INDIRECT SOVEREIGNTY THROUGH PROPERTY RIGHTS

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INTRODUCTION

Property rights—for example, direct property rights under the international intellectual property rights protection system or contractual rights creating assets in the form of debts, including financial debts in the international financial and monetary system—can confer on the property holder or creditor powers which share the characteristics of sovereign powers in some measure. Because property rights create social relations between people with respect resources—"things"—and powers over these resources—where the person is exclusively entitled to the resource, perhaps not in law, but factually and politically—can turn into powers *over* people. This conception shares features of sovereignty as understood in the early modern period. The individual property owner is hardly relevant to this phenomenon; instead, the important players are the property owners of a bundle of all forms of property rights, including land, chattels, and intangible assets—

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such as financial assets—held world-wide: typically, multinational corporations. Unlike modern liberal democracies where sovereign powers are ultimately vested in the people and delegated to representatives in an elected parliament, corporations, like banks or business entities in the manufacturing or service sector, lack the checks and balances that developed in states over the last three centuries. The general meeting of shareholders of a public limited company is in no way comparable to a parliament. The decision-making body for a private enterprise, with its limited interests and specialized scope of activity, was not designed for this role.

One notices that this "corporate" sovereignty shares certain features coming out of the conceptual development of sovereignty in political philosophy in the sixteenth and seventeenth centuries. Thus, there is a partial return to the beginnings of this development. While the modern theory of state sovereignty evolved in the late nineteenth and the twentieth centuries—especially in Germany—it has very little to contribute to the analysis of the present problem; instead, the property-oriented conception of state sovereignty of the seventeenth century more closely resembles the current phenomena. The authors of the early modern period carved out and emphasized the distinction between property and sovereignty, but it was recognized that the conceptual similarity of both was still sufficiently close. Only some critical authors, from the first third of the twentieth-century, have remarked that this bifurcation has never really operated in social reality.

This article shows some of the ways in which certain entities—fundamentally private law in nature— have recently been empowered by states or the European Union (EU) to enjoy property and contractual rights to such an extent that they effectively obtain a certain quasi-sovereign status. The article then examines the evolution of the concept of sovereignty and its connection with property in political philosophy and legal theory to obtain a theoretical basis for an analysis of present developments.

The following discussion presupposes a certain meaning of the terms "property" and "sovereignty." For present purposes, it suffices to say that property rights confer exclusive rights in objects or "things," whether tangible or intangible, such as a house, an apple, or an intellectual property. A modern concept of property would detach the legal construct of "property" from any possible materiality of a thing: the property right creates the property for the purpose of the law; the physicality, if any, of an object is only a social reifier that the property right represents.[1] With this concept of *dematerialized* property one can explain phenomena of physical chattels, land, incorporeal objects, such as debts, money and intellectual property rights, even "investment" or goodwill which all have, at least economically, the status of property. The property rights are enforceable against the whole world, *erga omnes*; everyone is bound to observe these rights.[2] This is in contrast to contractual rights that bind only the parties privy to the contract or other personal rights arising from tort or other obligations.[3] In this article "property" will be understood—consistent with the

[1] Andreas Rahmatian, *Intellectual Property and the Concept of Dematerialized Property*, *in* 6 MODERN STUDIES IN PROPERTY LAW 361, 361–70 (Sue Bright ed., 2011).

[2] *See* MICHAEL BRIDGE, PERSONAL PROPERTY LAW 1–3 (4th ed. 2015) (for English law).

[3] *Id; see also* FRANZ BYDLINSKI, SYSTEM UND PRINZIPIEN DES PRIVATRECHTS 171–74 (1996) (generally and for the German legal family in particular); NADEGE REBOUL-MAUPIN, DROIT DES BIENS 111–12 (3eme ed. 2010) (for French Law).

terminology of English law[4]—as comprising tangible, intangible, and pure intangible property—which includes debts, shares, other securities, and intellectual property rights. The European Court of Human Rights interprets the term "property" in Art. 1 of the First Protocol to the European Convention of Human Rights in a similar way.[5]

Lawyers distinguish between two forms of sovereignty. The first form is the sovereignty of the state internally, which is the supremacy of governmental institutions and subject to national public or constitutional law. The second form is the sovereignty as the supremacy of the state as a legal person founded on the fact of territory within public international law.[6] It will become apparent that this distinction is less relevant for the present problem than one might expect.

I. EXERCISE OF POWERS RESEMBLING SOVEREIGN POWERS THROUGH PROPERTY RIGHTS: EXAMPLES OF INTERNATIONAL TRADE AND FINANCIAL LAW

A. *International Free Trade Agreements (TTIP, CETA)*

International trade rests increasingly on free trade agreements, being international treaties of commercial law. One of these treaties is currently being negotiated between the United States (U.S.) and the EU, the Transatlantic and Investment Partnership (TTIP), although the recent election of Donald Trump as President of the U.S. may put an end to these negotiations. TTIP assumes that "[t]he obligations of the Agreement shall be binding on all levels of government."[7] TTIP has been said to be not only about trade, but also about "generating regulatory coherence and breaking down barriers to transatlantic commerce" to generate growth and become a "second transatlantic anchor" alongside NATO.[8] TTIP is also meant to be a challenge to the multi-lateral World Trade Organization (WTO) trade system in which, according to one commentator, a number of emerging economies do not want to open up to "open rules-based commerce"—that is, free trade and an unregulated market—and resort to national protectionist regulatory rules.[9] Put differently, national economies of developing countries should no longer seek to protect their markets through domestic regulations against cheap—and often subsidized—western products—usually from the EU—that may destroy their domestic economy and contribute to the current European refugee crisis.

The same objectives of efficient, high standard regulatory alignment and modernization apply to the system of Investor-State Dispute Settlements (ISDS) that TTIP will contain.[10] The ISDS are a principal point of grave concern;[11]

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[4] BRIDGE, *supra* note 2, at 13–19; J. E. PENNER, THE IDEA OF PROPERTY IN LAW 23 (1997).

[5] *See e.g.*, CLARE OVEY & ROBIN C.A. WHITE, JACOBS & WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 345 (4th ed. 2006).

[6] MALCOM N. SHAW, INTERNATIONAL LAW 487 (6th ed. 2008); *see also* GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 394, 406, 427, 435 (1900) (Sovereignty is a result of the state powers, being one of the constituting elements of the state as territory, people and state powers (*Staatsgebiet*, *Staatsvolk*, *Staatsgewalt*)).

[7] *See* Council Directives 11103/13, Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, art. 4, http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf.

[8] Daniel S. Hamilton, *Transatlantic Challenges: Ukraine, TTIP and the Struggle to be Strategic*, 52 J. COMMON MKT. STUD. 25, 32 (2014).

[9] *Id*. at 34.

[10] *Id*.; *see also* Council Directives, *supra* note 7, at arts. 16, 23.

similar measures exist in numerous international investment agreements and trade agreements already in force, but are comparable to TTIP, such as in the North American Free Trade Agreement (NAFTA).[12] The ISDS will be enforced through arbitration—that is, by private courts with judges selected by the parties to the arbitration with a procedure not open to the public or public scrutiny.[13] Here, a paradox of neo-liberalism becomes apparent: while neo-liberalism, or, more precisely, market fundamentalism, relies heavily on law—for the functioning of investment protection, the markets and arbitration as the form of dispute settlement with awards enforced by state courts—it rejects or circumvents the state and its legislative and judicial organs—as the sources of law, being either statutes or court decisions.[14] In the present context, the investment protection of foreign investors which ISDS guarantees *in principle* is to be seen as a property protection of foreign companies—"in principle" is a necessary qualification, because the arbitration scheme permits companies to raise investment protection claims, but there is no guarantee that the decision of the arbitral court will sustain such claims. Public policy interests, especially about health, labor rights, and environmental protection,[15] are increasingly taken into account—or so we are told.[16]

While the negotiations for the TTIP agreement are currently ongoing—and have not generally been made public or followed the norm of transparency in other ways[17]—one can obtain good insight into the regulation of such a ISDS system by looking into the sister agreement between Canada and the EU, the Comprehensive Economic and Trade Agreement (CETA)[18]—since the negotiations have been completed. This agreement has been signed and, in all likelihood, will enter into force. Critics have said that the controversies and movements seeking to stop TTIP would then become less relevant because U.S. companies could pursue arbitration through their Canadian subsidiary companies. According to the consolidated CETA text, the investment—that is, property—protection is wide, since the market access prohibitions are extensive[19] and "investment" is defined very broadly.[20] TTIP is likely to be very similar.[21]

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[11] Mark Weaver, *The Proposed Transatlantic Trade and Investment Partnership (TTIP): ISDS Provisions, Reconciliation, and Future Trade Implications*, 29 EMORY INT'L L. REV. 225, 253 (2014–2015); George Monbiot, *The TTIP Trade Deal Will Throw Equality Before the Law in the Corporate Bonfire*, THE GUARDIAN (Jan. 13, 2015, 3:46 PM), https://www.theguardian.com/commentisfree/2015/jan/13/ttip-trade-deal-transatlantic-trade-investment-treaty (instructive summary of the popular reservations against TTIP).

[12] *See generally* North American Free Trade Agreement U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA] (National Treatment, Most Favoured Nation Treatment rules, and so on.); Weaver, *supra* note 11, at 233.

[13] NAFTA, *supra* note 12, at arts. 1115–20.

[14] COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM 63 (2011); *see also* Council of the European Union, Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-Commerce, July 12–17, 2015, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

[15] *See* Negotiations for the Transatlantic Trade and Investment Partnership, INI 2014/2228 at 2(b)(vii) (2015).

[16] Roland Kläger, *The Impact of the TTIP of Europe's Investment Arbitration Architecture*, 39 ZEITSCHRIFT FUR DEUTSCHES UND AMERIKANISCHES RECHT 68, 70 (2014).

[17] *See* Weaver, *supra* note 11, at 254, 258–59.

[18] Hamilton, *supra* note 8, at 34.

[19] Comprehensive Economic and Trade Agreement, EU-Can., art. 10.5, Aug. 5, 2014, http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[20] *Id*. at art. 8.1. "Every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." This is followed by a non-exclusive list. *Id*.

Even if arbitration tribunals are more considerate than the critics fear, the mechanism is necessarily property protection-friendly—whereby "property" is understood here in the widest possible sense as "assets" or, according to CETA, "investments" that even include mere chances and opportunities that may later translate into tangible property.[22] Furthermore, while an investment protection claim is subjected to judicial scrutiny, the court is not a national and public court of law; nevertheless, it is empowered to make decisions of great importance for the public and national interest.[23] Decisions may even lead to amendments to existing legislation in the health sector for example, or require changes to employment legislation—at the behest of a body that is not publicly accountable as an authority, ultimately before an elected parliament within the constitutional framework of a modern liberal democracy. Thus, foreign companies can obtain protection for private property rights through the ISDS investment protection system that are potentially contrary to the policy decisions and legislative measures of elected governments. This can amount to an encroachment on a state's sovereignty[24] and, in effect, a limitation of the freedom of a national parliament to pass laws. The EU Commission has addressed some of these concerns when it embarked on a roadmap for further negotiation of TTIP; whether the concerns have been addressed adequately remains to be seen.[25] The EU public consultation on ISDS produced mostly opposing replies, except from large corporations.[26] The Investment Court system proposed by the EU Commission in November 2015, as an alternative to the original version of ISDS,[27] changes little because it is not a real system of courts and not subject to review by the CJEU or other courts.

B. *International Property Rights: Intellectual Property*

However, one need not speculate about the outcome of ongoing negotiations of a comprehensive trade agreement with a diffusely contoured property protection regime. One may rather look at an example of an already existing and implemented treaty in which straightforward property rights of foreign private entities obtain world-wide protection: intellectual property rights in the

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[21] According to a document leaked by Greenpeace in April 2016 on the negotiation regarding the liberalization of investment, definitions, market access, national treatment, performance requirements, the EU and the U.S. "have engaged in an in-depth comparison of their respective approaches, with a view to identifying areas that would require further substantive discussion in future rounds. Work towards a consolidated text has progressed, notably on definitions, performance requirements and senior management and board of directors." *Tactical State of Play of the TTIP Negotiations*, at para. 1.3 (Mar. 2016) https://wikileaks.org/ttip/Tactical-State-of-Play/Tactical-State-of-Play.pdf.

[22] Comprehensive Economic and Trade Agreement, *supra* note 19, at art. 8.1.

