"EMPIRE STATE OF MIND"
DECONSTRUCTING PROPERTY AND SOVEREIGNTY IN THE COLONIAL CONTEXT[1]

GIACOMO CAPUZZO[**]

I. INTRODUCTION

Drawing from Koskenniemi's idea of Law as a discourse aimed at persuading individuals to behave in a determined way, this paper will deconstruct Law as a *biopolitical* mechanism designed to capture, control and transform the reproduction of life within a social body.[2]

In this sense, Law affects the multiplicity of force relations among different individuals and groups that constitute society, it may intervene within social conflicts calling winners and losers, but it also impacts on the processes of knowledge production that characterized a particular social, cultural and political context. According to this critique, a specific legal model is not just a set of formal rules about property or contracts, rather it is a mix of legal arguments and technicalities elaborated to frame, structure and re-shape the way in which life is socially and politically organized, perceived and represented in a given legal system.

This is particularly evident in the colonial and post-colonial context, where legal instruments were used to promote a certain kind of social organization (market and state dichotomy) and social groups (white, men, colonizers) and to marginalize other types of structures (traditional and customary laws) and social formations (non-white, women, colonized).

In particular, the paper deepens how property and sovereignty concepts were deployed to create, organize and define the legal, social and political space of the colony.

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[1] This paper was presented at the Critical Legal Conference, held at the University of Warwick, September 1-3, 2017.

[**] Post-doctoral Researcher of Private Comparative Law, University of Perugia.

[2] M. Koskenniemi, *From Apology to Utopia*, Cambridge, 1989, 5 ff.

These western conceptions were employed both as a tool to re-think rural and urban life and as an ideal of progress and modernity. Property and Sovereignty were used in an extremely pluralistic legal environment to elaborate, define and shape the multiplicity of force relations among different individuals and groups that constitute imperial societies, well before the creation of modern national states.

II. A NEW APPROACH TO SOVEREIGNTY IN COLONIAL EMPIRES

Using Laurel Benton's study on Empires and colonial systems, the project will unpack the classical legal thought idea of the separation between property and sovereignty as a legal tool to divide a private and economic sphere from a public and administrative one. Benton defines the idea of Empire as a space of legal pluralism, in which different legal systems co-exist on the same territory, some sort of layered sovereignty it is a concept according to which there are multiple level of sovereign powers connected to the same piece of land.

This conception is based on the assumption that Empires were conceived as completely different entities as the national states, instead of being depicted as a middle stage in the supposed evolutionary path to the state, they have to be conceived as an alternative way to imagine sovereignty, Benton basically deconstructs national state sovereignty moving from the idea that Empires were a completely different type of domination: "Even in the most paradigmatic cases, an empire's spaces were politically fragmented; legally differentiated; and encased in irregular, porous, and sometimes undefined borders (…) Although Empires did lay claim to vast stretches of territory, the nature of such claims was tempered by control that was exercised mainly over narrow bands, or corridors, and over enclaves an irregular zones around them."[3]

Moving from this idea of Sovereignty in Empire, the project assumes that Property was used in those contexts as a legal instrument to socially and politically organize territories and lives within the colony. In another words, Property was part of this layered and pluralistic idea of imperial sovereignty, a different tool deployed to exercise sovereign power over particular territories and populations.

[3] L. Benton *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900"* Cambridge 2010, 5.

This assumption helps to criticize the mainstream formalistic idea of property, its naturalization and at the same time, to propose a different understanding of Property moving on the ideas of Hohfeld[4] and of the legal realist as R. Hale[5] and M. Cohen[6] regarding the concept of this legal instrument and his relation to Sovereignty.

Through Property, colonizers re-framed social hierarchies, re-imagine colonial cities and changed the general economic and political background, transforming completely the social constitution of the colonized population in order to create a more favorable environment for the free market.

In particular, the project deepens how, during Spanish and British Empire, law were deployed to create, organize and define the legal, social and political space of the colony. The western concepts of sovereignty and private property were employed as a mechanism to re-think colony as a series of anomalous zones, to change rural and urban life according to the ideals of progress and modernity, to re-framed social hierarchies and to elaborate a colonial legal discipline.

The relationship between Property and Sovereignty derives its own relevance within the private law field as a tool for understanding the development of legal discourse around the conception of the public and private divide. The existence of a correlation between these two concepts is at the basis of modern private law and constitutes the foundation of the European legal systems since the French Revolution.

European private lawyers are not new to this approach, which seems to designate two areas of competence: one concerning the public power in the hands of the sovereign, and the other that concerns private power, individuals and property. The framework changes if we look at how this dichotomy has been built within the Western legal

[4] Wesley Newcomb Hohfeld's conception of Property law is based on the idea that Property is a bundle of rights, it has any essential of intrinsic aspects and it must be seen as a mutable aggregation of different entitlements and disablements. See W. N. Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", in 23 *Yale L. J.* 16 (1913). Critically Cfr. P. Schlag, "How to do things with Hohfeld", in 78 L. and Cont. Pr. (2015) 185-234.

