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The Catholic Concordance

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By Nicholas of Cusa

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Book II, ch. 14. That all legislation is based on the natural law, and that all coercion must be brought about by the choice and consent of the subjects, since we are equally free by nature, and that jurisdictions that are created have no power from themselves, but only according to the laws and canons. This is a fine argument.

So that everyone might be better satisfied, I will add another consideration. Although it deserves to be explained at some length, in the interest of brevity and of pleasing the reader I will only touch on it briefly. All legislation has its root in the natural law, and if it contradicts the natural law, it cannot be valid legislation (*Decretum*, D. 9 § *Cum ergo* [post c. 11], & D. 10 c. 4 *Constitutiones*). Hence, since the natural law is naturally within the reason, every law is, at its root, innate to man. And so those who are wiser and more excellent than others are chosen as rulers, so that by their natural, clear reason, endowed with wisdom and prudence, they might produce just laws, and rule others and examine cases by means of those laws, so that peace may be preserved (as is held at *Decretum* D. 2 c. 5 *Responsa prudentum*). From this it can be concluded that those who are best endowed with reason are naturally the lords and rulers of others, although not by coercive laws or judgments that are imposed on others against their will. Therefore since all men are free by nature, every government that restrains its subjects from evils and uses the fear of punishment to orient their freedom towards the good, whether it consists of written laws or of a living law in the person of the prince, is constituted only by the agreement and consent of the subjects. For if by nature men are equally powerful and equally free, then the true and well-ordered authority of one who is a fellow and equal in power can only be established by the choice and consent of others, just as laws are established by consent (*Decretum* D. 2 c. 1 *Lex* and also D. 8 c. 2 *Quae contra*, which says, "An agreement of each nation or city among themselves," etc. "The general agreement of human society is that all will be governed by its kings, etc."). Note that a human society comes together by a general agreement in order to obey its kings. So in a truly well-ordered regime there ought to be an election of the ruler himself, by which the ruler is set up as the judge of those who choose him. Well-ordered and correct lordships and honors, then, are established by election, and so also are general judges established over those who elect them.

And because these are general judges, appeals can be made from them up to the highest authority, because they were not chosen by specific consent to individually make a decision in each case. But if they were chosen by the parties involved in a particular case, their decision could not lawfully be appealed, as is set forth in the 10th canon of the African council. "Indeed, if judges have been chosen by the consent of the parties, even if by a smaller number than prescribed, their decision may not be challenged" (see *Decretum* C. 2 q. 6 c. 34 *Sane*). A judge ought to judge justly, because by the law itself

a decision is null and void if it goes against the laws or canons (see *Decretum* X 2.27, *De sententia et de re iudicata*, c. 1 *Sententia*, with the cross-references mentioned there in the gloss).

We read that not even the Apostolic See has ever judged against the canons, as can be seen in the letter from Pope Boniface to Zachary that begins “Confitemur,” and as is mentioned in many passages below. Indeed, even the pope’s judgments must be examined again by a plenary council, as is demonstrated below from the actions and authority of Augustine. Now they would be examining those judgments in vain, if the whole of the law was whatever the Roman pontiff wanted, because then it would be impossible for him to decide wrongly. Therefore it is necessary that his judgment should be constrained by the canons to which he is subject and by which his decisions are examined, to see whether or not they are just.

Furthermore, the canons have their roots in the natural law, against which even a prince is powerless; he cannot therefore go against a canon claiming that his decision is based in natural law or follows indirectly from natural law. And since this is so, how can we say that it is in a judge’s power to set down canons and statutes? If this were so, if a judge by himself had the power of setting down canons, it could never be proven that he had decided wrongly—his decisions would always be just. But because law must be rational, possible, and not contrary to the custom of the country (*Decretum* D. 4 § *Leges* [post c. 3 *In istis*]), we cannot say something is a law which is not accepted by the usages of those who are to observe it in any civil or canonical court (the same *Leges* and the following chapters). Therefore, if usage is required for the approval of law, as in the chapter *Leges*, we cannot justly condemn someone based on a new law, because he could not have offended against a law that did not yet exist. It is necessary that he have violated an approved law that was accepted by custom and usage. From this it is clear that the laws and the canons are a rule for everyone who judges, and that every law and canon is superior to any judge who judges.