[23] As to the question of publicity see *id*. at art. 13.20 (on choice and the list of arbitrators chosen on the basis of objectivity, reliability, and sound judgment, who are willing and able to serve as arbitrators with "specialised knowledge of international law") and *id* at art. 14.10 ("Each Party shall make publicly available the final report of the panel after it is presented to the disputing Parties, subject to rule 40 (confidentiality).").

[24] In this context, sovereignty is understood as the internal sovereignty of a state with the supremacy of governmental institutions under national constitutional law.

[25] *See* Kläger, *supra* note 16, at 71–72.

[26] *Commission Staff Working Report on Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, at 14 (Jan. 13, 2015).

[27] *See* Press Release, European Commission, EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), http://europa.eu/rapid/press-release_IP-15-6059_en.htm.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[28] This agreement imports many western standards of intellectual property protection;[29] in fact, TRIPS started as an enforcement treaty to ensure the enforcement of western intellectual property rights in all parts of the world, especially in developing countries. Hence, unique to international law treaties, TRIPS contains rather detailed commercial law provisions on the subsistence and principles of intellectual property rights to implement a minimum standard of intellectual property protection *de lege ferenda* and to enforce existing rights.[30] The idea of TRIPS was not only the enforcement of western intellectual property rights in the rest of the world, but also a development agenda;[31] but how genuine this agenda was cannot be discussed here.[32] In the years following the implementation of TRIPS, it emerged that some non-western countries were no longer mere recipients of intellectual property rights and know-how, but also significant producers—especially India, Brazil, and China[33]—which should have been a welcome development, whether or not this can be attributed to TRIPS. The U.S. and the European Union Member States, however, have tended to counteract this development by resorting to so-called "TRIPS-Plus" bilateral agreements. These agreements between individual states bypass the WTO dispute settlement mechanism applicable to TRIPS[34] and are generally favorable to the more economically powerful party to the agreement—that is, the western party. Even where TRIPS allows compulsory licensing and parallel importation[35] of patented products—for example, in the case of a health crisis—that does not mean the Western countries and their pharmaceutical companies will automatically acknowledge them. The South African government, invoking this provision of TRIPS, faced aggressive litigation in 1998 which only came to an end in 2001—and informally, because of campaigns by NGOs. From this experience, the right to take protective measures for public health were reasserted

[28] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 81 (1994), https://www.wto.org/english/tratop_e/trips_e/trips_e.htm [hereinafter TRIPS].

[29] *See* Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. OF TRANSNAT'L L. 689 (1989); Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, *in* GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT 166–70 (Peter Drahos & Ruth Mayne eds., 2002); Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New world Order of International Intellectual Property Protection*, 6 IND. J. GLOB. LEGAL STUD. 11, 15–28 (1998).

[30] TRIPS, *supra* note 28, at arts. 8–40 (provisions for a minimum standard for the laws of copyright, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, and unfair competition).

[31] *Id*.

[32] For a discussion of the reality, see Samuel A. Oddi, *TRIPS – Natural Rights and a "Polite Form of Economic Imperialism*," 29 VAND. J. TRANSNAT'L L. 415, 455–60 (1996); Andreas Rahmatian, *Neo-Colonial Aspects of Global Intellectual Property Protection*, 12 J. WORLD INTELL. PROP. L. 40, 42–45 (2009); Alexander Peukert, *Intellectual Property: The Global Spread of a Legal Concept*, *in* 1 KRITIKA: ESSAYS ON INTELLECTUAL PROPERTY 114, 121 (Peter Drahos et al. eds., 2015) (with further references).

[33] Especially in the context of pharmaceuticals. *See* MONIRUL AZAM, INTELLECTUAL PROPERTY AND PUBLIC HEALTH IN THE DEVELOPING WORLD 4 (2016).

[34] Peter Drahos, *BITS and BIPS, Bilateralism in Intellectual Property*, 4 J. WORLD INTELL. PROP. 791, 805 (2001).

[35] TRIPS, *supra* note 28, at arts. 6, 31(b); Carlos M. Correa, *Pro-competitive Measures under TRIPS to Promote Technology Diffusion in Developing Countries*, *in* GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 29, at 43, 48–50.

in the Doha Declaration in 2001,[36] and the CETA Free Trade Agreement confirms the relevance of the Doha Declaration.[37]

Intellectual property rights give far-reaching powers that go beyond the proprietary rights in relation to tangible property as a result of their conceptual and purely intangible nature. Intellectual property rights are not confined to a geographic location but are abstract legal concepts that can exist worldwide. Certain international conventions have granted such expansive intellectual property rights,[38] most recently TRIPS. For example, a licensee of a computer program not only has to accept all restrictions the licensor—the software company or copyright holder—imposes, but it is also dependent on updates—perhaps requiring further payment—and compatibility with other software. The relationship is not a one-off sale but a continuous one, with the sustained power of the licensor to interfere with the licensee's activities and business. A seller of genetically modified crops can gain control over the buyer's farming methods and choices on the basis of his patents, in relation to plant varieties, pesticides and so forth.[39] Trademark owners have extensive powers of control over the sale, pricing, distribution of their products sold under the protected mark—even over the working conditions in the factories in which the products are produced.[40]

C. *The EU Financial Stability Mechanism*

Another intrusion on national sovereignty happened in Europe in the wake of the banking crisis in 2008 and 2009 and the measures by the European states—under the auspices of the EU—to rescue the banking industry and, subsequently, the euro. An analysis of the methods and legal measures for the complex rescue actions cannot be discussed here.[41] From a property theorist's perspective, one can summarize these measures as being designed to protect the property of the banks as creditors so as to avoid their failure and to prevent a systemic failure of the banking industry in general. Apart from the emergency measures implemented to prevent the financial failure in Greece,[42] the two particularly important means of EU financial intervention[43] in the present context are the

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[36] World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/2, 44 ILM 746 (2002); Willem Pretorius, *TRIPS and Developing Countries: How Level is the Playing Field?*, *in* GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 29, at 183, 188–94; CARLOS M. CORREA, TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, A COMMENTARY OF THE TRIPS AGREEMENT 80–81 (2007).

[37] Comprehensive Economic and Trade Agreement, *supra* note 19, at art. 20.3.

[38] *See generally* World Intellectual Property Organization, Paris Convention for the Protection of Industrial Property, March 20, 1883, http://www.wipo.int/treaties/en/text.jsp?file_id=288514; World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1161 U.N.T.S. 3, http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

[39] TRIPS has arguably facilitated this development. *See e.g.*, Martin Khor, *Rethinking Intellectual Property Rights and TRIPS*, *in* GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT, *supra* note 29, at 207.

[40] *See* Rahmatian, *supra* note 32, at 56–70.

[41] *See e.g.*, ALICIA HINAREJOS, THE EURO AREA CRISIS IN CONSTITUTIONAL PERSPECTIVE, 15 (2015).

[42] It failed to fulfil all but one criteria to join the Eurozone in the first place. *See* Sideek M. Seyad, *A Legal Analysis of the European Financial Stability Mechanism*, 26(9) J. INT'L. BANKING L. REG. 421, 422 (2011).

[43] Other important means include the second revision of the Stability and Growth Pact ("six-pack"), consisting of five EU Regulations and one EU Directive—Regulations 1173/2011, 1174/2011, 1175/2011, 1176/2011, Council Regulation 1177/2011, and Council Directive 2011/85; the Treaty on Stability, Coordination and Governance, TSCG (Fiscal Compact), an intergovernmental treaty under international law between twenty-five EU Member States; and Regulations 472/2013 and 473/2013 ("two-pack"). *See* Bruno De Witte, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or*

creation of the European Financial Stabilisation Mechanism[44] (EFSF) and, its successor, the European Stability Mechanism (ESM)—as a permanent measure to enable financial assistance to EU Member States in financial difficulties. The sources of law from which these measures emerged and the constitutional significance of the used methods of law-making have puzzled and concerned many EU constitutional and financial law scholars and specialists.[45] In the *European Law Review*, Kenneth Armstrong detects that EU fiscal legislation is trending towards framework norms which blur the boundary between rule-formation and rule-implementation, such that the norm production and norm compliance operate interdependently and the boundaries become ambiguous.[46] In the words of traditional political theory, this represents a disintegration of the strict separation of legislative and executive powers—a typical feature of feudal and landownership-based political and constitutional regimes. This is exactly what modern national constitutions abolished.[47] Some fiscal measures do not involve the legislature in form of a parliament—rather weak at EU level in any case—at all: the Fiscal Compact[48] entrusts the European Commission—not the European Parliament—with new, extensive instruments to direct the fiscal policies of the Member States[49] that have the effect of limiting their national fiscal sovereignty.[50] Ultimately this regulation confirms the prevalence of private property rights—in the form of investments—in the public law sphere.

In addition to the measures and regulations, the basis of these measures, however, can also assume forms of private commercial law. The EFSF was established as a limited liability company under Luxembourg law with its registered office in Luxembourg. The company shareholders were the EU Member States in the Eurozone. The EFSF is based on a framework agreement between the Eurozone Member States and the EFSF—as represented by the director[51]—and the construction of the company law confers the necessary legal personality to enable such an agreement. It is obvious that the legal form of a company under the private law is not designed to—nor does it permit—a democratic participation or scrutiny in the way parliaments would under constitutional laws. In fact, these devices are the result of accommodating certain obstacles in the EU treaties. Some have assessed this course of action as the development of a new constitutional order in the EU in the form of an increased

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Constitutional Mutation?, 11 EUR. CONST. L. REV. 434, 438–40 (2015); Loreta Poro, *Fiscal Union v. Individual National Sovereignty of EU Members States: A Conceptual Battle*, 30(2) J. INT'L. BANKING L. REG. 68, 73–75 (2015); Kenneth A. Armstrong, *The New Governance of EU Fiscal Discipline*, 38 EUR. L. REV. 601, 601–04, 607–08 (2013).

[44] The EFSF is the result of the Decision of the Representatives of the Governments of the Euro Area countries of 10 May 2010. It was initially envisaged as a temporary measure until 2013, but in fact lasted until September 2012. *See* De Witte, *supra* note 43, at 438.

[45] Armstrong, *supra* note 43, at 605; Seyad, *supra* note 42, at 425, 428; Jonathan Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, 14 GERMAN L. J. 169, 170 (2013).

[46] Armstrong, *supra* note 43, at 605.

[47] This started prominently with the U.S. Constitution. *See* U.S. CONST. art. 1–2

[48] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union art. 7, Feb. 1, 2012, http://europa.eu/rapid/press-release_DOC-12-2_en.htm [hereinafter TSCG]. This is an intergovernmental treaty between twenty-five EU Member States and is technically outside EU law.

[49] *Id*. at art. 3 ¶ 2.

[50] Poro, *supra* note 43, at 75; TSCG, *supra* note 48, at art. 3 ¶ 2 (provision formally preserving the national parliament's powers by establishing that a fiscal correction mechanism to be proposed by the European Commission on the basis of common principles "shall fully respect the prerogatives of national Parliaments").

[51] Seyad, *supra* note 42, at 425; Tomkin, *supra* note 45, at 170–71.

institutional variation.[52] Others believe it is a measure to circumvent and violate EU constitutional law and to create a transnational executive system that escapes democratic accountability normally guaranteed by the rule of law.[53] At least in relation to the foundation of the ESM, succeeding EFSF, the latter viewpoint must appear attractive.

The provisional ESFS was established through a Council Regulation[54] on the basis of Article 122 (2) of the Treaty on the Functioning of the European Union (TFEU).[55] This "solidarity clause" for Member States in need has, besides natural disasters, "exceptional occurrences" in mind, and a sympathetic interpretation might also include financial crises.[56] The permanent stabilization mechanism of the ESM could obviously not rely on Article 122 (2), because the occurrence invoked would no longer be exceptional.[57] The European Council then decided to amend the Lisbon Treaty by adding a new provision to paragraph 3 of Article 136 TFEU[58] under a simplified revision procedure.[59] The reasons for this move were, among other things, to emphasize that no transfer of power from Member States to the EU was intended while also avoiding complications in the ratification process in the Member States,[60] especially in form of a possible referendum.[61] More importantly, however, this amending procedure was chosen because the institution of the ESM was in conflict with the "no-bailout" provision of Article 125 TFEU and a formally adequate reconciliation could have proved difficult.[62]

The European Council decided to have the permanent financial rescue mechanism of the ESM established by an intergovernmental treaty under general international law that would be ratified by the EU Member States in the Eurozone—technically outside of EU law.[63] The idea of this financial stability mechanism was to reduce systemic risks and to establish a restructuring or insolvency regime, especially for financial institutions with systemic relevance

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[52] De Witte, *supra* note 43, at 451.

