

SOVEREIGNTY AS PROPERTY:
REDISCOVERING THE ECONOMIC FOUNDATIONS
OF SOVEREIGNTY IN INTERNATIONAL LAW

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ABSTRACT

Sovereignty and the right to property share a common function, and may be seen as equivalent. This paper intends to argue such equivalence. In order to do so, it builds on COASE's economic theory of property, and shows a close relation between COASE's Theorem and the work of THOMAS HOBBS, which has, in turn, set much of the basic framework of modern international law. This interjection serves as the starting point for comparing HOBBS' Commonwealth with property rights, but finds considerable differences in their nature. However,

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these differences are not present when comparing property with the Commonwealth's main feature: sovereignty. By applying certain methodological tools of comparative law, these similarities lead us to conclude that sovereignty and property, as legal institutions, follow the same logic, a conclusion that will be useful for further theorization on international law & economics.

Keywords: Law & economics, international law, sovereignty, economic theory of property, HOBBS, COASE.

*LA SOBERANÍA COMO PROPIEDAD: REDESCUBRIENDO
LOS FUNDAMENTOS ECONÓMICOS DE LA SOBERANÍA
EN DERECHO INTERNACIONAL*

RESUMEN

La soberanía y el derecho de propiedad tienen una función común, y pueden ser vistos como equivalentes. El presente escrito busca argumentar tal equivalencia. Para hacerlo, parte de la teoría económica de la propiedad de COASE, y muestra gran cercanía entre éste y el trabajo de THOMAS HOBBS, cuyo pensamiento fijó, a su vez, gran parte de la estructura básica del derecho internacional moderno. Esta intersección sirve como punto de partida para comparar la Commonwealth de HOBBS con los derechos de propiedad, ejercicio del cual resultan considerables diferencias entre las dos instituciones. Sin embargo, tales diferencias no están presentes cuando se comparan los derechos de propiedad con el principal atributo de la Commonwealth: la soberanía. Mediante el uso de ciertas metodologías propias de derecho comparado, el documento muestra las efectivas coincidencias funcionales entre soberanía y derechos de propiedad, conclusión que será de utilidad para posteriores esfuerzos en el análisis económico del derecho internacional.

Palabras clave: análisis económico del derecho, derecho internacional, soberanía, teoría económica de la propiedad, HOBBS, COASE.

It is said that OSCAR WILDE once commented that biography lends death to a new terror. Revisiting past mistakes, reliving them and, even worse, making other people actually read them, sounds like a conduct one should, most certainly, abstain from undertaking.

This perspective is not too encouraging for the project of this paper. To a certain extent, I intend to advance a revisiting agenda: I will go back to authors and theories that have been widely discussed before. But I expect to approach them in a way that will not lend new terror to international law. I expect, on the contrary, to present a new perspective on classical issues that, hopefully, will be useful in diverse scenarios.

The basic purpose of this text is, in a sense, simple. I intend to argue that, under international law, the concept of property is equivalent to the concept of sovereignty. This theoretical framework, in turn, is usefully applicable in several areas of international law, such as international competition policy¹, the law of indirect expropriation² or international law of natural resources³.

However, I do not intend to enter these substantive areas of international law during the present undertaking. In this paper, I shall present a construction of some arguments that seek to justify

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- 1 See, for instance: URUEÑA, RENÉ, “The World Trade Organization and its powers to adopt a Competition Policy”, in: *International Organizations Law Review*, vol. 3, 2006.
 - 2 Limitations of regulatory sovereignty as a legitimate consequence of the right to property under its prohibition of expropriation form, is a subject matter that should regain its importance in the Andean Region after the recently signed FTA between the states of the region and the US. On the issue, see generally: GÓMEZ-IBÁÑEZ, JOSÉ A., *Regulating Infrastructure: Monopoly, Contracts and Discretion*, Harvard University Press, 2004.
 - 3 See, for instance: URUEÑA, RENÉ, “Más allá de la frontera: recurso hídrico y la estructuración de derechos de propiedad bajo derecho internacional”, in: *Revista Regulación*, n° 10, 2006.

the existence of property rights and of sovereign powers. Given the existence of these arguments, I will prove how the reasons that explain the existence of these concepts may be seen as equivalent, thus justifying a similar treatment of both of them under international law.

