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Of Sovereign Kings and Propertied Subjects: Beginnings and Alternatives

Chapter 1: Legal Imagination in a Christian World

Julia Costa Lopez* 

1 Introduction

To write a history of legal imagination before the 19th century is no small endeavour, and one that this book undoubtedly accomplishes. Marshalling what seems like an impossible array of literature, sources, languages and topics, Martti Koskenniemi takes the reader on an exploration of the slow, political construction of our present, understood as the series of distinctions that rest upon the foundational notions of sovereignty and property. Koskenniemi's interest is avowedly not writing a linear (pre-)history of international law, but rather exploring the connections between different ways in which legal idiom has been used in the context of specific disputes.

Chapter 1 revisits a site familiar to both legal historians and historians of political thought:¹ the disputes surrounding the power of Philip IV of France at the turn of the 14th century. From the perspective of International Law and International Relations, this is already a breath of fresh air, for it unsettles some powerful assumptions about the medieval/modern divide that have so far underpinned the historical narratives furthered in both disciplines. What is more, through the entanglement of sovereignty and property, and through the exploration of the struggle for the consolidation of authority of the King of France, Koskenniemi also foregrounds something that is too often forgotten in the focus on sovereigns and the relations between them: the foundational and yet contested role of articulations of the relations between rulers and ruled, or in other words, the centrality of notions of political community.

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¹ See, e.g., J. Canning, *Ideas of Power in the Late Middle Ages, 1296–1417* (2011), esp. ch. 1; B. Tierney, *The Crisis of Church and State, 1050–1300* (1964).

At the same time, although it is but a truism that any genealogical endeavour needs to start somewhere and that this somewhere is always to a certain extent an arbitrary choice, the choice is a very consequential one. In this contribution, I want to explore how by focusing on this very specific historical dispute, and framing it in the context of the making of the sovereignty–property relation, the chapter may have too readily inscribed the late medieval imagination within a recognizably modern history, and thereby reduced the resources that allow us to think outside of it.

2 The Problem of the Kingdom

If political disputes and new events are the prompt for imaginative legal argument, what was then the problem that kick-started this history of the legal imagination? As Koskenniemi reconstructs it, the ‘problem’ of the King of France was twofold. On the ‘sovereignty’ side, the king needed to justify his authority: externally, against the universalisms of Pope and Empire; internally, against a variety of feudal relations. On the ‘property’ side, the establishment of the Kingdom of France required an increasing amount of resources, which needed to be extracted from the inhabitants, thus pitting the king’s authority not only against the property rights of subjects, but also against the jurisdiction of the Church. With this setup, the thrust of the chapter is to show how the attempts at consolidating Philip’s power creatively recombined a variety of sources and languages – biblical, theological, legal, polemical – among which the idiom of the *ius gentium* acquired a particular significance. In Koskenniemi’s reading, the *ius gentium* served, first, to naturalize kingdoms and endow them with a history; and, second, to entangle the right of property with the discussions about rule in a way that constituted property as both the object and the limit of political authority.

This reconstruction of legal argumentation at the service of the king can be understood as an instantiation of what I will here call the ‘problem of the kingdom’. To put it briefly: the variety of extant resources that could be mobilized to support Philip’s position provided a variety of avenues to justify *kingship*, from its biblical role, to Aristotelian-theological notions, to canonistic and Roman law treatments. In legal terms, however, the ways in which the *king* related to the *kingdom* were much less developed. The joint articulation between sovereignty and property, in this reading, can be inscribed within broader thinking about the problem of the relation between rulers and ruled.

Koskenniemi’s starting points, just like much of historical scholarship, are the maxims *rex in regno suo imperator est* (a king is an emperor in his kingdom) and *rex superiorem non recognoscens* (a king who does not recognize a superior) which had been deployed in canonistic and French juristic thought throughout the 13th century as a way of addressing the first of the problems mentioned above: the independence of the King’s authority from the universalisms of Pope and Emperor. While effective in doing so, however, the maxims provide little by means of a developed notion of kingship, its origins or the relation between the ruler and the ruled. As Magnus Ryan has noted: ‘The doctrine of non-recognition of a superior did not bring civilians any closer to a

general set of reflections on the relationship between kings and their subjects; quite the opposite: it absolved lawyers from rendering a separate account of royal power in a given kingdom.² The rest of the chapter, and the different readings of the *ius gentium* that it provides, can be read as a masterful way of unpacking how the legal imagination at the service of the king dealt with this 'void' in *rex imperator*. Koskenniemi presents an original argument, which hinges on two steps: first, theological and juristic debate in the context of the Franciscan poverty controversy situated property alongside kingdoms as institutions of the *ius gentium*. Second, as a result, both property and authority, once secured on a reformulated *ius gentium*, were entangled through the notion of the common good.

