

Professor Koskenniemi's erudite lecture, 'Empire and International Law: The Real Spanish Contribution' (UTLJ 61.1) examines the thinking of the Spanish scholastics from three perspectives. He offers a reconstructive interpretation of the reasoning that the Spanish scholastics engaged, a contextualization of the issues they took themselves to be addressing because of the context in which they wrote, and an account of the role that their reasoning served in subsequent rationalization of international law's indifference to private power. In this brief response, I say both something about the distinction between these perspectives and something about the Scholastics' signature distinction between the two forms of dominium, private property and public law.

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As a general matter, a single distinction can be of interest in a number of different ways: we might wonder what preoccupations led someone to draw it or how it was taken up by later generations who inherited it; or we can try to understand it on its own terms, not *why* it appeared when it did or seemed important to those who drew it, but *what* it distinguishes from what else, and *how* those putatively distinct terms are distinguished. An adequate grasp of the problems, puzzles, or preoccupations that led someone to draw a distinction may enable a subsequent generation to understand how what now seems obvious first came to be taken to be so. Again, the way in which ideas are received – for example, as rationalizations, over-generalizations, or perversions – may well be of the first importance in understanding how they are taken up in contemporary institutions. But, for all that, the perspective described above – trying just to make sense of the claims made by thinkers in an earlier age and of the relations between these claims, considered in abstraction from the context that made them urgent for them and from the way in which they classify and categorize our own social, legal, and political world – has a certain kind of priority. There are times when this priority is at the centre of the discussion in Martti Koskenniemi's erudite lecture,

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'Empire and International Law: The Real Spanish Contribution,'¹ as when he talks of the central contribution of the Spanish scholastics. But the idea of a central contribution is deployed in different ways by each of our three inquiries. It may mean the fundamental organizing idea, it may mean the way in which they engaged the issues of immediate concern to them, or it may mean the main influence of their writings on the world that followed.

There is something striking about finding the roots of contemporary institutions and vocabularies in the works of writers for whom providing the right vocabulary for confession was a central preoccupation and for whom 'infidel' was not just a religious but a political category. Francisco Suárez and Francisco de Vitoria cite scripture in support of their positions but are alarmingly ready to argue from non-scriptural authority, appealing to the positions of philosophers (the A-team of Aristotle, Augustine, Aquinas), popes (Gregory), and the '*jurisconsultus*' Justinian. These aspects make the Spanish scholastics seem to exemplify Bertolt Brecht's remark on reading Descartes, that he had encountered someone who lived 'in a completely different world.'² In other places, the scholastics seem to embody the skills a lawyer dreads in opposing counsel: the apparent ability to deploy a battery of distinctions to get to pretty much any conclusion whatsoever. But the organizing ideas they use to work their ways through these problems are different. They seem to be very much a part of our world because the scholastics are puzzled about what they, like us, regard as a recurring question of legal and political life, the childlike question, 'Why do you get to make the rules?'

I want to take up the question of scholastic contribution in the narrow sense of 'fundamental organizing idea' offered above. I proceed in this manner on two grounds. The first is that, although the scholastics may have been mostly concerned with providing materials for confessional purposes, to salve or challenge the consciences of emperors and conquistadors, they found themselves subject to a pressure towards generality that almost always arises in social and legal contexts. Perhaps some questions can be resolved through a purely contextual casuistry. But the questions that issues of conquest and confession placed before the Spanish scholastics weren't like that. And even if they were, the relevant authorities whose writings were available to them always talked in general terms. The justification or otherwise of the conquest of the Indies could not turn on something as particular as the fact that Spain was the conqueror rather

1 Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' 61:1 UTLJ [this issue]; all subsequent references to Koskenniemi are to this article.