Still further, if a canon is approved by agreement, usage, and acceptance, then the strength of all legislation is based on acceptance. It is for this reason that ecclesiastical canons are properly issued by a common council. For the church is a congregation. A single person could not properly issue ecclesiastical canons. We can conclude from this that in councils, canons are made by agreement, acceptance, and consent, while decrees and judicial decisions of the Roman pontiffs and their clarifications of the law in new situations derive their strength and justice not from the pope’s pure will, but because the canons have allowed that such decisions are to be made. This point is worth noting. This is how I understand *Decretum* D. 15 c. 3 *Sancta Romana* §16 *Item decretales*, and D. 19 c. 6 *In canonicis* and similar canons, and I have elaborated on this further at the end of this second book, and at the beginning and the end of Book III.

Book III: Preface

If anyone cared to investigate from the beginning the foundations that are not so much useful as necessary to our undertaking, he would need to look for those first principles that have been taken as a starting point by Aristotle, Plato, Cicero, and all other authors who have written about well ordered political, economic, and monarchical regimes. Indeed, the natural laws precede all human considerations and are their principles. To every kind of animal it has first been given by nature that they are able to protect themselves, their body, and their life, to avoid what is harmful, and to acquire what is necessary, as Cicero argues in the third chapter of *De Officiis*. For the first thing for anything that exists is that it should in fact be able to exist. And for this purpose—that it might continue to exist—everything has innate principles: instinct, appetite, or reason. This is why various means of ensuring existence and self-preservation have been put into the instinct by nature, according to the diversity of natural things. On these grounds, Aristotle concludes at Politics VII.17 (1337a1) that all art and training exist to remedy defects of nature.

Now men, who from the beginning have been gifted with reason above all animals, which is a great advantage for the conservation of their fellowship and community, and for the end on account of which each one of them exists. Indeed, having come to understand what is necessary through rational

discourse, they were moved by a natural instinct to unite with one another and, once they were living together, to construct villages and towns. And if man had not discovered the rules for preserving peace against the corrupt inclinations of many, union would not have been enough to save him. And it is for this reason that cities were established, in which the citizens are united, and there are laws to preserve that unity and agreement by the common consent of all, and there are also guardians over them all, with the power to do as much as is necessary for the public good.

By a law that was divine, most admirable, and bestowed by grace upon all, it was made known to men that community was greatly in their interest, and that they are therefore preserved by an order in which laws are established by the common consent of all, or at least of the wise and heroic, with the others' support. For just as it was maintained in the previous book that, according to St. Cyprian, by the promise of Christ the majority of the priesthood will not diverge from the true law, so likewise, when measures have been taken for the preservation of the commonwealth by common consent, the greater part of the people, citizens, or heroes will not diverge from the way that is right and useful for the times. Otherwise, the natural appetite would be frustrated in many things, which is held to be most inappropriate by the philosophers. For we see that man is a civil and political animal, and is naturally inclined to civilization [*ad civilitatem inclinari*]. Therefore the more vigorous part ought to make decisions for the rest of the polity, as Aristotle concludes in Politics IV.12 (1296b15).

But almighty God has conferred a sort of natural servitude on the weak and foolish, on account of which they readily trust the wise, and so by the help of the wise are governed and helped to preserve themselves, as we read in the letter which is eighth in the sequence called "Ambrosian": "The foolish man is like a plantation, and the man lacking judgment is like a vineyard." "Now the vineyard bears fruit if it is pruned, it flourishes if it is half-pruned, but if it is neglected, it becomes overgrown."