The common good for Koskenniemi thus stands as the medieval legal imagination's solution to the problem of the kingdom. A notoriously difficult notion, the 'common good' can be understood in a variety of ways. Reconstructing the Aristotelian idiom of Thomas Aquinas, Koskenniemi shows how the common good was tied to organicist ideas of a *communitas perfecta*, whereby, in fulfilling their role, all parts would contribute to the good of the community. But how should we understand *community*? The chapter's most original argument from the perspective of current historical narratives in International Relations and International Law reads the common good in the context of property in a way that directly connects it to early modern thinking on the topic. The striking result of the process is that 'ruling became a kind of political economy, the calculation of the usefulness to the *regnum* of specific types of individual good'.³ And yet, through this reading of the relations between king and subjects – between ruler and ruled – into the long history of sovereignty/property, Koskenniemi ultimately centres the medieval legal imagination on notions of privatized publics – of private individuals as property owners – in a way that may not do justice to the myriad different and contested ways in which authority, the ruled and property were imagined at the time.

3 Kingdoms and Corporations

A starting point for exploring some of these alternatives can be the very same Hermogenian passage in the Digest that, as Koskenniemi points out,⁴ links kingdoms, property and the *ius gentium*: 'From this *ius gentium*, wars were introduced, *gentes* differentiated, kingdoms founded, properties individuated.'⁵ On a strict reading, the passage takes us once again to the problem of the kingdom, although this time starting not with the *rex* but with the *regnum*. For, while kingdoms are founded of the *ius gentium*, Hermogenian does not actually indicate either what a kingdom is or how it relates to

² Ryan, 'Political Thought', in D. Johnston (ed.), *The Cambridge Companion to Roman Law* (2015) 423, at 436.

³ M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021), at 99.

⁴ *Ibid.*, at 74.

⁵ D.1.1.5.

a king. Although, for Koskenniemi, the common good mediated through private property is what helps fill this gap, a passing glance at 13th- and 14th-century juristic uses of this passage shows that there were multiple ways in which the *ius gentium* could be mobilized in order to understand kingdoms, and while helpful in detaching them from Pope and Emperor, not all of them gave the same centrality to notions of property. Nor were they all beneficial for the position of the king. As staunch an apologist of kingship as Marinus de Caramanico, to whom Koskenniemi points as someone who grounded kingship in the *ius gentium*,⁶ could for example entirely bypass the notion of the ruled and use the material meaning of *universitas* to understand the kingdom as a corporation ‘of cities, castles, villages’, in possession of the king.⁷ In contrast, Bartolus de Sassoferrato used the passage to argue that kingdoms were of the *ius gentium* because they ‘were founded because of the unrestrained ability to commit crimes’.⁸

Most immediately addressing the relation between a king and his subjects, however, the ordinary gloss on the words *regna condita* provided an entirely different explanation: kingdoms were founded *a singulis gentibus quae sibi reges elegerunt* (by individual *gentes* who elected kings for themselves). Standing, at the very least, in potential tension with ideas of divine kingship that would understand the power of the king as coming directly from God, this passage seems to derive not only the creation of kingdoms but the authority of the king from his election by a discrete *gens*. In doing so, the passage brings the legitimation of kingdoms to a terrain that resonates with what some have termed the medieval theory of corporations.⁹ Unpacking juristic corporate notions, I suggest, reveals a legal imagination distinct from the one that emerges in Koskenniemi’s reading of the common good.