[53] Tomkin, *supra* note 45, at 188.

[54] Council Regulation (EU) 407/2010 of 11 May 2010, Establishing a European Financial Stabilisation Mechanism, 2010 O.J. (C 118) 1.

[55] Consolidated Version of the Treaty on the Functioning of the European Union art. 122(2), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU] ("Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.").

[56] It is, however, not clear whether Article 122 (2) had economic "disasters" in mind. *See* Tomkin, *supra* note 47, at 171.

[57] Seyad, *supra* note 42, at 428.

[58] European Council Decision of 25 March 2011 Amending Article 136 of the Treaty on the Functioning of the European Union With Regard to a Stability Mechanism for Member States Whose Currency is the Euro art. 1, 2011 O.J. (L 91) 1 ("The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.")

[59] Consolidated Version of the Treaty on the Functioning of the European Union art. 48, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

[60] *See* European Union Committee, *Amending Article 136 of the Treaty on the Functioning of the European Union* (2010–2011), https://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/110/11005.htm.

[61] Seyad, *supra* note 42, at 427–28.

[62] Tomkin, *supra* note 45, at 171; TFEU, *supra* note 55. Under the "no-bailout" provision, neither the EU nor its Member States become liable for other Member States. *Id*.

[63] Treaty Establishing the European Stability Mechanism (ESM), Feb. 2, 2012, 2011 O.J. (L 91) 1. https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf [hereinafter ESM Treaty].

and, subsequently, the states.[64] The EU could have pressed ahead with further formal economic-political integration—a politically unrealistic plan—or pursued an intergovernmental agreement formally less invasive of national sovereignty—the approach that had been taken for the ESM.[65] It is doubtful whether circumventing the decision-making powers of the European and national lawmakers while also introducing a regulatory regime that binds the individual states' legislatures can really be seen as less invasive of national sovereignty. It is true, with the route via an intergovernmental treaty, the European Council based the ESM on a different source of law outside EU law—preventing a formal conflict with Art. 125 TFEU.[66] It, however, is problematic depending on whether or not the rule of law has been preserved adequately in this way.

A challenge to the compatibility of this legal framework with EU constitutional law came before the European Court of Justice (ECJ) in *Pringle v. Ireland* and failed.[67] The ECJ held that the ESM Treaty was compatible with the TFEU provisions relating to economic policy—especially with the "no bailout clause" of Art. 125 TFEU.[68] The ECJ said that the ESM Treaty did not oppose the use of the EU institutions outside the EU legal framework provided that the institutions do not act in areas that fall under the exclusive competence of the Union and that the tasks entrusted to institutions do "not alter the essential character of the powers conferred on those institutions by the EU and TFEU Treaties."[69]

The ESM was presented in the litigation before the ECJ as an independent entity under international law, in that it was immune from prohibitions under EU law; at the same time, it was also presented as not an independent entity, in that the ECJ had jurisdiction to rule on disputes relating to the EU Treaties.[70] Also, it was argued that the ESM was not concerned with monetary policy and was rather conceived to save the euro.[71] One commentator noted that "there were compelling reasons to create the rescue funds EFSF and ESM outside the EU legal order, since the Union itself could not act . . . [and] , logically speaking, no erosion of the EU institutional balance has occurred."[72] Such a statement is, logically speaking, a *petitio principii*, and a judgment concerning the constitutionality of the Lisbon Treaty from the German Constitutional Court can demonstrate that.

The German Constitutional Court decided that the EU conforms to democratic principles.[73] In its decision the court held that the Lisbon Treaty did not create a new state but preserved the European Union as the creation of sovereign democratic states, even though the EU itself has obtained legal

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[64] *Id*.

[65] Christian Hofmann, *Stabilizing the Financial Sector: EU Financial Services 2010-2012*, 8(4) EUR. REV. CONT. L. 426, 431 (2012).

[66] Seyad, *supra* note 42, at 428.

[67] Case C-370/12, Pringle v. Ireland, (Nov. 27, 2012) ¶ 147, http://curia.europa.eu/juris/document/document.jsf?text=&docid=130381&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=361447; *see also* Tomkin, *supra* note 47, at 181–85 (the author was a member of Mr. Pringle's legal team).

[68] *Id*.

[69] *Id*. at para. 158. *See also* Koen Lenaerts, *EMU and the EU's Constitutional Framework*, 39(b) EUR. L. REV. 753, 756 (2014) (discussing Case C-370/12, *Pringle*).

[70] Tomkin, *supra* note 45, at 176.

[71] *Id*., at 187–88.

[72] De Witte, *supra* note 43, at 449.

[73] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvE 2/08, Jun. 30, 2009 (Ger.), https://www.bverfg.de/e/es20090630_2bve000208en.html.

personality.[74] According to the court, for this level of integration, it was not required to democratically develop the system of the European institutions in a way that is analogous to a state.[75] Hence, the European Parliament does not necessarily have the same competencies and powers of a national parliament in a democratic state.[76] The German Constitutional Court also made it clear that the European Parliament was not a parliament comparable to the national parliaments of the Member States.[77] Under this interpretation, since the EU was still an organization of independent sovereign states and could not act on its own, the national parliaments would be left with the authority over the ESM—therefore, the democratic principle is upheld by the national parliaments. By creating the ESM, the EU institutions introduced a process for which they did not have the competencies or powers and thus largely bypassed the national legislatures, which would have had the respective competencies subject to their national constitutions.

There are concerns not only about the method of establishing the ESM, but also about its framework that leads back to an increasingly established prevalence of international property rights beyond constitutional safeguards by sovereign states. The ESM Treaty establishes the "international financial institution" ESM[78] modeled upon the private law nature of a company limited by shares[79]—with a legal personality,[80] shares,[81] dividends payable in principle,[82] and a governance regime similar to that of companies.[83] But, unlike a normal company, the governing members have complete immunity from liability for their actions.

In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.[84]

The Board of Governors, in connection with the interpretation and application of this Treaty, decides disputes arising between an ESM Member and

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[74] *Id*. ¶ 278. *See also* TEU, *supra* note 59, at art. 47.

[75] 2 BvE 2/08 (¶ 278).

[76] *Id*.

[77] *Id*.¶ 280. The German court stated,

Measured against requirements in a constitutional state, even after the entry into force of the Treaty of Lisbon, the European Union lacks a political decision-making body created in equal elections by all citizens of the Union and with the ability to uniformly represent the will of the people. In addition, connected with this is the lack of a system of organisation of political rule in which a European majority will carries the formation of the government sustained by free and equal electoral decisions and thus genuine competition, transparent for citizens, between government and opposition can come about. . . . [Th]e European Parliament is not a representative body of a sovereign European people. This is reflected in its design as a representation of peoples in the respective national contingents of Members, not as a representation of Union citizens in unity without differentiation, according to the principle of electoral equality.

Id.

[78] ESM Treaty, *supra* note 63, at art. 1(1).

[79] *Id*. at art. 8(5) ("The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM.").

[80] *Id*. at art. 32(2).

[81] *Id*. at art. 8(1) (authorised capital stock: EUR 700,000 million, divided into seven million shares, having a nominal value of EUR 100,000 each, available for subscription); *see also id*. at art. 41 (payment of initial capital).

[82] *Id*. at art. 23.

[83] *Id*. at art. 4(1) ("Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary."); *see also id*. at arts. 5–7.

[84] *Id*. at art. 35(1).

the ESM or among ESM Members—including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty.[85] Ultimately, the ESM Member can seek a final appeal against the Governors' decision to the CJEU.[86] EU countries that have not adopted the euro are not members of the ESM and have no appeal to the ECJ under the ESM.[87] Obviously then, states that are not a part of the EU are also not members of the ESM either, although they may be affected by measures of the ESM.

It is understandable that there was not great interest of the EU institutions to involve the national parliaments of the Member States when drafting the ESM. Rather, the institutions would take the approach of letting the Member States effectuate the international treaty according to their respective constitutional procedures. In this way, the ESM seems to outsource core activities of states' fiscal sovereignty to a non-state private law entity in substance—and an institution under international law in form—to broadly safeguard property interests, particularly of banks of systemic importance. The institutional structure of the ESM emulates company law that is not naturally equipped to provide the democratic scrutiny and transparency which public law generally guarantees for authorities and bodies established under constitutional law. This complete immunity of the ESM organs for every activity has no counterpart in commercial law; indeed, company directors are responsible before the national courts. It is also highly unusual in the context of international law. Diplomats—arguably the closest equivalent to the members of the ESM governing bodies—do not enjoy immunity in their sending states. The receiving state can declare them as *personae non gratae*, and then no longer recognize the person as a diplomat after a reasonable period of time.[88] An ESM board member can lose its immunity, but only if another member of the ESM board—that is, the governor or a director—waives it with respect to that member.[89] Apparently neither a national legislature nor an institution of the EU has the power to intervene in this process, and an ESM Member State which seeks the waiver of the immunity of an ESM organ against the ESM boards' opinion will probably have to appeal to the CJEU[90]—possibly even to just establish jurisdiction in the first place.

It appears that decisions by the ESM could bind future national parliaments in relation to their political decisions on economic policy with a very limited recourse provided,[91] in which case the sovereignty and powers of the legislatures may become restricted by a non-constitutional act or entity outside the state in question—and the national parliaments did not and do not have any influence in the making and the possible amendment of the ESM. Similar problems can arise for fiscal measures based on the ESM. This question, more precisely the suspension of voting rights of an ESM Member for non-compliance with the payment obligations of ESM members under the ESM,[92] was raised in a

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[85] *Id*. at art. 37(2).

[86] *Id*. at art. 37(3); *see id*. at recital 16 (The procedure is Art. 273 of the TFEU.).

[87] *Cf*. *id*. at recital 9, art. 5(4) (They have observer status in the meetings of the Board of Governors.).

[88] Vienna Convention on Diplomatic Relations 1961 art. 9, Apr. 24, 1964, http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf; SHAW, *supra* note 6, at 764–66; Ignaz Seidl-Hohenveldern, VÖLKERRECHT 192–93 (9th ed. 1997).

[89] ESM Treaty, *supra* note 63, at art. 35(2)–(3).

[90] *See id*. at art. 37(3).

[91] *Id*. The process to appeal to the CJEU under Art. 37(3) of the ESM Treaty, which may invite the court to make an economic policy decision that should be confined to the realm of politics where the decision makers are ultimately held to account by the electorate in general elections.

[92] *Id*. at arts. 4(9), 5–8.

constitutional challenge before the German Constitutional Court.[93] At issue, among other things, was whether the suspension of the voting rights of Germany as an ESM Member—for example, because it disagrees with EU fiscal policy regarding payment duties, especially increase of payment obligations for further rescue measures, and so on—would restrict and violate the constitutionally guaranteed budgetary sovereignty of the German parliament. The Court found that this was not the case.[94] The Court said that "an upper limit for payment obligations and liability commitments following directly from the principle of democracy could at most be exceeded if the [parliament]'s budget autonomy were for at least a considerable period of time effectively non-existent."[95] The ESM Treaty does not oblige Germany, under international law, to agree to a capital increase.[96] The Court probably thought, whether correct or not, that it painted an extreme scenario that could never occur in a way that an unconstitutional permanent constraint of democratic principles in fiscal planning can be ruled out. The Court stated that the ESM Treaty

> grants the bodies of the European Union no powers which affect the overall budgetary responsibility of the German [parliament] and does not force the Federal Republic of Germany to make a permanent commitment regarding its economic policy that can no longer be reversed . . . . [The ESM Treaty] does not grant the European Commission authority to impose specific substantive requirements for the structuring of the budgets . . . .[97]

Unfortunately, the constitutional development of the EU is rather unpredictable.