[…]

And so, by a certain natural instinct, the superiority of the wise and the subjection are brought into agreement through the common laws, of which the wise are the primary authors, guardians, and executors, with the concurring consent and voluntary subjection of all the others. And if the regime is arranged in this way, then "it is impossible for the aristocratic city, that is, a city governed according to virtue" by the wise, with the consent of others, for the common good, "not to be well arranged," as Aristotle decides in Politics IV.7 (1294a1ff).

Now law ought to be made by all those who are to be bound by it, or by a majority in an election, because it is for the good of the community, and what affects all ought to be decided by all, and a common decision can only be reached by the consent of all, or of a majority. There can be no excuse for disobeying the laws when each has established the law for himself. "For it is not good that good laws should be made, but not followed," as Aristotle says in Politics IV.7 (1294a3). And so also the right to interpret the law belongs to those who have the right to establish it. For it is necessary that the realm be governed by these laws, since love and hatred are present in everyone.

For this reason, it is better for the commonwealth that there should be laws, than that the best man should be king, as Aristotle concludes in his investigation in Politics III.16 (1286a17-20) and in Rhetoric I.1 (1354b7). For where there is not the rule of law, there is no polity, as in Politics IV.4 (1292a32-34). So it is necessary for the state that the laws have great dignity [*gravitate*], and are seriously thought out through prudence propped up by long experience, as it says in Politics 2.5 (1264a1-3).

It is also necessary that the laws should be observed by the rulers, who in the first place must exercise sovereignty [*dominari oportet*] according to the laws, as in Politics 3.11 (1282b1-3) and in Ethics V.6 (1134a35), since the law is "an eye made up of many eyes" and "understanding without appetite," as it says in Politics III.16 (1287a32, b26-29). For many people have found that rulers ought not to change that to which one has already subjected himself.

And even though the prince must exercise sovereignty in accordance with the laws, nevertheless,

because he is the lord over those things about which nothing is clearly stated in the laws, as it says in Politics III.11 (1282b3-5), it is necessary that he be prudent, as it says in Politics III.4 (1277b25-27) and the tractate on justice in Ethics V.10 (1134b1), that he ought to exercise epieikeia [i.e. judgment outside of the law] with the guidance of the law, in those matters to which the law does not directly apply. And so every government (whether it is a monarchical rule of one, an aristocratic rule of many wise men, or a politic rule of all together and each according to his rank), as long as it tends toward the common good according to the will of its subjects, is called temperate and just, as in Politics 3 and 4. But if a government goes against the will of its subjects and tends toward some private good, it is intemperate, as in Politics 3.7 (1279a22ff). And so there arise three kinds of governments opposed to the temperate governments mentioned above: tyranny, oligarchy, and democracy. And the history books are full of these intemperate tyrannical, oligarchic, and democratic governments.

Book III, ch. 4: That the electors are not created by the Roman pontiff and do not have their power from him, but by the common consent of those subject to the empire, who by divine and human law, not positive law, can set an emperor above themselves, and that the upright and just empire has power from the subjects' choice alone, without papal approval, and that [the emperor] cannot be deposed by the pope.

[…]

Who, I ask, gave the Roman people the power to elect the emperor, unless it was the living and natural law itself? For it is by way of voluntary subjection and consent to leadership that agreed-upon offices are established as upright and holy in every kind of rulership, since all violence goes against the law. For there is a general human agreement to comply with laws (*Decretum.* D. 8 c. 2 *Quae contra* mores § 2 *l. fin.*, C. 3, 13. *De iurisdictione omnium iudicum*, l. 7 *Periniquum*, Di. 3, 4 *Quod cuiusque universitatis* l. 1 § 2. *Quod si nemo*).

The 75th canon of the Council of Toledo, held in the year of Christ 581 in the time of King Sisenand, established that, when the king died, the nobles of the nation together with the priests had to approve his successor by the general counsel of the realm, so that while agreement and unity were preserved, no discord might rise up in the country or the nation through the force of ambition. And the canon established that if anyone tyrannically usurped the realm, he would be excommunicated, and would be subject to a terrible anathema and curse.