As may be seen, the argument will pay a visit to long – known acquaintances. I will start by presenting the economic theory of property, in reference to the work of RONALD COASE.

Then, I will argue a close relation between COASE Theorem and the work of THOMAS HOBBS. Concretely, I will show how COASE'S line of argumentation is actually the same as HOBBS', hence the latter's conclusion, the Commonwealth, may be regarded as similar to the former's, property.

However, I will then argue that property and the Commonwealth are different in nature. For that reason, I will bring the element of sovereignty into the argument. Following this line, I will conclude that sovereignty is equivalent to property.

This conclusion, nonetheless, may be attacked from the perspective of certain methodologies of comparative law. I will, thus, tackle this criticism, by analyzing such critiques and advancing the reason why my argument should stand.

I will, finally, state that the equivalence that is proposed is a valid, although admittedly incipient, way of understanding the theoretical framework of the two concepts, from where it is possible to derive its use to analyze concrete problems.

1. INTRODUCTION

Imagine no protection available. Imagine there is only a constant and generalized fear of violent death. That is how THOMAS HOBBS understood humanity's state of nature, arguing that, in essence, human beings are equal, and that from equality, distrust derives. Sure enough, from distrust, war soon arrives. The constant fear is then there. No justice, no peace: only competition for limited supplies of

material possessions, distrusts of one another, and glory insofar as people remain hostile to preserve their powerful reputation⁴.

Now, HOBBS' state of nature is valuable for my own reasoning if it is understood as an argumentative device. Indeed, the state of nature is necessary to advance the reasoning according to which humans had to raise, through an agreement, from such a painful and undesirable state, to a better state: literally, *the state*⁵. In this way, HOBBS began the contractualist tradition in theoretical thought, which has proposed for centuries different arguments as to why there should be a state, and how it should act⁶.

However, my interest in HOBBS lies in the fact that through the use of the state of nature, HOBBS sets the building ground for two concepts that will serve as a guiding thread of this paper. More specifically, it is through the state of nature that I will be able to explain, on one hand, the idea of property that will be used in this paper. Similarly, it is through this argumentative device that the concept of sovereignty will be presented. And more importantly, it is in that fashion that the basic premise of this paper, related to the interaction between those two concepts, will be introduced.

4 HOBBS, THOMAS, *Leviathan*, Penguin Classics, 1985, chapter XIII, Notoriously, HOBBS' "common wealth" through a *pactus potentia* argument is then presented in chapter XIV.

5 For an in depth discussion of the Hobbesian argument as the cornerstone for the passage from medieval naturalism to positivism, see: BOBBIO, NORBERTO, *Thomas Hobbes*, Paradigma, 1991.

6 The contractualist canon of authors commonly begins with HOBBS, passes through LOCKE and KANT, then ROUSSEAU, to end up in RAWLS. Controversy is then presented, and the counterparts start normally with the Aristotelian influence, up to ALISDAIR MACINTYRE. A notable exception of this presentation is JOHN RAWLS himself, for whom HOBBS is not a good example of the contractualist tradition, since HOBBS "presents certain special problems" (RAWLS, JOHN, *A Theory of Justice*, Harvard University Press, 1971, on p. 24, footnote 4). In any case, good part of the current theoretical tools available in social sciences appeared within this debate, fact that has been also criticized from the other shore; for example, see: NOZICK, ROBERT, *Anarchy, State and Utopia*, Basic Books, 1974.