D. *Outsourcing of Traditional Acts of State Sovereignty*

The pseudo-commercial law organization of the ESM has already pointed towards outsourcing traditional acts of state sovereignty. Those activities that were traditionally understood as the exemplification of the core of state sovereignty—for example, warfare and related activities—has become increasingly common. A notorious example in the U.S. was the controversy surrounding Halliburton. Halliburton, the largest private oil and military services company in the U.S., obtained the contract to manage the logistical planning of the Iraq war in 2003 without competitive bidding. The justification of this blatant creation of a monopoly position was that Halliburton constituted the only company sufficiently large to manage the task in question. Halliburton, however, subsequently subcontracted with a number of other companies, creating a web of contractual relations which obscured specific obligations and accountability or liability.[98] The ensuing scandal of mismanagement and overcharging would preoccupy the U.S. media and Congress for a long time to come.[99] Relatedly,

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[93] 2 BvR 1390/12 (Ger.), http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/03/ rs20140318_2bvr139012en.html (joint proceedings of several complaints).

[94] *Id.* ¶¶ 183–245.

[95] *Id.* ¶ 184.

[96] *Id.* ¶¶ 184, 220; *see also* ESM Treaty, *supra* note 63, at art. 10(1).

[97] 2 BvR 1390/12 (¶ 244.).

[98] Martha Minow, *Outsourcing Power: How Privatising Military Efforts Challenges Accountability, Professionalism, and Accountability*, 46 B.C.L. REV. 989, 992–93 (2005); Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L., 1, 12–13, 19, 24–27 (2007); Arthur J. Jacobson, *Outsourcing Incompetence: An Essay in Honor of Paul Verkuil*, 32(6) CARDOZO L. REV., 2325, 2328–30 (2011).

[99] Minow, *supra* note 98, at 990; Tiefer, *supra* note 98, at 27–31.

after the invasion of Iraq, running the country's economy was delegated to several large companies to be in charge of reconstruction, transportation, electricity, and so forth.[100]

As a consequence of this type of arrangement, the government, as the representative organ of the executive, is not accountable because it is acting through private companies. These companies, however, are only liable, in principle, under contract or commercial law and are free to organize their company structures and contractual relations—either to achieve favorable tax status or to obfuscate the chain of command so as to avoid possible civil and criminal liability. Furthermore, within the construct of corporate mercenaries it becomes difficult to enforce human rights or international law of armed conflict. This prosecutorial deficiency is noteworthy because it is possible for contractual disputes to lead to military consequences. For example, in Iraq, a dispute over payment for the security for military convoys between two subcontractors led to an under-equipped and under-prepared team of one of the subcontractors that subsequently led to the death of four employees—possibly killed by insurgents—that would trigger the military invasion of Fallujah in April 2004.[101]

Despite the far-reaching consequences of classical state actions traditionally derived from state sovereignty, the checks and balances that a government is subject to under a functioning democracy do not necessarily operate in such organizational designs with sufficient effect.[102] The private property interests of companies and their shareholders will prevail over those of a state and its population in a way that the state effectively sanctions private contractual deals while also ensuring a lack of legal enforceability and allowing—or even encouraging—favoritism in public procurement.[103] The state thus divests itself of any ability to control these interests or to hold the private actors accountable for their actions.

E. *Summary of the Examples*

What these examples have in common is that the agents—usually large and multinational business corporations and non-state agencies—have powers, potentially worldwide, through the exercise of their property rights, and these powers resemble exclusive and absolute powers normally associated with sovereign states.[104] They, however, do not have the formal legal status of a sovereign subject under public international law, nor do they have the position of a sovereign under municipal public law. These agents are legal—though artificial—persons formed under private and commercial law that have traditionally not been granted sovereign powers.

In the first case, the international free trade agreements, such as CETA and the currently negotiated TTIP, are good indications that the future development of non-state sovereignty will be derived from—and invade—traditional state

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[100] Bart S. Fisher, *Investing in Iraq: Legal and Political Aspects*, 18 TRANSNAT'L L., 71, 74 (2004).

[101] Jacobson, *supra* note 101, at 2329–30.

[102] Minow, *supra* note 101, at 1023.

[103] In Iraq, even foreign companies that were allies of the U.S., for example, Britain, were excluded. This was decided just before the invasion in Iraq in 2003. Tiefer, *supra* note 98, at 36 n.172; *see also* Cathy Newman, *Oil groups Eye Steak in Wake of Conflict*, FINANCIAL TIMES (Mar. 12, 2003), http://libertyparkusafd.org/Hancock/primers/Oil%20Groups%20Eye%20Stake%20in%20Wake%20of%20Conflict.htm.

[104] Daniel J. H. Greenwood, *The Semi-Sovereign Corporation*, *in* PROPERTY AND SOVEREIGNTY: LEGAL AND CULTURAL PERSPECTIVES 267, 267–69 (James Smith ed., 2013).

sovereignty. From this, a new relationship between public law and private property law emerges. The ISDS has the potential to safeguard private investment interests against public interests without an analogous control that generally governs a state under a constitutional framework. At the same time, however, the ISDS must rely on a state's sovereign powers to enforce the arbitral awards that implement its property protection over "investments"—broadly defined and therefore causing inherent conflict with the state's national sovereignty in other areas like economic and health policy. The protection is enforced by international, yet still private, non-state judicial bodies. As noted earlier, the classical distinction between internal state sovereignty and sovereignty of a state as a legal person within international law has become blurred and of less importance.

The second case examines the international protection of intellectual property rights and the unique characteristics of these property rights. As mentioned before, intellectual property rights are intangible and geographically unconnected—in contrast to land—with far-reaching powers and worldwide enforcement. These unconstrained rights have to the potential to encroach on the sovereignty of individual states—especially in the developing world. In this way, it becomes apparent that the non-state entity—for example, a multinational company—can exercise regionally quasi-sovereign power that restricts or partially replaces local state sovereignty.

The third example—specific to the European Union—discusses the financial stability mechanisms for times of financial difficulty. Through the establishment of the ESM as a principal device aimed towards EU financial stability, the Member States have created a non-state entity to direct their fiscal activities—traditionally, a central area of authority for sovereign states. The ESM, however, effectively falls outside the constitutional checks and balances of the Member States and the EU—for both its creation and operation. The ESM's organizational structure is modeled upon that of private companies, and the organs of the ESM are given unprecedented immunity. The investment or property protection through the ESM is a combination of public and private interests—especially those interests of states and banks. The property protection applies to specific branches of business—banks and financial services—and their respective influences on the financial position of states. Under this "sovereign debt," the protection and financial assistance bypasses the legislatures of the Member States as the central expression of their state sovereignty.

The fourth case concerns the outsourcing of core activities in which state sovereignty normally manifests itself, such as warfare and associated logistics. Halliburton is a well-known example of a U.S. company active in such outsourcing. In this case, quasi-sovereign powers were handed over to a non-state entity that functioned as a mix of state sovereignty and sovereignty under international law.

From the viewpoint of constitutional or international law theory, non-state entities in these four scenarios are not seen as enjoying the classical conception of sovereign powers; in fact, there does not seem to be a thorough academic examination of this situation at all. There are some guidelines by the UN about the conduct of transnational corporations, but there is great uncertainty as to their legal effect;[105] similar guidelines were issued by the Organization for Economic

[105] Draft United Nations Code of Conduct on Transnational Corporations, 23 I.L.M. 626, 627 (1984); *see also* SHAW, *supra* note 6, at 250.

Co-operation and Development (OECD).[106] But the legal reality cannot be ignored permanently, and legal doctrine ought to start critically analyzing these existing phenomena. A study of the evolution of sovereignty as it emerges from reading the classical texts, as well as the role of property in this development, can give helpful insights.

II. PROPERTY AND SOVEREIGNTY IN POLITICAL PHILOSOPHY

Political philosophy, legal theory, and legal history may be a starting point for trying to explain the phenomena of non-state powers with features of sovereignty and their relationship to property. The following discussion focuses more on internal state sovereignty.

A. *Bodin*

The modern idea of sovereignty, as an expression of uniform state power, appears in the sixteenth century as an attempt to reconcile the conflicting authorities among king, church, regional princes, and estates in medieval times. It was also a reaction to the wars of religion—against which a strong and undivided state power and pacifying force was supposed to be positioned. The notion of sovereignty is generally attributed to Jean Bodin: "A commonwealth (*république*) may be defined as the rightly ordered government of a number of families (*ménages*), and of those things which are their common concern, by a sovereign power."[107] This sovereignty is an absolute and perpetual power (*majestas*) vested in a commonwealth.[108] The sovereign retains this absolute and perpetual power, even if he delegates it to an official—this delegated authority could expire or be revoked according to the sovereign's will. The power is absolute if someone has, or obtains, a perpetual power to dispose of property and persons, to govern the state as he thinks fit, and to order the succession liberally as any proprietor.[109] This power is not a power delegated to him and thus he is not subject to any commands of another, but he himself can delegate the power.[110] The power is perpetual because it lasts for the lifetime of the person who exercises this power.[111] If that sovereign is not a physical human being, but a magistrate—such as in the estates or a commonwealth of people[112]—it is perpetual in the same way that the states are.[113] If the sovereign is a prince or king, then the people have renounced and alienated their sovereign power "in order to invest him with it and put him in possession," and thus transfers all their powers and rights, "just as the man who gives to another possessory and proprietary rights" over his former property.[114] How this sovereignty has been

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[106] DECLARATION ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES: THE GOVERNMENTS OF OECD MEMBER COUNTRIES, 75 U.S. DEPT. ST. BULL. 83 (1976), https://babel.hathitrust.org/cgi/pt?id=osu.32437010892608;view=1up;seq=99.

[107] JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 1 (M.J. Tooley trans., 1967).

[108] *Id*. at 25. In Latin, this sovereignty is called *majestas*.

[109] *Id*. at 27.

[110] *Id*. at 28.

[111] *Id*. at 26.

[112] In French, this is "l'état aristocratique et populaire."

[113] BODIN, *supra* note 107, at 27.

[114] *Id*.

acquired, whether by consent or by force, is irrelevant; the tyrant is sovereign, like the robber who is possessor: "The robber's possession by violence is true and natural possession although contrary to the law, for those who were formerly in possession have been disseized."[115] The relationship between sovereign—if it is a prince—and the person subjected to his authority is: one is prince, the other subject; one is lord, the other servant; one is owner and holding sovereignty, the other is neither owner nor possessor.[116] Law is the command of the sovereign in the exercise of his sovereign power. The principal characteristic of sovereign power is that the sovereign can impose laws generally on all subjects regardless of their consent.[117] The sovereign is not bound by other laws, such as the laws of his predecessors, or by his own laws: the laws proceed from his free will; he is unable to bind himself, even if he wishes to do so.[118]

Several points in Bodin's argument are noteworthy. Sovereignty differs from property, but property is an illustrative and instructive metaphor to explain the powers that sovereignty confers. The property owner is a private "sovereign" in relation to his object of property. The sovereign has *imperium*, similar to the owner who has *dominium*—with the former, the power is exercised over persons and through these things, while with the latter, power is exercised over things against persons. Ultimately, this *dominium* is a power over persons. Sovereignty does not distinguish between legal entitlement and factual power, because sovereignty is the source of positive law and legal entitlements. Property law does distinguish between ownership as legal entitlement—the most extensive property right—which the robber has not, and factual possession which the robber also has. The basis for this concept is, of course, Roman private law.[119] According to Bodin sovereignty is as alienable as a property right. The property laws, as indeed all positive laws, are a result of sovereignty.[120]

B. *Hobbes*

In the Anglo-Saxon world the author who is associated most with the concept of sovereignty is Thomas Hobbes. The sovereign in every commonwealth, whether monarch or "assembly of men,"[121] is the absolute representative of all subjects with unlimited power; the concrete representatives in bodies politic have limited power prescribed and delineated by the sovereign.[122] The sovereign is the legislator and is above all laws: "For having power to make, and repeal laws, he may when he pleaseth, free himself from [the] subjection [to the civil laws], by repealing those laws that trouble him, and making of new."[123] The legislator is not the one who passes laws in the first place, but under whose authority the laws

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[115] *Id*.

[116] *See id*. at 26–28. The original French passage says: "Car l'un est Prince, l'autre est sujet; l'un est seigneur, l'autre serviteur; l'un est propriétaire, et saisi de la souveraineté, l'autre n'est ni propriétaire, ni possesseur . . . ."

[117] *Id*. at 32.

[118] *Id*. at 28.

[119] BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 107–09 (1962).

[120] However, even the princes are subject to divine and natural laws. *See* BODIN, *supra* note 107, at 29.

[121] Whether it is a democracy or the estates. THOMAS HOBBES, LEVIATHAN 132 (Michael Oakeshott ed., Collier Books 1974) (1651).