[5] Robert Hale studied the distributive effects of Property and its relations to the role of the state, see R. Hale, "Rate Maaking and the Revision of the Property Concept", in 22 *Col. L. Rev.* 209 (1922); Id., "Coercion and Distribution in a Supposedly Non Coercive State", in 38 *Pol. Sc. Qu.* (1923).

[6] Morris R. Cohen analyzed the relation between Property and Sovereignty in famous essay, blurring the distinction between these two concepts, see M. R. Cohen, "Property and Sovereignty", in 13 *Cornell L. Rev.* 8 (1927).

discourse over the centuries and the role played by private law institutions such as property in the development of a dominium vocabulary, in the sense of power and control over a territory or a good, which has ensured the legal framework for the power relations that have formed both within the national states, and at the global level between the Metropolis and the Colony.

The pivotal role played by the concept of property and in general by private law in the diffusion of legal models and of western culture and above all in the construction of a legal discourse that allows the occupation and the domination of territories through the idea of Empire, which through the ages has remained intact, during the decolonization and the subsequent realization of the global market.

III. BUILDING EMPIRE: THE CONCEPT OF PROPERTY IN THE SPANISH EMPIRE

This legal discourse could be traced back to the legal and theological thinking of late Spanish scholasticism, in particular to the scholars and jurists gathered around the University of Salamanca.

The main issue faced by the Salamanca scholastics was the need to develop legal rules disciplining the conquest of the New Indies by the soldiers of fortune and the Spanish explorers. These jurists were strongly influenced by Catholic morality and disdained the massacres and abuses that were perpetrated by western *conquistadores*.

The main problem was to identify a set of rights that could apply to both the conquerors and the conquered. A system of rules that therefore binds one and the other to respect certain common principles. In Europe, this question was easily solved by recourse to the Christian faith, all individuals shared the same religion and as believers were included in what was called *Christian Respublica*. This belonging granted a series of privileges to individuals (obviously based on the status) that could not be extended to the inhabitants of the territories undergoing conquest because they were not believers. Vitoria, De Soto and the other jurists of the School of Salamanca are therefore forced to build a set of rules that does not depend on religious affiliation, which allows the protection of some principles they considered mandatory of Catholic morality and, at the same time, not prevent the political project of the Spanish Emperor to expand overseas trade with the Americas.

Their solution is built on the elaboration of a legal consciousness[7], based on a series of private law principles and concepts, strictly connected to mercantile trade. According to this new legal framework, all individuals have the right to trade and to bargain their goods with other individuals, they can therefore freely exchange what is within their property with individuals belonging to other populations. Moreover, a population or an individual cannot escape this exchange, it can not refuse to trade with those who propose to do so. In the case of such a refusal, those who are denied the opportunity to exchange their assets may resort to violence as an extreme weapon of retaliation. Such a system met all the requirements recognized by the Spanish jurists. It placed on the native populations of the territories under conquest a right/obligation to trade their property with the conquerors and it protected them from violence and killing, which could only take place as a response to a refusal of the natives to exchange.

This concept, however, necessitated a construction of the concept of Property, therefore it was based on the redefinition of a right on goods that was valid both for the native population and for the conquerors. At the same time, it was essential to distinguish which goods could fall within the scope of the right / obligation to exchange and which were protected from such trade.

The right of property became the fulcrum of the system of domination developed by the Spanish scholastics not only because it allowed to increase mercantile trade with the Indies, but because it established a secular system of exchange on a legal basis, which was based on the ownership of property both by the European conquerors and by the indigenous peoples.

The idea underlying such a turn was precisely in the conception of property advanced by scholasticism, a conception very similar to that developed later by Locke and by natural law scholars and arrived until the drafting of the French code. The individual is born with needs: to feed, wash, dress and entertain himself, so he has the right to those goods that are necessary for his subsistence and his entertainment.

[7] Duncan Kennedy develops the idea of legal consciousness as "the idea of legal consciousness is that people who practice legal reasoning do so within a pre-existing structure of categories, concepts, conventionally understood procedures, and conventionally given typical legal arguments" in Du Kennedy, Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, in 3 Res. L. & Soc. 3 (1980), 8.

Conquerors therefore have ownership over all the goods they brought with them from Europe, on their ships and on the portions of territory occupied by them and their properties. Likewise, Native populations, although they cannot be considered equal in all respects to the European colonizers, have a right of ownership on the territory that they occupy in a stable way and on the goods that allow their subsistence. The right / obligation to exchange arises precisely on the basis of this concept of ownership. If I have a right to any good that makes it possible for me to support myself, in case I can not find such good through employment, I will have to procure it through commerce. The refusal to exchange is therefore a denial of the means of sustaining and justifies the use of violence.