When looking at the later Middle Ages from the perspective of early modern ideas of the ‘body politic’, it is easy to conflate two loose strands of corporate images that run through late-medieval (legal) imaginaries. On the one hand, as Koskenniemi well highlights, there are a variety of organicist metaphors, where the kingdom is understood as a body within which – or outside of which, depending on variations – the king serves as the head that watches over its overall functioning and common good. In an alternative, and yet not reducible variation drawing on Roman law, the king is a tutor to the kingdom, which is likened to a minor. On the other hand, however, a second, more distinctively juristic corporate image yields an entirely different understanding of the ruled. This understanding developed in the context of the problems and politics of Church governance,¹⁰ characterized as it was by a variety of collective bodies – from cathedral chapters to monasteries, and orders – that raised questions about

⁶ Koskenniemi, *supra* note 3, at 72 n.259.

⁷ Marinus de Caramanico, ‘Proemium to the *Liber Constitutionum*’, in Francesco Calasso (ed.), *I Glossatori e la Teoria della Sovranità* (1951) 177, at 194 (all translations are mine). For meanings of *universitas*, see P. Michaud-Quantin, *Universitas: Expressions du mouvement communautaire dans le moyen-âge latin* (1970).

⁸ Bartolus de Sassoferrato, *In Primam Digesti Veteris Partem Commentaria cum Additionibus* (1589), at D.1.1.5.

⁹ Canning, ‘The Corporation in the Political Thought of the Italian Jurists of the Thirteenth and Fourteenth Centuries’, 1 *History of Political Thought* (1980) 9.

¹⁰ See, however, remarks about possible parallel origins in civil law reflection on northern Italian cities in Conte, ‘Roman Public Law in the Twelfth Century: Politics, Jurisprudence, and Reverence for Antiquity’, in E. Cavanagh (ed.), *Empire and Legal Thought* (2020) 189.

joint ownership, relations between members and authority structures. The resulting understanding of corporations took as its starting point the idea of a collective body of people that is the locus of authority and as such can constitute an authority.¹¹

Through the reference to a *gens* electing a king for themselves, we can appreciate the fundamental differences in legal and political imagination between a foundation of privatized property owners and one of corporations. In the case of corporations, *Ex hoc iure* can be read as setting the stage for a distinctive understanding not only of kingdoms as corporate, but of kings as being created by their corporate people. As is well known, this possibility was actively explored in legal argument by Baldus de Ubaldis:¹² when commenting on the passage in the Digest, and noting a possible contradiction with notions of inherited kingship, he explained that election was possible for provinces outside the empire under certain circumstances: 'if the lords of Castile were to completely die, the inhabitants of the kingdom [*regnicolae*] can elect a king for themselves of the law of nature'.¹³

The contrast between a corporate understanding of the relation between rulers and ruled and the legal imagination of sovereignty/property reconstructed in chapter 1 is patent if we examine Koskenniemi's original reading of John of Paris. This reconstruction draws on a historiography that centres John's Dominican affiliation in the context of the poverty disputes.¹⁴ It presents John's account of kingship as based on a strict separation of jurisdiction and property, with the latter being 'acquired by individual persons through art, labor, or their own industry',¹⁵ and the former 'the task of the king, to whom the owners to property had given the task to preserve the peace and realise the common good and individual rights, now seen as inextricably independent'.¹⁶ The 'election' of the ruler here rests upon the notion of propertied individuals who create authority for the protection of their individual property. In this culminating point of the narrative, Koskenniemi thus firmly embeds the legal imagination in a Christian world in the historiography that has seen in these legal disputes a predecessor to the 'possessive individualism' of later authors such as Locke.

The contrast between an imagination based on propertied individuals and a corporate understanding is perhaps subtle but crucial. Baldus, for example, explains that 'separate men do not make a people, whence a people proper is not men, but a collection of men joined in one mystical body'.¹⁷ Even more clearly, Azo notes: 'the agreement of two or three or even many private or single individuals that do not constitute a corporation . . . does not make a ruler [*iudicem*]'.¹⁸ Thus, in corporation theory, we do not find ourselves in the realm of collectivities as amalgamations of (propertied)

¹¹ Canning, 'Law, Sovereignty and Corporation Theory, 1300–1450,' in J. H. Burns (ed.), *The Cambridge History of Medieval Political Thought c. 350–1450* (1988).

¹² J. Canning, *The Political Thought of Baldus de Ubaldis* (1987).

