in Common law England with at least a structure, a formal, coherent structure of

[37] E.F. Vodola, '*Fides et culpa*: the use of Roman law in ecclesiastical ideology', in *Authority and Power, studies on medieval law and government presented to Walter Ullmann on his seventieth birthday*, ed. Brian Tierney and Peter Linehan (Cambridge, 1980), pp. 83–98.

[38] *Ibid.*, p. 84.

general notions into which English law as practised throughout the realm could be usefully categorized and unified. Despite the apparent randomness of English customary law, it was Bracton's concern to demonstrate its essential coherence and rationality.[39] And it is today admitted more readily that there are numerous affinities between the classical Roman law jurist and the early Common lawyer. In method, both medieval Common lawyer and Roman jurist avoided generalizations and universal definitions. Their *ratio* was casuistic, developing from case to case, and their interest was in establishing a good *working* set of rules.[40] This was what Canon lawyers sought to do as well. Unwritten law and church law could be presented through the categories established by Roman law. If Roman law was used by canonists in the thirteenth century to recast liturgical matters into juristic form, then John of Paris can be seen to be revealing this process and indirectly disclosing the reluctance on the part of Canonists or publicists like Aegidius Romanus, to acknowledge their sources in proper context: these were the imperial laws which in turn referred to nature and reason and man's history *prior to* sacred history, and were all fundamentally relevant to the issues of property rights, contracts, *dominium*. If baptism was a contract, then other more secular aspects of society could best be described in Civil law terms as well.

Indeed, the recent research on the reception of Roman law in thirteenth- and fourteenth-century Anjou, Brétagne and Poitou as evidenced in the vernacular customaries of these regions shows how Romanizing terminology, citations of Roman law texts, the inclusion of whole glosses to Roman law passages, did not serve to change customary law. Rather, Roman law justified the customary practice by a parallel Roman law rule; and Roman law provided systematic categories for accumulations of apparently random, in the sense of locally specific, practices.[41]

But why, we ask, was it necessary to cite Roman law as a system or as a source at all for customary practice? The answer, I believe, lies precisely in what Robert Lopez has called the 'commerical revolution' of the thirteenth century, and what Lester Little has described as the 'profit economy'.[42] It may

[39] See Peter Stein, *Roman Law and English Jurisprudence* (Cambridge, 1969).

[40] W.W. Buckland and A. McNair, *Roman Law and Common Law, a Comparison in Outline*, revised 2nd edn., F.H. Lawson (Cambridge, 1952), p. xiv and Lawson's *Excursus* to Buckland and McNair's text, *ibid.*, p. 80, where he says: 'the difference between Roman and English law is by no means so great as is stated in (Buckland's original) text.' p. 80.

[41] J.Ph. Lévy, *Le Droit Romain en Anjou, Brétagne, Poitou: (d'aprés les coûtumiers)*, in the series *Ius Romanum Medii Aevi*, pars V, 4b (Milan, 1976).

[42] Robert Lopez, *The Commerical Revolution of the Middle Ages* (New Jersey, 1971), and Lester Little, *Religious Poverty and the Profit Economy in Medieval Europe* (Cornell, Ithaca, 1978).

also be described as the reification of relations in a society where money had created a professional class for whom sovereignty could only have meaning as protecting the individual's private property and his rights thereto, defensible in law. Furthermore, Roman law served as a model for centralization and political unification, a means by which monarchs could exert a centripital force on their societies. In thirteenth-century France and England the growth of the wider national *regnum* was aided by centralized royal justice providing working legal 'remedies' for abuses of local representatives of royal justice through the procedures of formal plaints and bills and commissions of inquiry. Such remedies were meant at first, as Milsom has shown,[43] to enforce uniformity of traditional practice in feudal courts, lords and vassals being reminded there of the mutuality of their obligations and duties. The king's justice was merely an exercise of his capacities for jurisdictional arbitration. In England the royal assize was not supposed to replace seignorial jurisdiction but provide a sanction against its abuse. But because of the growth in both a familiarity with Roman law **and** the increasingly economic valuation of rights and duties and things, tenure in land was drained of its previous 'feudal' mutuality. The feudal maxim: *nulle terre sans seigneur*—was no longer appropriate. By the end of the thirteenth century in France and in England, tenements and dues appear to be independent properties in most regions, fixed by a centralized royal, legal system.