[122] *Id*. at 169.

[123] *Id*. at 199. *See also* THOMAS HOBBES, ON THE CITIZEN 84 (Richard Tuck & Michael Silverthorne eds., Cambridge University Press 1998) (1642).

continue to remain in force.[124] The right of the property owner is to exclude everyone from his property, except the sovereign; furthermore, the laws of contract, property transfer, and other dealings with property are determined by the sovereign.[125]

Features of the idea of property also appear in Hobbes's concept of sovereignty. The owner's *dominium* is subjected to the sovereign's *dominium*. This must be so, because a person's property right derives from the laws and power of the holder of sovereign power,[126] and so it is the sovereign power which creates the owner's power that property entails: "But without such sovereign power, the right of men is not propriety [sic] to any thing, but a community; no better than to have no right at all. . . . Propriety therefore being derived from the sovereign power, is not to be pretended against the same."[127] Hobbes explains taxes as consideration for "that peace and defence [of the property rights] which the sovereignty maintains for them."[128]

C. *Locke*

Locke qualifies the supreme position of the sovereign with regard to property in that, for him, the preservation of property is the purpose of government. Hence "people should *have property*" which is a prerequisite for people joining society.[129] Even the sovereign cannot take their property without their consent, otherwise "they have no *Property* at all."[130] The sovereign only has the power of passing laws, limited by reason, that regulate property, but there cannot be arbitrary power. Therefore, taxes can only be levied with the consent of the people, because otherwise it would undermine their rights of property and the purpose of government to safeguard property.[131]

D. *The Peace Treaty of Westphalia*

The Peace of Westphalia of 1648[132] was the first implementation of these modern concepts of sovereignty in international law and the first modern European arrangement of secular nation states with unrestricted sovereignty over given territories, and it is seen as the starting point for modern international law.[133] The Peace of Westphalia does not talk of the concept of private property as such, since the provisions on restitution,[134] acquisition,[135] and restitution of

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[124] HOBBES, *supra* note 123, at 199.

[125] *Id*. at 187.

[126] Hobbes, *supra* note 121.

[127] THOMAS HOBBES, ELEMENTS OF LAW 139–40 (Ferdinand Tonnies ed., Cambridge University Press 1984) (1640).

[128] *Id*. at 140.

[129] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360 (Peter Laslett ed., Cambridge Univ. Press 2008) (1689).

[130] *Id*. at 361.

[131] *Id*. at 362. This argument was essential in the American independence debate.

[132] Treaty of Peace Between Sweden and the Empire and Treaty of Peace between France and the Empire, Oct. 14, 1648, 1 Consol. T.S. 119, 119–356 [hereinafter Peace of Westphalia], *English translation available at* http://germanhistorydocs.ghi-dc.org/pdf/eng/87.%20PeaceWestphalia_en.pdf. The Peace of Westphalia consists of two treaties, the Treaty of Münster between the Holy Roman Empire and France, and the Treaty of Osnabrück between the Holy Roman Empire and Sweden.

[133] SHAW, *supra* note 6, at 1282; s*ee also* Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT. LAW 20, 26 (1948).

[134] *See, e.g*., Peace of Westphalia, *supra* note 132, at art. III § 1, art. V § 32.

[135] Referred to as "*investitura*." *Id*. at art. IV §§ 5, 9.

feudal rights, protection of emigrants' property,[136] presuppose the concept of property,[137] but do not define or regulate it. However, Article 8 § 1 on the constitutional position of the estates in the empire hints at property when it says:

In order to prevent all future disputes over the political order, each and every elector, prince, and estate of the [Holy] Roman Empire shall, by virtue of this treaty, be established and confirmed in their possession of all their ancient rights, prerogatives, liberties, privileges, the free exercise of their territorial rights, both spiritual and temporal (*libero iuris territorialis tam in ecclesiasticis quam politicis exercitio*), their seigneuries, and their regalian rights. In the possession of all these things, they may not, by virtue of the present transaction, be molested at any time, in any manner, or under any pretext whatsoever. [138]

This legal recognition of the concept of uniform sovereignty of nation states[139] also includes feudal privileges with a property element and outright private property rights.[140] The concept of sovereignty of nation states in international law, the development of which began in part with the Peace of Westphalia, is dealt with in specialized works and need not be restated.[141] Specialized literature, however, does not concern the relationship of property to sovereignty.[142]

III. PROPERTY AND SOVEREIGNTY IN LAW

A. *Early Modern Period*

Modern international law leaves the phenomenon of property to private law—and private law passes it on to legal theorists of property[143]—but, as we have seen, the sixteenth-century jurists who developed the contemporary concepts of sovereignty and the modern nation state still took account of property to a considerable extent. In particular, they emphasized the distinction between sovereignty—*imperium*—and property—*dominium*—which mirrors the Roman law division of *ius publicum*[144] and *ius privatum*.[145].

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[136] *See id*. at art. V §§ 27, 32, 36.

[137] In the respective provisions this could be private, feudal, or public property—or a blend of all three which was characteristic of late feudal societies.

[138] Peace of Westphalia, *supra* note 132, at art. VIII § 1.

[139] *See* DIETMAR WILLOWEIT, DEUTSCHE VERFASSUNGSGESCHICHTE, 6th ed., 150–51 (2009); *see also* Gross, *supra* note 133, at 31–34 (discussing the preparation of this concept of sovereignty by the jurists).

[140] Legal historians will stress the distinction between the sovereignty of state territories and a possible sovereignty of the estates themselves who were not intended to be sovereign in a modern sense as a result of the 1648 treaty. MICHAEL KOTULLA, DEUTSCHE VERFASSUNGSGESCHICHTE: VOM ALTEN REICH BIS WEIMAR (1495–1934) 103 (2008).

[141] *See*, *e.g*., Vaughan Lowe, *Jurisdiction*, *in* INTERNATIONAL LAW 334–60 (Malcolm D. Evans ed., Oxford Univ. Press 2d ed. 2006) (discussing prescriptive jurisdiction—principles of territoriality, national and protective principles—and enforcement jurisdiction).

[142] One particular exception is that state interference in private property law serves as a qualification for the principles of state territoriality and immunity—both features of state sovereignty. For example, in relation to the enforcement of judgments against property in foreign states, or even (possibly non-immune) state property of foreign states, or the enforcement of state debts and the situation of state insolvency. *See* Hazel Fox, *International Law and Restrains on the Exercise of Jurisdiction by National Courts of States*, *in* INTERNATIONAL LAW, *supra* note 144, at 379; *see also* Gerhard Kegel & Ignaz Seidl-Hohenveldern, *On the Territoriality Principle in Public International Law*, 5 HASTINGS INT'L & COMP. L. REV. 245, 253 (1982).

[143] *See, e.g*., PENNER, *supra* note 4.

[144] As matters of the Roman state. *See* GAINES POST, STUDIES IN MEDIEVAL LEGAL THOUGHT: PUBLIC LAW AND THE STATE 337–38 (1964)

[145] As interests of individuals. *See id*. *See also* ULPIAN, DIGEST, D 1,1,1,2.

Grotius, in his discussion of the original acquisition of property through occupancy of land, distinguishes carefully between "jurisdiction"—as an effect of sovereignty—and property— as a result of the occupancy of a specific piece of land. He says that kings have power over everything in their own dominion, but every man has his distinct property. Jurisdiction is exercised, first, in relation to persons, "and that alone is sometimes sufficient, as in an Army of Men, Women, and Children, that are going in quest of some new Plantations," and, second, in relation to a place "called *Territory*."[146] Yet, although jurisdiction and property are usually acquired by one and the same act, they are distinct: property may be transferred. Indeed, it may be transferred not only to nationals, but also to foreigners, but the jurisdiction in relation to the property remains as it was before.[147] Nevertheless, Grotius says in *Mare Liberum* that sovereignty is a special kind of proprietorship because it excludes ownership and possession by anyone else except the sovereign.[148] So the idea of property lingers on, if only as a metaphor.

Pufendorf follows Grotius's distinction between sovereignty and property, at least implicitly, but Grotius is more to the point.[149] Pufendorf, however, discusses a special issue where the different aspects of landholding *qua* sovereignty or *qua* proprietorship come to the fore: in a monarchy, the question is whether or not the land of the realm is the patrimony—or property—of the king. This can be the case in certain situations—"when later the ambition of rulers began to list among their chief possessions sovereignty over men"[150]—depending on the way in which the kingdom was acquired. In such cases, kingdoms were included in the kings' patrimony, "of the alienation of which at their pleasure rulers had received the power to dispose, because this was understood to be a part of the highest force of dominion"[151] or, one may query, sovereignty. If the case of a patrimonial kingdom is answered in the affirmative, the effect of

this manner of holding sovereignty is seen clearest in the fact, that not only is the condition of subjects fixed at the will of kings [as sovereignty in the form of passing laws and jurisdiction], but also that a king can transfer his right over such a kingdom to whomsoever he pleases.[152]

Pufendorf's explanation indicates a certain critical distance to the solution, which is presented as something coming from the past. But while the natural lawyers of the seventeenth century may have found it increasingly difficult to reconcile natural law principles with the idea that a kingdom could be the personal property of a king, we should not forget that in the colonial era of the nineteenth century, the Belgian Congo—the Congo Free State—was effectively the personal property of the Belgian king—legally it was more complicated.[153]

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[146] HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 457 (Richard Tuck ed., 2005) (1625).

[147] *Id*. at 456–57.

[148] HUGO GROTIUS, FREEDOM OF THE SEAS 22–23 (Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1609). But Grotius stresses that the use of the word "sovereignty" for ownership is an obsolete terminology and meant in the past the privilege of lawfully using common property. *Id*.

[149] SAMUEL VON PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 555–57 (C.H. Oldfather & W.A. Oldfather trans., Oxford, Clarendon Press 1934) (1688). The emphasis here is on the private law side, discussing the origin of *dominium* or proprietorship and ownership. With regard to the sea, a clear distinction between sovereignty and property cannot be made out. *Id*. at 560.

[150] *Id*. at 1081.

[151] *Id*. at 1080–81. Pufendorf distinguishes between several forms of sovereignty a king may be able to exercise (temporary or perpetual, limited or unlimited sovereignty etc.) which is not relevant here.

[152] That is, property transfer as another aspect of sovereignty. *Id*.

[153] ROBIN HALLETT, AFRICA SINCE 1875: A MODERN HISTORY 432–40 (1974). The acquisition of the Congo was a combination of hundreds of treaties with local chiefs. The Association Internationale du

Rousseau distinguishes between sovereignty and property,[154] and he stresses that property can be alienated, while sovereignty—contrary to Bodin—cannot be.[155] Montesquieu spells out the distinction more clearly: the "political laws" by which men relinquished their natural independence give them liberty, while the "civil laws" by which men renounce the natural communality of goods, confer on them property.[156] The classical bifurcation of public law, sovereignty, and private law, property, is also emphasized.

The emphasis on a conceptual separation of property and sovereignty, from the late sixteenth century onwards, is an attempt at overcoming feudalism—where the public and private law aspects, especially in relation to feudal duties and landholding, are strongly intertwined. This feudalism was also a basis for the mediatization of state powers via the feudal lords and the subordination of the king under the church, and the modern concept of sovereignty sought to eliminate both.[157] The definition of "property," in the sense of private law, also hails significantly from the seventeenth century natural law jurists, which always included reference to classical Roman law or its developed forms in the *ius commune*. For Grotius, violation of property was a justification of war. This angle allows him to launch into a discussion of the private law concept of property in a public law and international law context. He offers the common narrative—which has become particularly well-known because of Locke[158]—that God has given man things over which man has property in common, but when "labor and industry" emerged, communal property was no longer sustainable,[159] and men obtained property by appropriation—either expressly by agreement in the case of division, or tacitly in the case of seizure. To Grotius, this was the beginning of private property.[160] Grotius then proceeds to examine the rights arising from property—especially ownership.[161]

Grotius further deals with the original acquisition of rights, not over things, but over people, such as the rights of parents over their children—which arise from "generation"—or the rights arising from marriage or other associations, such as people and an assembly or person governing them or an association of several states. Grotius considers these rights over persons as arise from consent which itself is derived from the respective association or subjection.[162] A parallel discussion can be found in Hobbes, with the specific rule for the family, "wherein the father or master of the family is sovereign of the same; and the rest (both

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Congo had the Belgian King as its only member and was recognised as possessing sovereign status, made territorial treaties with France and Portugal as rivalling colonial powers, included large territories acquired as *domaine privé* of the king, and companies whose profits went into the king's private purse.