¹³ Baldus de Ubaldis, *Baldi Ubaldi Perusini in Primam Digesti Veteris Partem Commentaria* (1577), at D.1.1.5.

¹⁴ Coleman, 'Dominium in Thirteenth and Fourteenth-Century Political Thought and Its Seventeenth-Century Heirs: John of Paris and Locke', 33 *Political Studies* (1985) 73.

¹⁵ John of Paris, *On Royal and Papal Power* (1974), 8, quoted in Koskenniemi, *supra* note 3, at 113.

¹⁶ Koskenniemi, *supra* note 3, at 114.

¹⁷ Canning, *supra* note 9, at 13.

¹⁸ Azo, *Azonis Summa Super Codicem* (1966), at C.3.13.

individuals, but rather in a substantive notion of a group constituting precisely something more than an aggregate of individual *singuli*, and with the group itself and not the (prior) individuals, constituting both the subject of rights and, more important, the locus and ultimate legitimation of authority.

4 Medieval Legal Imaginations

Importantly, this can open up an alternative, if not necessarily competing, legal imagination. Corporations as the locus of jurisdiction immediately draw our attention to the way in which power-qua-*iurisdictio* was not only not reserved to the king, but could be seen as distributed (both factually and normatively) through a variety of loci and bodies in society – barons, churches, lords, cities, guilds – leading some to speak of jurisdiction as the distinct medieval semantic of power or even of a jurisdictional paradigm.¹⁹

And it is from this perspective that we can appreciate the significance of Koskenniemi's choice of starting point and the initial reconstruction of the 'sovereignty' problem of the king. For if we start from a notion of jurisdiction as the crucial semantic of medieval authority, Philip IV's problem becomes not only a problem of his independence from Pope and Emperor, nor only one of control over feudal barons or taxation of subjects, but rather one of the active production of a distinction between the sovereign and every other power holder. Similarly, the king–subject relation becomes a species of a broader social reflection on the relation between collectives and authority – a broader reflection that gave rise to important political arguments such as those of conciliarism or what some have seen as popular sovereignty.²⁰ It is from this perspective, for example, that we can understand how Innocent IV, when commenting on his own 1245 decretal of deposition of King Sancho II of Portugal, could at once deploy similar notions of tutorship, inalienability and care of the king for the *utilitas regni*, and immediately add 'the same which we are saying about kings is applicable to dukes and counts and others who have jurisdiction over others'.²¹ Can this really be read through sovereignty/property? This jurisdictional understanding of power, of course, stood in tension with a variety of alternative, existing and actively deployed understandings of kingship that Koskenniemi traces throughout the chapter. Biblical kingship or the Aristotelian *civitas* did allow for the drawing of distinctions that separate kingship from other manifestations of authority – distinctions that now make the distinction between domestic and international meaningful to us. And yet, despite the strong role that these notions of kingship still play in our imagination, these were not the only options.

¹⁹ See, e.g., P. Costa, *Iurisdictio: Semantica del Potere Politico nella Pubblicità Medievale, 1100–1433* (1969); B. Clavero, *Tantas Personas como Estados: Por una Antropología Política de la Historia Europea* (1986).

²⁰ F. Oakley, *The Watershed of Modern Politics: Law, Virtue, Kingship, and Consent (1300–1650)* (2015).

²¹ Innocent IV, *Comentaria Doctissima in Quinque Libros Decretalia* (1570), at X 1.10. Grandi, v. *utilitatem*.

What emerges is thus a contest between a variety of existing legal imaginations for the constitution of political authority, with a variety of possible relations to private property. Recentring the array of available options not only within but also beyond the sovereignty/property frame shows both the contribution and the limitations of this chapter's narrative. With it, Koskenniemi joins a distinguished array of scholars who have repeatedly cautioned us against taking a dramatic medieval/modern break as foundational for our thinking. By relocating the development of the 'immensely powerful frame that differentiates and juxtaposes sovereignty with property'²² distinctly beyond what international legal history had so far considered, he effectively shows us that in our entanglement of sovereignty and property, at the very least we have never *really* been *that* modern. And yet, however powerful the grip of this frame, we should not forget that it has never been the only one. For if we only see that the sovereignty/property frame was there all along, where else are we to search for resources that allow us to challenge it?

²² Koskenniemi, *supra* note 3, at 11.