2 Bertolt Brecht, cited in Ian Hacking, *Historical Ontology* (Cambridge, MA: Harvard University Press, 2004) at 32.

than the conquered or even as the fact that its power was exercised in a part of the world unknown to Aristotle or Aquinas. The pressure to generality fed naturally into the more general but also familiar question of the rights of *dominium*. The subject matter of the conquest was the extent and nature of an individual's *dominium* over a piece of land or of a ruler's *dominium* over his subjects and his territory. These provided the only way of thinking through extraterritorial exercises of power. So, by looking at the general concepts and distinctions the scholastics employed, we see, not just why this was a problem for conscience, but why it was a problem and which problem it was. Second, although it would be difficult to overestimate the human capacity for rationalizing base and selfish activity, rationalization always tries to give reasons; in this, rationalization is the purest form of hypocrisy, the flattery that vice pays to virtue. The reasons may not fit the particular acts being rationalized nearly as well as the rationalizer might hope. Abstract ideas never apply exactly to particulars, and disingenuousness can always get some leverage from uncertainty of application. But the mere fact of people trying to rationalize behaviour that they thought needed some kind of rationalization – behaviour that looked like it might be contrary to the natural law or the rights of human beings – shows that they were attuned to those concerns. Finally, the distinctions attract our attention because the general questions that concern them haven't gone away and won't: the question of what justifies one person's having power over others, whether to exclude, as in property, or to command and enforce, as in political power, is inseparable from the question of what types of dominion there are. Koskenniemi suggests that they provided a universal foundation for what were contingent features of the early modern European situation, and so paved the way for the triumph of those features. Without denying the contingency of those features – I have no idea whether or how history might have happened differently if the earth's continents had remained connected, or developments in navigation had not coincided in just the way they did with religious wars, or Aristotle's works had never been reintroduced to Europe – those contingent features faced the doctors of Salamanca with questions that they felt compelled to answer in recognizably universal terms. They talked in (precursors of) the modern and contemporary vocabulary of individual freedom; their concern with *dominium* shows up because they recognized the importance of individuality. And that question is still with us. Arguments that sought to demonstrate that the territorial state, public law, and private property, as well as trade among those states, were consistent with our common humanity may not have succeeded completely. Certainly, the particulars to which they sought to apply them are not the precise situation in which we find ourselves. And the obligations that they articulated have been honoured more in

word than in deed. For all that, the thought that these historically contingent developments have a special moral status is one that is worth taking seriously.

This theme of the universal terms in which the Spanish scholastics framed the issue of conquest also connects with a line of development that Koskenniemi traces but does not present as figuring centrally in what he characterizes as the fundamental contribution of the Spanish scholastics to international law. As he points out, after rejecting claims that the Spaniards had inherent political authority over the Indies, Vitoria gave them a different, 'protective' role, confined to protecting converts against the exercise of usurpation and political power by their rulers. As Koskenniemi frames it, having declared the Spanish colonization of the Americas illicit, the scholastics went on to justify its *continuation* on grounds of protection of converts and then extended this protection to missionary activity. Yet if political power could be used to protect believers from the infidels, the rationale for its use was strikingly non-political. On this understanding, a just war was still exclusively a defensive war: the defensive posture was not with respect to the state under attack but rather to innocents under attack.

The central innovation on which Koskenniemi focuses does not concern the protection of converts but the seemingly very different theory of private property and the role of the state in protecting it. That role led the Spanish scholastics to give states 'universal jurisdiction' with respect to the enforcement of private rights. The thing that gives rise to empire, he suggests, is this readiness to step in to enforce.

The religious and economic dimensions of these imperial arguments are distinct, but parallel: just as the colonial powers claimed to be protecting converts, so they claimed that the administrative role for empire arose from the need to protect private property claims. Those claims, though only perfected in a political order, were more basic than that order, because, as they understood Aquinas's rationale, private property was always a permissible departure from common property on the ground that there would be more usable things in more useful condition as a result. Koskenniemi may be mischaracterizing this when he identifies it as a utilitarian rationale; Thomas's argument comes closer to regarding private property as a permissible form of delegating the stewardship that humans were given over the earth, a way of taking better care of the property by assigning the care of particular things to particular persons. The scholastics regard political powers in a parallel way, either as a permissible departure from the common ownership of the earth justified by utilitarian arguments or as a permissible delegation of it. Either way, property and political powers are both legitimate forms of *dominium*, and the protection of the former is incorporated into the legitimate scope of the latter.

Koskenniemi thus shows how the same pattern of thought that, in the hands of Vitoria and Suárez, generated *obstacles* to the *direct* exercise of political power against other countries – growing out of the fact that, put in universal terms, the right of rulers to rule didn't depend on who the ruler was but had its origin, instead, in the benefits of rule and so applied to the societies already existing across the Atlantic – also generated a *rationale* for the *indirect* exercise of political power, focusing on the ways in which it could be used to protect antecedent claims to private property.

Both examples, the protection of converts and the protection of traders and acquired property, have a peculiar structure to them. In both cases, the scholastics provided a way of justifying intervention on the ground that interference with past intervention would be prevented. Missionaries are introduced, convert the inhabitants, and then the military can come into protect the converts. But, of course, the military can also come in to protect the missionaries. Or, perhaps, the missionaries followed the military. So be it. In the same way, traders must be protected as they trade, and then, if the protectors of trade are threatened, further intervention is warranted. Although the parallel is inexact, it is a little bit like generating a licence to enter another person's land to retrieve property by putting the property there in the first place.