Next to the right to property, Spanish jurists place jurisdiction. In the overseas territories there is no possibility of recourse to a judge who establishes which goods can be placed on the market and those that must be excluded. Jurisdiction thus becomes the completion of the right to property, because through the judicial body the limits within which the exchange can take place and the value to be attributed to the goods put on the market are established. In this way the scholastics reject both the jurisdiction of the Pope and that of the Emperor, placing the jurisdiction over their own property and therefore on their own territories, jurisdiction that derives from the relationship with the things that belong to him.

As Roman law before, Spanish jurists try to define the legal nature of things[8], that is to say their qualification, their translation into abstract concepts. This process is essential to develop the management of human affairs through law. It is a foundational procedure, which creates the ordinary regime of goods, thus it constitutes itself and the sphere of private relations it regulates.[9] But this means that behind each legal determination there is a power of government, which decides the latitude of private traffic. In this sense, the Salamanca school elaborates a legal discourse to organize life within the Colony. If Roman jurists conceive the legal qualification of goods through judicial intervention, the Spanish ones use private law concepts. They define the legal nature of things within the colonial space according to the principles, the mode of thinking, the vernacular and the conceptions of private law.

[8] G. Agamben, "Introduzione", In Y. Thomas (a cura di M. Spanò), *Il valore delle cose*, 2015.
[9] See Y. Thomas, *Vitae Necisque potestas. Le pére, la cité, la mort*, in Id. (ed.) *Du châtiment dans la cité, Supplice corporels et peine de mort dans le monde antique* (Table ronde, Rome 9-11 nov. 1982).

IV. A DIFFERENT APPROACH: CORPORATIONS AND THE CONSTRUCTION OF BRITISH COLONIAL EMPIRE

Moving from this point of view, Empires are framed using property and private law vocabulary. There is a main example of this layered idea of social organization, of this use of private law concepts to elaborate Sovereignty in the colonial context: the corporation system within the British Empire.

In the Medieval and early Modern period, contrary to the actual idea regarding corporations, they were forms of "commonwealth", *bodies politic*[10] responsible for governing "over the economic, political, religious, and cultural life of those under their charge, with their own claims to property rights, and immunities at law that generated claims to jurisdiction, allegiance, and subjects, and citizens."[11] Whether in joint-stock companies, corporate colonies, incorporated municipalities, or various other institutional forms, the corporation ensured that empire was defined by layers of competing and overlapping jurisdictional authority.

Strictly connected to the Corporation was the legal instrument of the Charter. They were used in the British Empire colonial context to grant rights to explorers over new territories. Basically Corporations or any kind of recipient were allowed to extract any kind of utility from the land, tributes included. At the beginning of the XVII century, corporations started to be used in any kind of colonial enterprise. They became entities of quasi-sovereignty, based on the occupation and possession of a new territory sanctioned by the Crown's Charters.

Colonial settlements possessed the powers of incorporation, of acquiring, purchasing and possessing lands and hereditaments within the realm, of property and joint stock, of direction and government, of permission of emigration and of transporting emigrants, of trading, making settlements, and of establishing factories, to build forts and otherwise fortify their possessions; to make war and peace with the natives, not Christians…of establishing government, and of appointing governors and all

[10] F.,W. Maitland "The Crown As Corporation". 17 *Law Quarterly Review*. (1901), 131–146.
[11] P. J. Stern, "Bundle of Hyphens" Corporation as Legal Communities in the Early Modern British Empire", in L. Benton, Richard J. Ross (Eds.), *Legal Pluralism and Empires, 1500-1850* New York and London 2013, 21.

necessary officers, civil and military, as have been given to all other colonialists and emigrants.[12]

V. CONCLUSION

In other words, corporations were one of the many layers of British Imperial sovereignty, and the source of such power derived from their connection to the property they hold, through the Charters, on behalf of the Crown. Such sovereign power was so strong that when the same Crown decided to centralize the control over the Empire and withdraw the Charters, it turned to a particular legal remedy, the writ of *quo warranto*, a prerogative remedy that could be used only by the ruler in order to ask to their subjects "by what warrant", by what authority the corporation claim to exercise the control over a particular territory within the British Empire.

The aim of the project is to study this genealogy of property and sovereignty in the colonies, in order to develop tools to deconstruct this and the other dichotomies (public/private for example). It seems extremely interesting to take them into question as the problem of private sovereignty and the decline of the idea of state across the globe are actual problems in the wake of globalization.

[12] T. Posnall, *The Right, Interest, and Duty of Government, as Concerned in the Affairs of the East Indies*, London 1773, 7.