An examination of English plea rolls shows that legal remedies in property disputes were available to all who lived within the reach of royal administration and who, thereby, acknowledged themselves (and were acknowledged) to be the king's subjects. England and France were defined as political entities by the practice of subjects petitioning the king and this may be taken as further evidence of the *legal* evolution of the state. The unique characteristics of the state were clarified as a *consequence* of *dominium* and possessory rights defended in the courts. The state was territorially defined, that is, defined by property rights defensible at law, and the limits of the petitioning community could be defined only in territorial terms. The focus of this territoriality and the notion of an individual's territorial residence, was the territorial royal court, the *parlements* of Paris and Toulouse, the parliament of England.

Pollock and Maitland[44] some time ago, spoke of the assize of novel disseisin in England, where appeal to a centralized royal justice was implicit, as an

[43] S.F.C. Milsom, *The Legal Framework of English Feudalism, The Maitland lectures, 1972* (Cambridge, 1976).

[44] F. Pollock and F.W. Maitland, *History of English Law*, Vol. II (Cambridge, 2nd edn., 1899), pp. 47–50.

example of the influence of Roman law acting immediately (or through Canon law) on English custom regarding possession. And this is the true beginning of a petitioning of the king as arbiter in property disputes which defined the role of the state. In Roman law language one could describe later thirteenth-century events as follows: the *dominus* hardly had a real interest in some property and had transferred the *res mancipi* by *traditio* to the user of his land, thereby creating a bonitary ownership. He retained some rights but they seem to be that of jurisdictional arbitration. This is what John of Paris was, in effect, defending in his distinction between *dominium* and *jurisdictio*. But a residual *dominium*, i.e. the **ultimate** right to a thing, was left in the hands of the king and gave him a right to control the property of his rightfully possessing subjects *in extremis*, for the survival of the state. This is very radical writing if only because it justified recent developments during the thirteenth century, and of course, it reduces the king's *arbitrium* as feudal overlord.

It is well to recall that in the earlier feudal seignorial world, rights as individual possessions were a nonsense. Property rights had no place in early feudal court cases where mutual relationships and their relative fulfilments were judged and whereby land was held (tenure) for a return. But by the end of the thirteenth century seignorial courts were the agents of the king's objective reifying law: the tenant makes his claim regarding his right to his tenement (*possessio*); the lord makes his claim to his right to dues or 'servitudes' (*dominium*, *jus in re*). Each plaintiff is recognized with individual, independent properties without reference to the other. The situation is now one where a tenant *de facto* owns or holds his land whilst the lord has a kind of servitude over the land, a *jus in re aliena*. Milsom has shown how this is true for thirteenth-century England. This can be extended to France of the same period. The fact of *dominium* had passed in one hundred years from being a relative, interdependent thing to an independent property defensible in the law courts where at least the descriptive categories of remedies can be seen to follow Roman, civil law procedure regarding possessory rights.

Marsilius of Padua, twenty-five years after John of Paris, was responding to the same Civil law language of property disputes in his defence of the Franciscan rejection of ownership of the property they used. Marsilius, thereby *maintained* a distinction between *dominium* and *usus* against current practice. This position was, strangely, conservative, for Marsilius does admit that it is more common to use the term *dominium* to mean both the principle power to lay claim to something rightfully acquired (in accordance with 'right' taken to mean a coercive command or prohibition of the human legislator) *and* the use or *usufruct* of the thing.[45] Also, he notes, 'possession' *does* more commonly

[45] Marsilius of Padua, *Defensor Pacis*, Discourse II, c. xii (14 ii). I have used the English translation of Alan Gewirth for my citations in translation; here p. 193.

mean *both* abstract, incorporeal ownership and the actual corporeal handling of the thing or its use.[46] But Marsilius put his distinctly defined terms—*dominium*, *ius*, *possessio*, *proprium* etc., to a narrower, more polemical use—the rejection of John XXII's interpretation of apostolic poverty and the pope's rejection of the opposing interpretation of the spiritual Franciscans. The consequence for Marsilius's theory was the temporal disendowment of the whole church through defining it as *incapable* of *dominium* in its own right. Marsilius's attitude to the role of the church in property disputes must be seen as only part of the larger issue—the practice of secular, coercive sovereignty, which was the question that interested him more. He was ready to draw on Roman civil law and practice when he could, but Roman law could also thwart his purposes. He more or less admits this himself when he says that

> some object that everyone who buys or sells, or who can buy or sell some temporal thing, necessarily has ownership of the thing or of its price—this I deny. And when it is proved by the assertion that every buyer or seller transfers the ownership of some thing or of its price, I deny this *with respect to all perfect men* (i.e. all ecclesiastics who should be living in apostolic povery). They do not on account of the transfer or exchange of things for a price receive the ownership of the thing *unless the ownership can be said to be transferred accidentally*.[47]

This is, in fact, bonitary ownership described in Roman law terms above. Marsilius is forced into making a special case for the ecclesiastic relation to property because he wants to justify his omission of the church from sovereignty itself.