[154] JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, 67–68 (Betty Radice & Robert Baldick eds., Maurice Cranston trans., Penguin Books 1968) (1762). Rousseau's very interesting polemic about first occupancy as property acquisition cannot be discussed here.

[155] *Id*. at 54, 69–70.

[156] 1 MONTESQUIEU, DE L'ESPRIT DES LOIS 876 (1768) ("Comme les hommes ont renoncé à leur indépendance naturelle pour vivre sous des lois politiques, ils ont renoncé à la communauté naturelle des biens pour vivre sous des lois civiles. Ces premières lois leur acquièrent la liberté, les secondes, la propriété.").

[157] Hermann Heller, *Die Souveränität: Ein Beitrag zur Theorie des Staats—und Verwaltungsrecht*, *in* 2 GESAMMELTE SCHRIFTEN: RECHT, STAAT, MACHT 35 (1971).

[158] JOHN LOCKE, SECOND TREATISE 286–87 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

[159] *See also* PUFENDORF, *supra* note 149, at 540, 550.

[160] HUGO GROTIUS, DE JURI BELLI AC PACIS (THE RIGHTS OF WAR AND PEACE) BOOK II 420–27 (Richard Tuck ed., 2005).

[161] *Id*. at 428, 454, 685.

[162] *Id*. at 508, 513, 545.

children and servants equally) subjects."[163] In *Mare Liberum* Grotius explains that no one is sovereign over a thing which he has never possessed—or which no one has ever held in his name—and, like in private law, only the delivery of property and subsequent possession confers sovereignty.[164]

Pufendorf was important in the shaping of concepts of property, at least on the European continent, and he was influenced by Grotius and Blackstone's discussion of property.[165] Equally important was Pufendorf's classical liberal statement that individual and private property, not communal property, safeguard peace in a society.[166]

B. *Twentieth Century*

Real advances in the theory of the state and sovereignty in legal scholarship in the twentieth century came from the German-speaking countries. Although the German legal scholarship on the theory of the state and the law in the first third of the twentieth century was substantial and influential, it also lacked any significant treatment of the relationship between sovereignty and property. The emphasis on conceptual separation—but at the same time proximity—in the discussion of property and sovereignty was characteristic only of the texts of the seventeenth century. The leading legal scholars of the twentieth century in this area were Hans Kelsen, Hermann Heller, and Carl Schmitt. These three very different scholars are, however, connected by a certain neo-Kantian perspective as a starting point.[167]

Kelsen stresses that the state has a normative character, more precisely, it constitutes a normative legal order—state and legal order are identical.[168] Only within this normative order is sovereignty conceivable. Property is merely a set of norms emanating from the power of legislation that is innate to a state and its sovereignty.[169] The state is a legal person,[170] and, as a legal person, it holds property in form of the fisc.[171]

Heller criticizes Kelsen's strict separation between an idealist realm of "ought" and the reality of the "is," which leads to the congruence of legal order and state but is artificial in the light of real states. "Ought" and "is" are bridged by the legal ought as being understood as a human will. The act of will that passes law is a dialectic unity of will and ought.[172] While Heller introduces a more sociological approach against the strict positivist position, as exemplified by Kelsen, he does not deal with the proprietary aspects of state sovereignty, either.

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[163] HOBBES, *supra* note 127, at 135.

[164] GROTIUS, *supra* note 148, at 11.

[165] WILLIAM BLACKSTONE, LAWS OF ENGLAND, 8–9 (Edward Christian ed., 1800).

[166] PUFENDORF, *supra* note 149, at 541.

[167] CARL SCHMITT, CONSTITUTIONAL THEORY 4–7 (Jeffrey Seitzer ed., trans., Duke Univ. Press 2008) (1928).

[168] HANS KELSEN, REINE RECHTSLEHRE 59 (Bonnie L. Paulson & Stanley L. Paulson trans., 1992); *see also* LESLIE GREEN, THE AUTHORITY OF THE STATE 76 (1988) (discussing the idea of the state being the national legal order only).

[169] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 189, 255 (Anders Wedberg trans., Harvard Univ. Press 1945).

[170] *Id*. at 97.

[171] Or "*fiscus*." *Id*. at 193.

[172] HERMANN HELLER, STAATSLEHRE 188–89 (1934).

Nor does Carl Schmitt, who has recently gained some importance in Anglo-American academic discourse, irrespective of the limited value of his theories.[173]

Schmitt, representative of a certain strongly conservative position and a sinister figure in legal history, was the leading jurist for the Third Reich and the most prominent apologist for its violations of the constitution until he became isolated beginning in 1937, apparently because even the Nazis found his unashamed opportunism too uncanny.[174] Schmitt criticizes Kelsen for his abstract conception of state-law-sovereignty. A valid norm as such cannot be "sovereign," while a constitution can be, in that the state is treated as something genuinely imperative that corresponds to norms. Sovereignty has existential superiority over the norm, hence a lawmaker can only establish, never violate norms.[175] The fiction of legal positivism that conclusively embodies sovereignty in constitutional norms disregards the essential political decisions of the state in reality, and these can conflict with norms. These "statutory ruptures" are characteristic even of the modern *Rechtsstaat*.[176] It is the exception—characterized by unlimited authority—being the emergency state, not the normal legal system, which determines who is sovereign, and the sovereign decides whether there is an emergency state and whether the constitution has to be suspended.[177] This concept of the supremacy of political leadership over norms of a *Rechtsstaat* in a liberal understanding and the connection of sovereignty with the political—not the law—became a suitable vehicle for the justification of any kind of arbitrary political act after 1933.[178] It cannot be expected that the liberal-technical concept of property would play any role in these diffuse and strange romantic concepts.

Neither the twentieth century liberal-democratic tradition—represented by Kelsen in its strictly positivist form and by Heller in a more sociologically informed version—nor the conservative tradition—very broadly understood, in the case of Schmitt—provides an explanation for the effect of property on sovereignty and the relationship between these two. Property rights are just a subset of the legal system. The legal system, in turn, is superordinate to sovereignty in Kelsen's view and even absorbs sovereignty—and the state itself—or it is subordinate to sovereignty according to Schmitt. This view is reinforced by the way public lawyers understand law given that legal theorists are, for the most part, public lawyers. But this approach has become more and more outdated.

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[173] *Id*. at 207 (discussing one of the essential features of Schmitt's thinking in an apposite critique, "Schmitt's friend-foe activism, which has been interpreted psychoanalytically not without good reason [or reference], is finally characteristic of any brawl, and, because of that, does never lead to a specific mark of the political but at best to the triviality that the whole life is a struggle"); *see also* ARTHUR JACOBSON & BERNHARD SCHLINK, WEIMAR: A JURISPRUDENCE OF CRISIS 249 (2000) (explaining that Hermann Heller was a great legal theorist of the Weimar Republic who had to flee from the Nazis in 1933 and died later that year, and this is why he is unknown in the English-speaking world).

[174] *See* JACOBSON, *supra* note 173, at 280. One should not overemphasise Schmitt's opportunism. Schmitt's isolation was probably the result of a typical cabal of different wings—here, the SS—within the NSDAP fighting against each other for power. Even a cursory study of Schmitt's works would quickly reveal that he was essentially a thinker of fascism even before 1933 and after 1945—despite those theories reaching their apex between 1933 and 1936—and his catholic roots did not stand against that.

[175] SCHMITT, *supra* note 167, at 62–63, 154–55.

[176] *Id*.

[177] CARL SCHMITT, POLITICAL THEOLOGY 5, 7, 12, 15 (George Schwab trans., 1985) ("Sovereign is he who decides on the exception").

[178] As demonstrated by Schmitt's spectacular arguments justifying the political murders in the Night of the Long Knives in 1934. *See* Carl Schmitt, *Der Führer schützt das Recht*, 39 DEUTSCHE JURISTEN-ZEITUNG 947 (1934).

IV. FEUDAL EFFECTS OF PROPERTY

A. *A Wider Sociological Understanding of Feudalism*

In the first decades of the twentieth century, Hobhouse, Tawney, and Morris Cohen provided a different analysis of the prevalent liberal interpretation of the concept of property. Hobhouse distinguished between property for use—as a power over things—and property for power—as a power relationship either between or over those people who have a duty of noninterference.[179] Tawney elaborated on this definition by stressing the conceptual separation between ownership and work.[180] Work would normally confer active ownership, and the corresponding property, such as food, stock-in-trade, tools, would therefore be a certain function or performance of a service.[181] The large majority of property, however, is in passive ownership, which is not a means of work but an instrument for the acquisition of gain or exercise of power—divorced from responsibility.[182] This passive property for acquisition and exploitation of power—as opposed to active property—appears in the form of rights, such as royalties, ground-rents and especially company shares—and today one would add, financial instruments of all kinds, like derivatives—as a basis for a class of rentiers.[183] Both active and passive property are, at least for the lawyer, property in equal measure, but passive property is so divorced from actual physical objects for use that they are closer to a form of currency.[184] Different from property as a result of one's labor, property for exploitation and power confers income upon its owners that is not derived from personal service.[185] As a result, "property is not theft, but a good deal of theft becomes property."[186]

Morris Cohen directly addressed the problem that is discussed here: property and sovereignty are, from a sociological and political perspective, by no means strictly separated. The legal distinction between *dominium*—rule over things by the individual—and *imperium*—rule over all individuals by the prince and an expression of sovereignty—will undoubtedly become blurred if one considers that the essence of a private property right is the right to *exclude*, not only the right to use by the owner—*ius utendi*, *fruendi*, *abutendi*. This right to exclude entails the obligation of others to obtain the owner's consent for the use of the property, and this power to consent gives a limited power and control over the other person seeking consent. Thus, for example, a landowner may obtain power over those who want to live on the land by obliging them to render services to him as a prerequisite for his consent, whether historically in a feudal setting or, as today, based on private law of contract and property.[187] Similarly, the employer will have power over his employees to require a certain behavior as a condition for

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[179] LEONARD T. HOBHOUSE, PROPERTY: ITS DUTIES AND RIGHTS 9–10 (MacMillan and Co., Ltd. 2d ed. 1915).

[180] R.H. TAWNEY, THE ACQUISITIVE SOCIETY 65–68 (1921).

[181] *Id*. at 78.

[182] *Id*. at 65–66.

[183] *Id*. at 77–78.

[184] *Id*.

[185] *Id*.

[186] *Id*. at 80.

[187] ALAIN SUPIOT, HOMO JURIDICUS: ON THE ANTHROPOLOGICAL FUNCTION OF THE LAW 86–100 (2007).

employment or continuation of employment. The employment relationship is theoretically based on a contract that was freely entered into, but typically the strong economic position of the employer tilts the bargaining power substantially in its favor. Because the exercise of a property right confers power over people—compelling them to behave in a certain way—Cohen maintains that property has the character of a sovereign power, so property is a form of sovereignty.[188] Cohen only mentions in passing the role of bankers and financiers and does not discuss the corporate powers of companies and their shareholders because of the passive property for acquisition and exploitation.[189]

These more sociological interpretations of the powers of property highlight a phenomenon that is well-known from the era of feudalism, and Cohen himself points out that the feudal system did not separate *dominium* from *imperium*; its characteristic was the inseparable connection between land tenure and personal homage.[190]

B. *The Classical Historical Legal Concept of Feudalism*

While an outline of the feudal system that emphasizes its legal institutional elements may be an idealizing presentation of this system from the viewpoint of a social historian,[191] it nevertheless serves well for the analysis of the concepts attempted here.[192] The medieval idea of the state until about 1300 was that of a realm, eternal and unlimited in space: a universal Christian imperium. What constituted the state was initially a relationship between persons, but that developed into socio-political formations that increasingly contained a territorial element. The rivalries between the secular rulers and the church in the investiture conquest in the eleventh and twelfth centuries paved the way for the modern nation state, because the state had to define itself against and resist the central ecclesiastical power or the *potestas papae*.[193] Besides, the strongly personal element in the feudal bond became gradually eclipsed by the proprietary element, so the territorialization of the state was accompanied by a stronger propertization of the individual feudal relationship—although one was not connected to the other as such. In fact, feudalism was an important force in the fragmentation of the state and in its division into smaller principalities as territorial states, particularly in Germany.[194] The practical applications of the theories of sovereignty in the later Renaissance period, as discussed above, led to these smaller territories and legally independent principalities. Initially, feudal

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[188] MORRIS R. COHEN, LAW AND THE SOCIAL ORDER 46–49 (1933).

