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Property Rights as a Governing Institution

A Few Selected Remarks

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Two forms of dominium: jurisdiction and property

A credo of Martti Koskenniemi is that there is a relationship between law and power. This credo, which I support, is impressively confirmed when taking a look at one specific part of jurisdiction, namely the regime of property rights. Political power is the application of influence, whereas allocating property ownership as a legal position is awarding power. Thus, there are two different forms of exercising power.

As Martti Koskenniemi presents under the headline »Ruling Humans and Owning Land« (66 ff.), the regime of normativity during the age of feudalism consisted of two legal relationships: legal relationship of fiefdom between the king and the vassal, which subjugated the vassal under the »jurisdiction« of the king, and the law of the entrusted ones, offering the possibility to handle the fief in the same way as one's own property. The result is clear: »the two forms of dominium – jurisdiction and property – would gradually come to express the relative separation of political and economic governance« (72).

Every form of exercising power – in the sense of influence over a third party – must be legitimated and justified. Offering narratives of justification is – as one can see in the example of Jean Bodin's doctrine of sovereignty – one of the main tasks of law. Because a legally valid form of power is by tendency one that is equipped with legitimacy and as such an assertive form of power.

The justification game

If there is one discipline of law that could show how the »justification game« works it definitely is international law. Because of this, international law can – with only some aggravation – be defined as the *factory for narratives of justification*. Three examples are given to prove that.

The first example is colonialism, a form of power, which, simply put, was connected to an extremely high number of formulas of legitimiza-

tion. The most common were found easily: discovery, conquest, cession and occupation. Their relative weight was naturally subjugated to development; cession in the form of unequal treaties and occupation became the favored options. The second example concerns the imperialistic conquest of the world, a mission that was presented with great effort as »*mission religieuse et civilisatrice*«. The third example must obviously include Hugo Grotius questioning the Portuguese trade monopoly with his jusnaturalistic argument of the »mare liberum« in his role as advocate for the Dutch East India Company.

What can be observed here is something like a fight for the semantic supremacy; sovereign is – in a modification of Carl Schmitt – not the one who has the power over the situation in an emergency but the one who has the power over the essential »moral legal vocabulary«. Following this idea, one can speak of a »semantic imperialism«.

The necessity of private property in a trading and commercial world

In light of the prevailing understanding of property as being linked to »common property«, a large argumentative effort was always needed in order to justify the existence of private property, which only seemed to offer an opening for unhealthy high profit gain, while also infecting Christian society with the disease of inequality. Still, private property has been established as legal institution: »[...] by the year 1000 a de facto system of landed power had come into existence in the Frankish realm that would be formalized with the help of the church, the rise of seigneurial courts and the spread of an expert culture of lawyers giving these facts legal meaning. There was little one could do about landed property had emerged« (93).

Facing this, one might choose a pragmatic way of dealing with it by seeking sanctuary in Aquinas' »*utilitarian justification*«. In this way »property was needed because (1) everyone is more diligent when they procure something to themselves; (2) human

affairs are more orderly with private property and (3) there will then be a more peaceful state of things«. But this utilitarian approach, which was followed by the influential school of Salamanca, falls short.

Thanks to Koskenniemi's book, I feel supported in my belief that »moral-legal reasoning« was not a suitable medium through which to act against the inevitable development into a commercialized world participating in global trade. The reason for this is rooted in institutional economics. In trade, as well as while commercially participating in markets of any nature, transaction costs (as they are called in institutional economics) must be paid. Transaction costs in this sense would be, for example, costs to gain information about future trading partners, costs for the completion of a contract, and costs for control of the right satisfaction of the treaty. Only if the property relations and the content of the treaties are clear, can the »transaction costs« stay in an economically reasonable frame. This leads to the next point.

The relationship between state and property as a relation of mutual support

The relationship between state power and private property is highly important – a conclusion which is presented as *leitmotif* throughout the whole book. Three scenarios are imaginable:

In the first scenario state power functions as potential threat to the undisturbed use of property. Property can be expropriated, highly taxed or can be made unattractive by other means. But, in doing this, the state would itself fail in its task to protect the property of citizens seeking relief in its jurisdiction. Because, as John Locke famously put it: »the great and chief end [...] of men uniting into commonwealths, and putting themselves under government is the preservation of their property«.

The second scenario places the core of political communization in the »community of property holders«. Under the headline »rule by property«, Koskenniemi states »the state was needed only to get rid of the inconveniences experienced by property-holders in the natural state, to make the enjoyment of rights and the enforcement of contracts

more secure« (635). The Lockean state was – as Macpherson put it – »in effect a joint-stock company whose shareholders were the men of property«.

Neither scenario matches the essential point that the state and private property guaranteed by the state present a *community of mutual utility*. To make my thesis plausible, I want to introduce the term *infrastructural function of law*.

In this third scenario, law functions as guarantor of the infrastructure needed to enable private cooperation gain. In this context, one could also speak of the state's role in the supply of law, for example through the supply of the organization type of a limited stock company or modern patent law. Without all of these forms of legislative supply, the industrial revolution would not have been able to take place in the same way or with the same velocity as it did. In return for this legislative supply, the state demands to participate in the economic success of its citizens through taxation, and it then uses the economic activity of its citizens to keep the mills of public welfare going.

Transforming goods into capital: the transformative power of law

From these considerations it is not a long way to the main thesis of Katharina Pistor, recently presented in her book *The Code of Capital* (Princeton 2019): »Das Kapital regiert durch das Recht« (»Capital reigns through law«). According to Pistor, capital is mainly composed of two components: a good and a legal code. The example of an invention as a good and its coding as intellectual property shows that each and every good can be changed into capital by giving it the right legal code, thus enhancing its tendency to create wealth for its owner. These codings are accomplished in and by the core institutions of private law: the law of contract, the law of property, collateral security law, corporate law, and insolvency law. And this time, the main »keepers of the codes« are not scholars of international law but highly professionalized lawyers working in »big law firms«.