John of Paris, on the other hand, responding to Aegidius Romanus, and absorbing the position of Godefroy of Fontaines, paradoxically broadened the concept of sovereignty by focusing on the pre-civil rights to property through labour of the individual as an individual. Thereafter, he used Civil law to justify practice—the conflation of *dominium* with *possessio* and *usus*.

In an earlier feudal period one could justly say that lordship was not a right to be claimed but rather one that could only be exercised. In the period during which Godefroy of Fontaines and then John of Paris were writing, lordship, *dominium*, was indeed a right to be claimed and defended rather like a possession. The lords were left with fixed economic rights over property but without customary mutuality, and tenants acquired rights of ownership and use through money payments. Lordship could not, by then, even prevent the

[46] *Ibid.*, c. xii (19 iii).

[47] *Ibid.*, c. xiv, 18. Gewirth translation, p. 225. (The italics are mine.)

alienation of lands by tenants. The old fief, the fee simple had, in many places in northern Europe it seems, become an estate whose ownership was an article of commerce.[48] Old feudal services were now seen as income; feudal incidents as capital gains. Feudal *seisin* had become a *possessio in rem*, defensible before the law, like *usucapio*. Godefroy of Fontaines and certainly John of Paris were not describing feudal inheritances or birth rights but property justly acquired through labour. Revised Roman law formulae were, therefore, extremely useful as justificatory means of explaining what had indeed happened in the thirteenth- and early fourteenth-century France and England regarding *dominium*, *iura in re* and *possessio*.

It has already been noted that John of Paris's inspiration and source for his understanding of *dominium* was Godefroy of Fontaines's quodlibetal *determinationes*. Godefroy had shown himself in favour of a republic where the law reigned supreme, where an elected prince was like a magistrate with jurisdictional powers who must conform to the law, where taxation was to be freely discussed, agreed to and established by community representatives, where revolt against a tyrant who by definition had broken trust with the ruled, was legal. Lejeune has shown how such principles had penetrated local political practice in Godefroy's Liège by the end of the thirteenth century.[49] These principles were employed not only as formulae to be imitated by those politically involved but also as justificatory formulae after the fact, seen as ready-made for a situation that had evolved politically. Civil law formulae as expressed by Godefroy served, then, as the theoretical justification for the behaviour of the chapter of canons of Notre Dame et Saint Lambert in Liège, as described by Lejeune.[50]

Indeed, Roman Civil law procedures and formulae as, in effect, defended by the publicist John of Paris, were not merely meant as programmatic

[48] Milsom, *Legal Framework of English Feudalism*, p. 99. See also Milsom's *Historical Foundations of the Common Law* (London, 1969).

[49] J. Lejeune, 'De Godefroid de Fontaines à la paix de Fexhe (1316)', in *Annuaire d'Histoire Liègeoise*, *6* (1958–62), pp. 1215–61. I owe this reference to Father John Wippel who has just published a study of Godefroy of Fontaines which I have not yet had the opportunity to see. A xerox of Lejeune's article was kindly sent to me by Prof. Bultot of the Université Catholique de Louvain, Louvain-la-Neuve.

[50] Lejeune, 'De Godefroid de Fontaines', pp. 1248 f. 'Le chapitre . . . a decouvert dans le consentement des représentants du pays la legitimation d'un pouvoir dont il est ambitieux, mais qu'il ne pouvait tenir ni du sacre ni de l'investiture. . . . Il se substitue ainsi au prince absent mais tient son pouvoir du consentement de tous.' From 1302 until the peace of Angleur (1313) and then to the peace of Fexhe (1316) 'on voit la primauté de la communauté qui utilisent des positions, des attitudes, des pouvoirs, l'alliance du chapitre des chanoines avec le peuple de la ville de Liège'. p. 1254.

proposals for secular *dominium* in the future. John's narrowed definition of *potestas* as *dominium in rebus* was a *ratio*, an explanation of what *de facto* and *de iure* had already occurred.

Janet Coleman EXETER UNIVERSITY