[189] *See* TAWNEY, *supra* note 180, at 66.

[190] *Id*. at 42.

[191] *See* STEFFEN PATZOLD, EPISCOPUS: *WISSEN ÜBER BISCHÖFE IM FRANKENREICH* 25–38 (2012) (The criticism against the classical scholarship of feudalism, exemplified by Mitteis and Ganshof, started in the 1990s with Susan Raynolds and others. An outline of the debate among legal historians, especially with regard to the earlier feudal, Carolingian, period is available here.).

[192] *See* ANDREAS RAHMATIAN, LORD KAMES: LEGAL AND SOCIAL THEORIST 198–99 (2015) (For the legal theorist and the intellectual historian of the law, it is not so important to determine what the legal reality may have been and how it translated into the social reality of the Middle Ages and the Early Modern period, but how the legal concepts were developed and understood.).

[193] HEINRICH MITTEIS, DER STAAT DES HOHEN MITTELALTERS 4–5, 191 (1953). *See also* PATZOLD, *supra* note 194, at 73. "[Christ] conferred only spiritual power on Peter, and gave corporeal power to Caesar." JÜRGEN MIETHKE, POLITIKTHEORIE IM MITTELALTER : VON THOMAS VON AQUIN BIS WILHELM VON OCKHAM at 25, 116 (2008) (citing JEAN QUIRDOT, DE POTESTATE REGALI ET PAPALI [ON ROYAL AND PAPAL POWER] ch. 10 (J.A. Watt trans, Pontifical Institute of Medieval Studies 1971) (1302)).

[194] MITTEIS, *supra* note 193, at 4–5, 19–20, 67.

relationships could be used as an argument to prove sovereignty in respect of a specific territory—even up to the present day, in rare cases.[195]

The legal elements of the feudal relationship were somewhat simplified[196]: the personal element—the contract of commendation or vassalage that consisted of the act of homage that established the placing of the vassal's person at the lord's position—and the oath of fealty—with which the vassal undertook to be faithful to the lord. In particular, the oath of fealty was seen as the source of the mutual obligations of lord and vassal—for example, the vassal's military services, advice,[197] and the lord's duty to protect and to provide for the vassal.[198] The property element—which only became especially dominant during the classical period of feudalism and onwards—was the fief or benefice: a grant of land to the vassal to secure the vassal's maintenance, having been the lord's duty, and to enable the vassal to carry out the vassal's services due to the lord.[199] When the fief or proprietary element later came to the fore within the feudal bond, fiefs emerged which were not attached to services to the lord,[200] or services for which the vassal was not granted land but obtained money with which the lord fulfilled his obligation to the vassal.[201] This gave the feudal system a capitalist aspect.[202] In particular, the last two phenomena are important for an analysis of sociological effects of a personal dependence—"feudalism" in a wider sociological sense[203]—because of a proprietary nexus and the permeation of state sovereignty with proprietary elements.

V. COMBINING THE ELEMENTS: POWERS IMITATING SOVEREIGNTY WITH PROPERTY

Property rights, and the contractual relations of private law—especially in the context of international commercial law—for preparing the attribution and transfer of property rights, are intermingled with state sovereignty and serve as a constitutive force in establishing sovereignty; both internally—within the state where it establishes as the supremacy of governmental institutions—and externally—in the realm of public international law where it serves as the supremacy of the state as a legal person founded on territory.[204] International law is more open to a private law-based approach than municipal public law, since

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[195] Minquiers and Ecrehos Case (France v. U.K.), 1953 I.C.J. 47 (Nov. 17), http://www.icj-cij.org/docket/index.php?sum=88&code=fuk&p1=3&p2=3&case=17&k=19&p3=5 (This case was between France and the U.K. The court said, however, that although the Kings of France had an original feudal title with respect to the Channel Islands, that title was found to have lapsed in the thirteenth century and cannot produce a legal effect today, so that the Court's decision on sovereignty was based on more recent acts in relation to the exercise of jurisdiction and legislative enactments.).

[196] Historians will considerably qualify the somewhat ahistorical and typified presentation of feudal institutions here, which does not take account of significant regional differences—Italy, France, England, German States—either. Relevant for the present discussion is, however, the conceptual model. *See* PATZOLD, *supra* note 195, at 7–9.

[197] Also referred to as "consilium."

[198] F.L. GANSHOF, FEUDALISM 69–78, 83 (Philip Gierson trans., 1976).

[199] *Id*. at 106.

[200] Referred to as "feudum francium." *Id*. at 93.

[201] Referred to as "fiefs de bourse."

[202] MITTEIS, *supra* note 193, at 340–41.

[203] *See* SUPIOT, *supra* note 187, at 106–07 (as understood by Marc Bloch in the tradition of the polemic against feudalism by the French Enlightenment and French Revolution).

[204] SHAW, *supra* note 6, at 489.

typical institutions of international law emulate private law—for example, the contract law nature of treaties[205] or the property law nature of state territory and its acquisition[206]—with its characteristic subjects of equal standing, the sovereign states, as opposed to the classical public law setting of hierarchy and subordination. The Austrian economist F. A. Hayek, who trained as a lawyer like many other Austrian economists, noticed the attitude in public law as compared to private law:

The belief in the pre-eminence of public law is a result of the fact that it has indeed been deliberately created for particular purposes by acts of will, while private law is the result of an evolutionary process and has never been invented or designed as a whole by anybody.[207]

Public law passes, private law persists.[208] It is therefore difficult for public lawyers and legal theorists to understand that matters traditionally reserved to projectable and alterable public law can be regulated with the means of generally persistent private law which does not have built-in checks and balances for public accountability and revision—such as separation of powers, parliamentary scrutiny, and constitutional courts.

Legal theory has not realized that a new form of sovereignty is being created by a mixture of cooperation between states and corporations and outsourcing of activities commonly regarded as expressions of state sovereignty—for example, private prison services. Nor have scholars realized that this new sovereignty is the result of detailed international agreements of a clearly private and commercial law nature, which organize matters of financial and fiscal sovereignty—for example, the ESM—or which guarantee worldwide property protection that may affect the way of peoples' lives in certain regions—for example the TRIPS Agreement on intellectual property rights. All that is underpinned, not by a traditional state bureaucracy, but by an ubiquitous managerialism: it derives from management science developed for private enterprises and is applied throughout, not only in business corporations, but increasingly also in state institutions.[209]

This is reminiscent of the critique of the Frankfurt School. But Karl Jaspers already had described the dehumanizing and leveling reduction of the individual human being as elements in an "apparatus" for maintenance in society in which the individuals fulfill short-term oriented duties without a permanent aim or perspective—derived from the structure of an anonymous and scientifically optimized management organization that is found in enterprises and state institutions alike.[210] For Jaspers, this apparatus confers the fiction of equality, but self-evaluation only exists through envious comparison with others. Any effect of intellectual endeavor can only be achieved by advertisement. Otherwise one cannot reach this unintellectual mass of people that represents "being" without

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[205] *Id*. at 902–50; *see also* JEAN MOUSSÉ & IGNAZ SEIDL-HOHENVELDERN, LE CONTENTIEUX DES ORGANISATIONS INTERNATIONALES ET DE L'UNION EUROPÉENNE (1997) (discussing the 1969 Vienna Convention of the Law of Treaties and the typical topics of contract formation, such as consent, interpretation, invalidity though error, fraud or coercion, and performance and breach, impossibility to perform, and *clausula rebus sic stantibus*).

[206] SHAW, *supra* note 6, at 487–521; MOUSSÉ & SEIDL-HOHENVELDERN, *supra* note 205, at 209–14.

[207] F.A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 78 (1978).

[208] *Id*.

[209] *See* COLIN CROUCH, *supra* note 14, at 81–85, 103–06; *see also* SUPIOT, *supra* note 187, at 64–68, 168–80.

[210] KARL JASPERS, DIE GEISTIGE SITUATION DER ZEIT 31 (1931) (using the term "Daseinsfürsorge," but a translation as "public welfare" suggests an inappropriate limitation to public services only).

"existence" and adopts superstition, not creed.[211] Carl Schmitt observed that there is an "onslaught against the political"—the "political" being "the exacting moral decision"—and the "biased rule of politics" appears to become replaced by "unbiased economic management."[212] Political problems are supposed to be dissolved into organizational-technical and economic-sociological tasks; the modern state becomes a "huge industrial plant."[213]

Modern legal theory does not assist in an analysis of the modern relationship between property and sovereignty. One must return to legal history, the feudal system, and classical political philosophy. It seems that sovereignty has not disappeared, but adopts the early forms of the seventeenth century from which it emerged. Bodin and Hobbes saw the property right or *dominium* emanating from the sovereign's *imperium*, and that is the endpoint already for modern twentieth century constitutional theory about sovereignty: property need not feature specifically—and indeed it does not—with thinkers such as Kelsen, Heller or Schmitt. But the exclusivity of the rights of the owner—the classical *ius utendi*, *fruendi*, *abutendi*—have the quality of *imperium* in the realm of private law. Furthermore, the sovereign power can be delegated, for example to an authority or an official, and according to some—Bodin, not Rousseau—sovereignty can be alienated, like property. Historically, the idea of sovereignty was modeled, to a large degree, on the familiar concept of property. This could not be otherwise, because the feudal system Bodin and other Renaissance thinkers sought to overcome was the contemporary system they knew—although the prime of feudalism had long passed. What remained was the proprietary aspect of feudalism, the *beneficium*, while the personal bond of vassalage had largely become an empty formality. It was the time of early "capitalist" forms of fiefs which were not attached to personal services and *fiefs de bourse*. Offices within the state were attached to fiefs and were obtained through purchase.[214] While the early modern thinkers emphasized the separation between sovereignty and property to move the emerging modern nation state away from feudalism, property was nevertheless a source for the concept of the all-embracing and unfettered power that characterizes sovereignty. Grotius clearly saw sovereignty as a special kind of proprietorship, not technically, but as to its effects, which emulate ownership. Pufendorf shows that it could become difficult to disentangle the ownership of the sovereign—at the time typically the king—of his personal property from his possible ownership of the state territory, a problem that recurred with colonialism in the eighteenth and nineteenth centuries.[215]

As the sovereign nation states weaken, property returns as the amalgamating force that can transcend national borders in a globalized market. "Property" is to be understood in the wide sense of "assets", and it is the equivalent to the definitions of "investments" which are provided protection through mechanisms

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[211] *Id*. at 31–38 (translation provided by the author).

[212] SCHMITT, *supra* note 177, at 65.

[213] The possible initial attractiveness of this statement fades somewhat if one considers that the desire to replace the political by economic and organisational management is supposedly found with "American financiers, industrial technicians, Marxist socialists, and anarchic-syndicalist revolutionaries." *Id*. These are exactly the principal groups of opposition for the far right until today.

[214] Montesquieu became a counsellor of the Parlement of Bordeaux in this way in 1714. *See* LEON E. KASTNER & HENRY G. ATKINS, A SHORT HISTORY OF FRENCH LITERATURE 189 (1907).

