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Alternative Pasts and Alternative Futures

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Alternative Pasts and Alternative Futures

Martti Koskenniemi's most recent book tells the complex and convoluted story of the emergence of several key concepts and orienting ideas that led to the legalization of relations between polities. The monograph is built like a tower reaching to the skies and held by both horizontal and vertical scaffolding, and several points make it particularly compelling as well as exceptionally important. These include the affirmation that relations with the other begin with relations with the self. It is impossible to understand inter-polity dynamics without inquiring on the way rulers imagined their powers over their own subjects and territories. Equally illuminating is the observation that, although these powers might have gradually delineated a »public« law, much of what we now identify as such began in the »private« sphere. The call to remember that people write for a reason is powerful, as is the statement that all scholars are necessarily part of a community whose members, often operating under radically different circumstances, nonetheless engage in dialogue with one another and with past interlocutors. These actors move from the universal to the particular because they constantly apply theoretical discussions to concrete cases, while also perpetually reconsidering the general rule because of concrete decisions.

Following these maxims, yet operating like George Lucas in Star Wars, Koskenniemi departs from the present to return to the past. He seeks to answer the question what happened before the 19th century and explain »the formation and consolidation of the immensely powerful frame that differentiates and juxtaposes sovereignty with property that generates a realm of public authority in contradistinction to private rights and institutions« (11). This *Histoire Régressive* sets him on a path that enables important discoveries yet also obscures many other factors.

Koskenniemi's point of departure, for example, is with the French jurists who labored to define the relations between the French monarchs, popes, and emperors as well as vis-à-vis French lords and vassals. From these debates about royal sovereignty, Koskenniemi draws a compelling argument leading to Vitoria, Gentili, Grotius, and others. Directed at revealing the evolution of royal sovereignty and the emergence of kingdoms, this point of departure makes perfect sense as it describes the very beginning of state-building the way we have come to imagine it: a monarch who reaffirms himself both internally and externally, in order to improve his position in relation to other powers and challengers. At the center of this analysis are relations of subordination: who is subordinate to whom, in which way, and to what degree. Those who engage in the elaboration of these ideas are mostly French and they are moved by the interests of the French monarchs (or their rivals). Some discussants studied in Bologna, and here and there an Italian makes an appearance (James of Viterbo (33) and eventually Bartolus and Baldus (51, 71), but the discussion itself is presented as internal to the kingdom of France.

How would this story change if, instead of seeking to understand how we got here, we observed the multiple possibilities that existed in the past? For example, if we began with the 11th-century investiture conflict or the 12th-century Italian city-states, what would we have captured that Koskenniemi does not?

The investiture conflict featured many of the questions identified in 13th- and 14th-century France. Yet, beginning from it would award a better understanding of why Roman law became such a powerful instrument, and how it intertwined with canon law, theology, and certain practices that from the 11th and 12th centuries came to be identified as sufficiently »customary« to produce a papal revolution.[1] It would affirm that issues of sovereignty were first raised by popes, not secular powers, and that, though much energy was directed at competing with emperors, the biggest challenge was to domesticate the bishops, against

1 The classic work of Harold Berman, Law and Revolution: The Formation of the Western Legal Tradition, Cambridge (MA) 1983, has both admirers and critics but there is much to it that still holds true. See, most recently, Larry Siedentop, Inventing the Individual. The Origins of Western Liberalism, Cambridge (MA) 2014, 196–207, where the author concludes that »the example of the church as a unified legal system founded on the equal subjection of individuals thus gave birth to the idea of the modern state« (207).

whom the popes began a true jurisdictional warfare. The Italian city-states would contribute by focusing our attention on the emergence of jurisdiction (*iuris-dictio*) rather than sovereignty as the first and foremost tool of government and interpolity relations. In the 11th to 13th centuries, Italian municipalities successfully fought against both imperial and papal pretensions and they transited from an older type of relation (feudal?) to a new social reality based on commerce. These polities were also the first to come into intense contact with non-Europeans through trading mostly in luxury goods. Their governments constantly engaged in relations with one another.[2]

Yet, the structures that sustained them were mostly jurisdictional. Rather than unitary bodies headed by a king, these states were imagined as conglomerates made of a plurality of communities and corporations, with government mainly being charged with both announcing and applying the law.[3] In such a setting, public authority was diffused rather than concentrated and relations were not only, not even mainly, vertical and focused on subjection, but had important horizontal and pluralistic dimensions. Of particular centrality was the culture not of property, but of possession, where *dominium* never marked a permanent situation but instead referenced a constantly evolving state of affairs, which required continuous assertion, cultivation, and use. Looking at the investiture conflict or Italian cities would have also clarified the degree to which the different interlocutors, regardless of where they were born, resided, studied, or whom they served, formed part of the same communicative system.[4] Thus, even when they employed their legal imagination at the king's service (114) or were indispensable for monarchs (115), their jurisprudence was never a local affair. Its first loyalty was to the common enterprise of discovering an order that they all believed in, even as they disagreed as to what it was and how it should be best defended.

At stake in these short comments is not the wish to argue that one could have begun earlier or that additional elements could have been considered. Neither do I want to repeat the cliché that law »was conceived in Italy, developed in France and improved in Holland«.[5] Instead, the claim is that remembering these alternative pasts would have affected the way we read Vitoria, Gentili, and others, and would have contributed to the emergence of a distinct narrative that would have followed a distinct thread that could explain the more pluralistic present.

■

2 Niktitas E. Hatzimihail, Bartolus and the Conflict of Laws, in: Revue Hellénique de Droit International 60 (2007) 11–79.

3 Pietro Costa, Iurisdictio. Semantica del potere politico nella iuspubblicistica medievale (1100–1433), Milan 1969; António Manuel Hespanha, A historiografia jurídico-institucional e a *morte do estado*, in: Anuario de Filosofía del Derecho 3 (1986) 191–227; Maurizio Fioravanti, Stato e costituzione, in: idem (ed.), Lo Stato moderno in Europa. Istituzioni e diritto, Bari 2002, 4–36.

4 António Manuel Hespanha, The Law in the High and the Late Middle Ages: The Learned *Ius Commune* and the Vernacular Laws. Southern Europe (Italy, Iberian Peninsula, France), in: Heikki Pihjalamäki et al. (eds.), The Oxford Handbook of European Legal History, Oxford 2018, 332–357; Jean-Louis Halpérin, Est-il temps de déconstruire les mythes de l'histoire du droit français?, in: Clio@Thémis. Revue électronique d'histoire du droit 5 (2012), https://www.cliothemis.com/, who criticizes the move to equate the history of law with the history of the state, and Soazick Kerneis, La forge du droit. Naissance des identités juridiques en Europe (IVe–XIIIe siècles), in: Clio@Thémis. Revue électronique d'histoire du droit 10 (2016), http://www.cliothemis.com/Rome-and-the-Barbarians-the.

5 Luigi Nuzzo, Between America and Europe. The Strange Case of the *derecho indiano*, in: Thomas Duve, Heikki Pihjalamäki (eds.), New Horizons in Spanish Colonial Law. Contributions to Transnational Early Modern Legal History (Global Perspectives on Legal History 3), Frankfurt am Main 2015, 161–191, http://dx.doi.org/10.12946/gplh3, 181. These ideas were already present in Franz Wieacker, Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung, Göttingen 1967, 169.