For kings are called *basilei* in Greek, because like bases they sustain the people in unifying agreement; for this reason bases have crowns. *Tyranni* in Greek means the same as *reges* [kings] in Latin, for *tyro* means "strong," and a tyrant is a strong king. Afterwards it became customary for "tyrants" to refer to the worst and wickedest kings, who rule in luxury and cruelly dominate the people, as Isidore says at Etymologies IX.3. And so those who usurp lordship without being invited or elected to do so are called tyrants.

Now if you call to mind those things which were said earlier about how all orderly authority arises from an elective agreement about voluntary subjection, and that there is in the people a divine seed, on account of the equal birth and equal natural laws that are common to all men, so that all power (which is primarily from God, from whom man himself also comes) can be considered divine, when it arises from the common agreement of those subject to it. And it should be constituted so that the one who rules, enacting in himself the will of all, might be called a public or common person and the father of every individual, governing all things with right, lawful, orderly power without any haughtiness or pride. While he recognizes himself as the creature of all his subjects collectively, he acts as a father to each individual. This is the orderly, divine marriage of spiritual unification, rooted in an enduring agreement, by which the commonwealth is best directed, in supreme peace, to the end of eternal happiness. And because the grounds for this in divine and human law are given above, I will not repeat them here.

It is enough to know that free election based on natural and divine law does not derive from the positive law or from any man, so that it might be in his power to judge the validity of an election. This is

particularly the case in elections of the king and the emperor, whose *esse* and *posse* [i.e. existence and power] do not depend on any one man. And so the electors established in the time of Henry II, by the common consent of all the Germans and other people subject to the Empire, have their fundamental power [radicalem vim] from the common decision of everyone who by natural law could establish an emperor for themselves. This power does not come from the Roman pontiff, since it is not in the pontiff's power to give a king or emperor to any province of the world without their consent.

Gregory V himself consented to this, in his role as Roman pontiff. According to his rank, he has the right of consenting to the common emperor, just as in universal councils he has the highest authority by the consent of all the others present at the council with him. Nevertheless, the force of [the council's] decisions depends not on him as the first pontiff of all, but rather on the common consent of all, both of the pontiff and of the others. And although the consent of the priesthood, just like that of the laity, has a place in the establishment of a king or emperor, this is not because the imperial regime is necessarily superior to the priesthood (because we know that the priesthood is compared to the sun, and the empire to the moon, as in *Decretum* X I.33 *De maioritate* c. 16 *Solitae* §4), but because the details of temporal matters, without which the priesthood could not last very long in this fallen life, are subject to the empire (as Augustine says at *Decretum* D. 8 c. 1 *Quo iure,* & C. 23 q. 7 c. 1 *Quicumque*), and to its laws.

Book III, ch. 12: That the king or prince ought to issue general statues and laws that affect his territory by consent, in general councils of both estates of his realm, and he ought to execute and defend those laws, saving only his epieikeia, and that he ought to have a daily council of men chosen from all the territory subject to him, by the consent of his universal council.

In sum, it must be recognized that the goal of a ruler ought to be to lay down laws by agreement. Therefore it is appropriate to establish and direct all matters affecting the commonwealth in a council of both estates [i.e. the aristocracy and the clergy], of nobles and bishops. The king ought to be the executor of that which is established by agreement, because legislation is a rule according to which the subjects want the king's authority to be ordered. Now no one doubts that a universal council, by the agreement of its head and members, can regulate governmental power for the common good. Still, when unclear circumstances arise, the laws so established can be suspended or overturned by the king for the good of the commonwealth and to the end of justice, through his power of equity [*epikeiam virtutem*]. But nevertheless, this must be understood to apply in the same way as was discussed above with regard to the Roman pontiff and the canons. The king cannot overturn a law without a council, if that law was established by a council, but he can declare that, in a specific case, the reasoning behind the law does not apply. And this is enough for us to know that in councils of the church the role of the king is to consent, to exhort, and to confirm, and to obey and execute ecclesiastical legislation that has to do with faith or divine worship.