[215] *See* HENRY HOME, LORD KAMES, ELUCIDATIONS RESPECTING THE COMMON AND STATUTE LAW OF SCOTLAND 234 (1777) (''It seems to be an established law among European nations, that new land belongs to the state by whose subjects it is discovered . . . I am at a loss to comprehend upon what principle this law is founded . . . symbolical possession [without real occupation] will confer no right . . . .").

in free trade agreements, such as CETA. Thus "property" includes not only physical objects, but also contracts, that is: debts—including money,[216] company shares, monetary and financial investment products of any kind—as well as options and expectations and products in relation to the assumption of risk. "Property" in the present context also comprises property organized for holding, investment, and exploitation—for example, in the form of a company or other business organization. Corporate law emphasizes the separate legal personality of the company as property owner—so that shareholders technically do not own the company—but the aspect and effects of sovereignty of the property-owning company do not go away.[217] An agreement of a free trade treaty—such as NAFTA and the future CETA and TTIP, if implemented—is an expression of sovereignty of the negotiating states. Once implemented, it is not merely a delegation of sovereignty to an international body or a network of contractual relations based on an international treaty—that is, contractual in nature—and securing property claims—through investment—but a partial alienation of sovereignty. Property-created quasi-sovereign powers, however, remain dependent on the state, since property and contractual rights only exist because individual state powers enforce these rights—in courts, in enforcement procedures—as an application of the general sovereign powers that characterize states. The private law of contract and property—property understood in a wide sense—is enforced and rendered effective by the sovereign powers of the states which acceded to the treaty: the duties under the treaty cannot be annulled because the contract under private law keeps binding the states and their legislatures, and these can only act in conformity with the international treaty. One can agree with Hayek: public law passes, private law persists. Theoretically, a contracting state can declare to be no longer bound by such a treaty or it may affect a material breach of the agreement and thus terminate, or have terminated, its membership under international law.[218] Whether that is a realistic option from a political, economic, or military points of view, is a different matter. The implementation of ISDS through arbitration is a privatization of parts of the judiciary which is traditionally another central part of a state's sovereignty. Here we even have parallels to historical feudalism, because in the feudal era the courts were in the jurisdiction of the feudal barons and the state's—that is, the king's—power was mediated through these local or personal courts. Today there are no feudal barons, of course, they are replaced by a conglomerate of international companies and states—acting as private entities and not in the capacity as sovereign powers—and, as a very important difference to historical feudalism, disconnected from any specific territory or land.

Where the content of the treaty is not a web of contractual relations which create, or protect proprietary interests, but outright property rights themselves, particularly those not attached to any physicality or geographic location and territoriality. For example, with intellectual property rights—safeguarded by the TRIPS Agreement and other international conventions—one can make out the consequences of international property protection even more directly. Both free trade agreements and intellectual property enforcement can have a profound influence on the political and economic situations of people and peoples. Decision-making does not necessarily require the participation of the national

[216] Money is itself a debt designed to satisfy another debt, for example for the delivery of goods.
[217] *See* Greenwood, *supra* note 104, at 267–68.
[218] Shaw, *supra* note 6, at 945–49.

legislatures of individual states in a way that could shape the political and economic future of the nation significantly—even if the people have voting rights in a general election to a parliament in a liberal democracy. This is the sociologically-informed definition of the power of property with the characteristics of a sovereign power that Tawney and Morris Cohen described in the 1920s—although they spoke little about the corporate powers and the financial systems then.

The corporate powers of companies, banks, and financial systems in general came to the center of attention with the bailout of the banks following the financial crisis in 2008.[219] The financial stability mechanism that the EU developed as a consequence of the rescue actions for the banking industry is firmly based on a private law-commercial law framework. The ESM and its predecessor, the EFSF, have been organized in the form of companies. The EFSF organized as a national limited liability company under Luxembourg law. The ESM is organized as a creature of a treaty of international law that emulates commercial companies, with independent legal personality, shares upon which dividends can be declared and a corporate governance system that resembles the two-tier system of governance of companies limited by shares in Germany. The treaty establishing the ESM is an intergovernmental treaty, and although the EU acted as an agency for the negotiations bringing about this agreement, the treaty and the ESM are outside EU constitutional law. Although the contracting parties are the EU Member States within the Eurozone, they are not parties by virtue of their status as EU Member States, but just as ordinary states under international law. The EU Member States have effectively reduced—perpetually and irrevocably—the exercise of their sovereign powers by largely precluding any participation of their national parliaments in the making and amendment of the ESM or measures under it. The EU itself has clearly ceded its supranational sovereignty—leaving aside whether that concept exists[220]—permanently in creating the ESM, and the grant of an extensive immunity to the organs of the ESM, which mirrors sovereign powers, further emphasizes that fact. The fiscal powers that the ESM can wield on the basis of private-commercial organizational structures created under international law are profound,[221] and unlike the EFSF, the ESM is theoretically perpetual.

If the EU embarks on making it a more common practice to establish such international agencies, it could make itself redundant in the long run. A possible disintegration of the EU may not necessarily be provoked by the refugee crisis, for example, but by the strengthening of the banks and the financial sector instead—by conferring quasi-sovereign powers through private law techniques. Then, the businesses of the financial sector no longer need the EU for their operations since the members states will become separate international entities—either in the form of companies for the operational side or intergovernmental organizations for the regulatory side—with an arbitration system of civil procedure for dispute settlement and without interference from either the parliaments or courts of law of the nation states or the EU. This is evidently the

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[219] *See The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article.

[220] The quality of the sovereignty of the EU and its relationship to the sovereignty of the Member States is unclear and a complicated problem. *See* DIETER GRIMM, SOVEREIGNTY IN THE EUROPEAN UNION 44–48 (2015).

[221] *See* ESM Treaty, *supra* note 63, at arts. 5(6), 14–18.

creation of a conglomerate of sovereign bodies—ultimately based on contract and property law—that gradually replaces the sovereignty of nation states that, in their exercise of their own sovereign powers, helped initially to form these new sovereign bodies. It is also a replacement of public, constitutional law by private, international commercial law. Again, there is a certain reminiscence of feudalism. A major difference is, however, that today the state cedes sovereignty through permanent delegation, so that business entities and international regulatory bodies and financial agencies—such as the IMF—obtain quasi-sovereign power, like the historical estates and the church—in contrast to the sixteenth and seventeenth centuries when the state took such powers from the estates and the church.

Furthermore, today, this transferred sovereign power is shared with the powers of the state. Whether the state has ultimate control and a right to retract, as true delegation of sovereignty would require, however, is doubtful. Law-making is still in the sole sovereign power of the state—although there is a proliferation of rules and regulations in the financial sector which do not derive from classical legislatures—so it still remains necessary for businesses to influence legislation through lobbying.

This permanent transfer of sovereign powers, in part, is not confined to fiscal powers. Core acts of sovereignty, such as warfare and its logistics, have been outsourced to private companies. The case of Halliburton and its subcontractors in the U.S. in the Iraq war is but one prominent example. Such evolutions commercialize the state in all its facets and ultimately promote the state's redundancy.

The intention of such methods of implementation is obviously to bypass pesky parliaments—and the voting public—and courts of law, which may block certain acts as violating constitutional rights and the rule of law. The further effect is that parliamentary elections and any involvement of the general public in politics, legal reform, and constitutional development of a state can become less and less relevant.[222] One could already notice these effects in the context of financial stability measures and sovereign debt. The problem with imposing certain financial and economic austerity programs is that they are supposed to be accepted by future incoming governments, irrespective of their political orientation and of the economic theories they may wish to implement. This was clearly demonstrated by the election in Greece in January 2015 and the referendum in July 2015.[223] The insistence on the austerity measures by the EU—led by Germany—against the professed conviction of the Greek ruling parties did little to advance the democratic reputation of the EU and its Member States.[224] The practical inability to depart from a given economic plan forces political parties of different political convictions to agree on broadly the same economic policy. That, in turn, destroys political pluralism that is the essence of a liberal democracy.

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[222] SHELDON S. WOLIN, DEMOCRACY INCORPORATED 98–99, 212 (2010).

[223] *See* Emilios Christodoulis, *Europe's Donors and Its Supplicants: Reflections on the Greek Crisis, in* CONSTITUTIONAL SOVEREIGNTY AND SOCIAL SOLIDARITY IN EUROPE 241 (J. Ellsworth & J. Van Der Walt eds., 2015) (discussing the history of the imposition of austerity measures on Greece after the 2008 financial crisis).

[224] *See* Paul Krugman, *Killing the European Project*, NEW YORK TIMES (July 12, 2015), https://krugman.blogs.nytimes.com/2015/07/12/killing-the-european-project/; *see also* Ambrose Evans-Pritchard, *Greece is Being Treated like a Hostile Occupied State*, THE TELEGRAPH (July 13, 2015), http://www.telegraph.co.uk/finance/economics/11736779/Greece-is-being-treated-like-a-hostile-occupied-state.html.

Furthermore, it makes democratic elections increasingly redundant since one of the central elements of a national government is the ability to shape economic policy. One can see an erosion of state sovereignty by economic "practical constraints" of the "laws of the market" and inherent necessities which are not subject to democratic scrutiny because a parliament—no matter how it may be composed after new elections—has to consider itself bound by these constraints. Where the envisaged economic measures are, in the exceptional case, put to a vote in a referendum, an undesired result can be disregarded or counteracted with political pressure on the government. This happened in Greece where a referendum was planned for 2011-2012—the government under Papandreou—and then abandoned under pressure.[225] In July 2015—the government under Tsipras—a referendum was actually held that rejected the bailout plan. Despite that, a bailout plan that even went beyond the bailout conditions put to vote in the referendum was implemented.[226] The partial delegation of state sovereignty in the form of contract and property structures and commercial business organizations confers upon banks and businesses sufficient power to assert their interests—and economic theories advancing their interests—against parliaments and politics with noticeable success.

The future could be a bleak one. Large multinational corporations—generally unconnected with a specific state or territory—may organize whole societies and communities through contractual agreements with other business entities—including states which are acting in ways that resemble businesses and not sovereign bodies. Property rights are created, transferred and safeguarded. The exploitation of these rights, in effect, consists of activities that traditionally fell within the domain of politics and the exercise of sovereign state powers. Disputes among these corporate entities are settled by way of private courts through arbitration; the role of nation states being limited to ensuring the enforcement of arbitral awards at the local level. Defense measures against attacks, real or claimed, on a company's commercial interests can be approved informally by a government and subcontracted to a mercenary company specialized in warfare. These days, cost-effective drone attacks against oppositional individuals and groups or parties in breach of contractual duties could be implemented everywhere in the world. The parliaments are confined to legislation giving effect to the framework of international commercial contractual and property relations, for example, through suitable enforcement or employment laws. This is backed by a management system which is supposedly well-suited for businesses and state authorities alike—politicians, senior company managers, civil servants, journalists, academics all become interchangeable managers.[227] Allegiances and dependencies are created through contractual and employment relationships, not too dissimilar to feudal times.[228] But the symbol of allegiance is no longer the coat of arms of the lord or the flag of the state; instead, it is the trademark of one's company. Any important political discourse, vision, or

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[225] Although the German government had a central say in this manoeuvre, this was also controversial in Germany itself. *See* Frank Schirrmacher, *Der griechische Weg: Demokratie ist Ramsch*, FRANKFURTER ALLGEMEINE ZEITUNG, (Nov. 1, 2011) http://www.faz.net/aktuell/feuilleton/der-griechische-weg-demokratie-ist-ramsch-11514358.html.

[226] Ian Traynor et al., *Greek Crisis: Surrender Fiscal Sovereignty in Return for Bailout, Merkel Tells Tsipras*, THE GUARDIAN (July 12, 2015), https://www.theguardian.com/business/2015/jul/12/greek-crisis-surrender-fiscal-sovereignty-in-return-for-bailout-merkel-tells-tsipras.

[227] WOLIN, *supra* note 222, at 135.

[228] SUPIOT, *supra* note 187, at 101–06.

measure, is reduced to a business decision or a business plan. The principal way of participating in such a business decision is in the shareholder's meeting of a company—which presupposes ownership of *voting* shares and preferably a majority of shares at that. This would be in a strange way the resurrection of the specter of the Prussian "three class" voting system,[229] which disappeared in 1918.[230] This system would fit nicely within the trend towards privatization of the state—especially if the criterion of eligibility to vote were no longer taxes, but company shares. Such a reform would presumably also invoke John Locke's comments on taxation and representation as a justificatory authority.

The future, however, need not develop in this way. The start for reform is not initially legislative change, but the abandonment of the ubiquitous paradigm that law can be replaced by economics and management; that justice can be considered as a version of efficiency. That would confine businesses to their proper role again as producers and providers of goods and services while encouraging the states to exercise their traditional sovereign powers—subject to the modern liberal democratic constraints of a system of checks and balances. Only when this guiding principle has been reestablished will legislative reform can be meaningful and effective.

[229] The "Preußisches Dreiklassenwahlrecht."

[230] Under this voting system, only male taxpayers—as property owners beyond a minimum threshold—could vote and there was no direct suffrage. The voters in each district were divided into three classes according to the proportion of their tax payments, and each class accounted for a third of the electors who would vote the deputies. The inequality of this system is well-illustrated, as in 1903 the first class represented 3.4%, the second 12.1% and the third over 84.5% of the electorate, and in 1893 even a chancellor and three ministers found themselves in the third and lowest class. *See* HELLMUT V. GERLACH, DIE GESCHICHTE DES PREUSSISCHEN WAHLRECHTS 31–32 (1908).