This giving-with-one-hand-and-taking-away-with-another structure arises both in the example of converting and then protecting converts and in the example of merely visiting and then protecting acquired property. The initial arrival of the missionaries was under the sword, as were the initial visits, and, whatever might be said in favour of extending the right to visit to generate a right to settle peacefully in another country, this new right does not, without much more, apply to traders or settlers who arrive with a conquering army. The problem is not that protecting people from religious oppression or even protecting private property is not a legitimate state purpose, or perhaps even legitimate grounds for war; it is that the universal principles to which the Spanish scholastics appeal don't seem to apply in cases where the converts or settlers were placed there.

More generally, Koskenniemi's narrative of the changes in the international order following the Spanish Conquest might be used to support the conclusion that the problems of domination born of empire have less to do with the distinctions drawn by the school of Salamanca than with the distorted and selective application of those distinctions to particular cases. As he rightly points out, for Vitoria and Suárez, property and commerce can only be fully grasped if we move away from the Thomistic idea of a just price and replace it with the modern idea that the just price is the market price as set through free exchange in the absence of force and fraud. The conceptual apparatus

through which they can be understood to make space for capitalist relations is organized around this thought. From this standpoint, however, among the most distressing aspects of the world's commercial order is the regular tendency to overlook the distinction between the two forms of *dominium* and to justify the use of force to protect private holdings that were themselves acquired through force.

So, although the conceptual resources for thinking about international trade without formal empire have their roots in the Spanish scholastics, most of the actual transactions have their roots in the background of exercises of political power, both directly and in authorizing exercises of both force and fraud. Bringing in soldiers on the pretext of trade but with the intent to foment internal wars is not replacing one form of *dominium* with another; it is combining them, as is invading or overthrowing the government to protect or reclaim property. The word 'decolonization' discloses this, but so, too, did the readiness of private traders to do business with dubious rulers who did not even pretend to honour even the minimal requirement that the Spanish scholastics sought to place on the right to rule and the duty to govern.

In emphasizing the moral importance of the differences between the two forms of *dominium*, I don't mean to suggest that all is well in either the world order or in the legal institutions that purport to govern it. In some ways, like some of their successors, Grotius, Vattel, and even Pufendorf, the thinkers Koskeniemi discusses are 'miserable comforters,' who are 'always duly cited in justification of an offensive war, though there is no instance of the state ever having been moved to desist from its plan by arguments armed with the testimony of such important men.'³ These men reject the idea that people are to be used and so are hard to press into service in rationalizing wrongdoing. But pressed they are.

Writing at the beginning of the modern state system, then, the Spanish scholastics seem to have introduced an entire battery of distinctions, each of which could be thought to cut more than one way. No doubt, they opened up space for the idea of economic domination without political domination, an idea that is, once more, easy to cast in either a positive or a negative light. It can be made to look very bad if it is thought of as a way in which some people exercise power over others. It can also be thought of as a way in which people make their own arrangements, rather than being subject to imperial powers. Of course, the latter way of thinking of things is only compelling if we have good reason to suppose that the

3 Immanuel Kant, 'Toward Perpetual Peace' [1795] in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, translated by Mary Gregor (Cambridge University Press, 1996) 8:355; volume and page numbers are from the Prussian Akademie edition of Kant's *Gesammelte Schriften*.

trade itself is not, finally, voluntary in name only, the product of circumstances growing out of centuries of force, fraud, and Empire.

The Spanish scholastics were notably unsuccessful in their attempts to shape Spanish conduct in the New World. If anything, Hobbes's dismissive remark, '[B]ut for the multitude, Suárez and the schoolmen will never gain them because they are not understood,' applies to the rulers even more than to the multitude.⁴ The distinction between recognizing a people's claim to be free from outside interference, on the one hand, and allowing trade, on the other, is important.

As Koskenniemi meticulously documents, the same distinction has been used more than just to consecrate capitalist social relations; it has provided cover in international law for exercises of power by private corporations that no modern state would be thought entitled to exercise. But for all that, many of the worst excesses flow not from *drawing* the distinction but from *ignoring* it, from mixing political power with private property: slavery collapses the distinction in one direction in the worst possible way; corruption, cronyism, and the citizens of a state being held responsible for the private debts of their rulers collapses it in the other. It is, as Vitoria writes, quoting Horace, 'unjust . . . that for every madness of their kings, the Greeks take the beating.'⁵ The distinction that the Spanish scholastics gave us enables us to understand those wrongs.

4 Thomas Hobbes, 'An Answer to Bishop Bramhall's Book Called "The Catching of the Leviathan"' in *The English Works of Thomas Hobbes of Malmesbury*, ed Sir William Molesworth (London: John Bohn, 1811) vol 4, 279 at 330, online: Google books <<http://books.google.ca/books>>.

5 Francisco de Vitoria, 'De Indis relectio posterior, sive de iure belli hispanorum in Barbados' translated by John Pawley Bate, in Ernest Nys, ed, *De Indis et de iure belli relectiones* (New York: Wiley and Sons Ltd. 1964) at 187.

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