Matters relating to the public state ought to be established likewise. The case is just like that of a metropolitan, as discussed above, who is the head of his council and can establish nothing concerning the whole province without the agreement of the council's members. In the case of a king, the king ought to preside in a council concerned with matters that affect the regime of the commonwealth, and, taking council with the princes and also the bishops subject to him, he ought to make decisions carefully, and with their consent.

And so from among his subjects the prince ought to have men perfect for this purpose from every part of the realm elected to assist the king with daily counsel. Such counselors ought to play a role corresponding to that of all the residents of the realm who assist the Roman pontiff, as described above. And these counselors ought continually to defend the public good of those they represent, and to give advice, and to be a proportionate means by which the king governs and interacts with his subjects, and by which the subjects may give feedback to the king in particular matters. And in this daily counsel comprises the great power of the realm. Indeed, these counselors would need to be appointed by agreement from among the general assembly of the realm, and would clearly be obliged to advance the

public good through laws and legal judgments. And since on the subject of the regime of a commonwealth we have been bequeathed many great volumes by St. Thomas, Aegidius of Rome, Sedulius Scotus, and, before them, Plato and Cicero (although these last books are lost), one should turn to these for further discussion.

Book III, ch. 25. On the imperial council assembled of the principle members of the empire, and its ancient use and usefulness; that it is greatly helpful to the government of the republic, if it is rightly convened and continued. […]

This would be the place for dealing at greater length with the things mentioned previously about the imperial council, in which those imperial matters that have to do with the good governance of the public good would be enacted in law after mature, considered counsel and with the consent of all. But since this imperial council is very similar to the universal synod of priests which we have already discussed in all its particulars, we can deal with the subject more briefly here.

We know that the emperor is the head and foremost of all, and that he has the imperial power to assemble the kings and princes subject to him. And in this universal council of the empire, those who, like limbs, ought to come together with this head are the princes, the governors of the provinces representing their provinces, and also the rectors and teachers of the great universities, and those who are of the senatorial class which is called the “sacred convention.” This class consists of the “illustres,” who are closest to the emperor and are part of his body (C. 6 q. 1 c. 22 *Si quis*), the “exspectabiles,” who have a middle rank, and the “clarissimi,” who have the lowest rank. There is no one among the senatorial group who is not of one of these ranks (C. 2 q. 6 c. 28 *Anteriorum* § *Illud etiam*). In the book of digests, their offices are described according to their ranks.

In the first rank are the kings and the imperial electors, and the patricians. Second are the dukes, governors, prefects, and such. third are the marquesses, landgraves, and the like. All those who exceed others and are closer to the Empire constitute the imperial body, of which the head is Caesar himself. And while they are meeting together in one representative assembly, the whole of the empire is gathered together (as is proved in the Lex Julia, included in the *Decretum* at c. 6 q. 1 c. 22 *Si quis cum militibus*, where it is called *Ad legem Juliam maiestatis*, C. 1 *Quisquis*, and also in the 17th chapter of the text cited previously from the Eighth Council [i.e. the Fourth Council of Constantinople], where it says, “Since princes frequently hold conventions for their purposes,” &c.).

And since universal decrees for the good of the empire ought to be issued by consent, and for the end that the general law should not be objectionable to a part of the empire, and so that accurate knowledge may be had of this, the aforesaid leaders and other most trustworthy sworn men come together to deliberate, with clear wisdom, about the measures appropriate for each time and place, and to make their decisions known to all. And so the mature decisions of the council are entrusted to their firm guardianship. I have found in old books that certain universal councils of the empire were held, in which, after the emperor, the princes added their signatures in their own hand as a testament to the council’s perpetual validity, just as the custom has been in ecclesiastical synods.
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