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Alternative Pasts and Alternative Futures

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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 power 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 compelling as well as exceptionally important.

Koskenniemi draws a compelling argument leading to Vittoria, 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. 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).

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whom the popes began a true jurisdictional warfare. The Italian city-states would contribute by focusing our attention on the emergence of jurisdiction (\textit{jurisdictio}) rather than sovereignty as the first and foremost tool of government and interpoltiy relations. In the 11th to 13th centuries, Italian municipalities successfully fought against both imperial and papal pretensions and they transitioned 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.\footnote{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.\footnote{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 \textit{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.\footnote{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».\footnote{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.

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