2. THE ORIGIN OF THE FENCES

When attempting to address the economic theory of property, COOTER and ULEN start their argument by proposing a “*thought experiment*”⁷. The experiment is none other than the state of nature. Their basic argument is an approach from game theory, where the state of nature is an uncooperative game. Hence, the origin of property rights is explained as a bargain process, in the following way:

“First, a description is given of what people would do in the absence of a civil government, when military strength alone established ownership claims. That situation —called a state of nature— corresponds to the threat values of the non-cooperative solutions, which prevails if the parties cannot agree. Second a description is given of the advantages of creating a government to recognize and enforce property rights. Civil society, in which such a government exists, corresponds to the game’s cooperative solution, which prevails if the parties can agree. The social surplus, defined as the difference between the total amount of spent defending land in the state of nature and the total costs of operating a property right system in a civil society corresponds to the cooperative surplus of the game. Third, an agreement is described for distributing the advantages for cooperation”⁸.

It is always uncomfortable to quote such long expressions; however, I have decided to do so because of the truly remarkable way in which COOTER and ULEN present their argument. As may be felt from the textual read, even though the language that we read is economic (what they propose is, after all, a game), what we actually understand is a political idea (the state of nature), which COOTER and ULEN use to present the basic economic theory of property rights.

Now, this is relevant because it hints that we can trace our way back from economic theory to certain original political thought. In a way, it suggests that we re-walk our own steps back from COASE to

7 COOTER, ROBERT; ULEN, THOMAS; *Law and Economics*, Addison Wesley Longam, 2000, on p. 76.

8 *Ibidem*, on p. 79.

HOBBS. And this exercise will leave us in a cross road where an important train for international law will also pass: the train of sovereignty. Let us, however, start from the beginning: the economic theory of property.

2.1. AN INTRODUCTION TO THE ECONOMIC THEORY OF PROPERTY

Economic theory of property is easily understood through COASE Theorem⁹. This theorem, which is the corner stone of the economic approach to legal reasoning¹⁰, has diverse and far-reaching implications. I will, however, use it inasmuch as it proves useful for advancing the international law argument that I wish to present¹¹.

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- 9 Originally, the idea was presented by RONALD COASE in 1959, in a presentation on radio frequencies (“The Federal Communications Commission”, in: *Journal of Law and Economics*, vol. 2, 1959, on p. 1). His basic point was that if property rights were well defined, it would not make a difference if radio stations interfered initially on each other’s signals, by broadcasting on overlapping widths. One year later, COASE published “The Problem of Social Costs” (in: *Journal of Law and Economics*, vol. 3, 1960, on p. 1), where he presented a more elaborate version of his ideas. The article was groundbreaking. According to GEORGE STIGLER (the first to talk of a “COASE Theorem”), COASE has to economics the importance that Archimedes had to natural sciences. Interestingly enough, COASE’s writings are sparse, and he uses very simple mathematics to explain his points. In essence, his influence derives from two pieces: one, “The Problem of Social Costs”, already referred to. The second, “The Nature of the Firm” (in: *Económica*, vol. 4, 1937, on p. 386), was written when COASE was aged 27, still an undergraduate student, and a socialist. When visiting some American factories (COASE was born in Britain), he wondered how economists could question Lenin’s idea of a centrally planned economy, if firms such as General Motors worked pretty well as centrally planned agents. His answer was that firms worked well because they were built upon people’s voluntary choice. In developing that point, COASE reached the concept of “marketing costs”, which are now widely known as “transaction costs”. In 1991, COASE won the Bank of Sweden Prize in Economic Sciences in memory of ALFRED NOBEL.
- 10 For a brief presentation on the importance of the COASE Theorem in law and economics, see: POSNER, RICHARD A., *Economic Analysis of Law*, Little, Brown and Company, 1992, on p. 45.
- 11 A general overview of the COASE Theorem may be found in any microeconomics textbook. For instance, see: PINDYCK, ROBERT S.; RUBINFELD, DANIEL L.,

In essence, the COASE theorem presents two hypotheses: The first one is known as the “efficiency hypothesis”, and states that given zero transaction costs, regardless how rights are initially assigned; the resulting allocation of resources will be efficient. The second, known as the “invariance hypothesis”, holds that the final allocation of resources will be invariant under alternative assignment of rights. Depending on how the commentator presents the theorem, he may present the *weak version* (only the efficiency hypothesis) or the *strong version* (both hypothesis).

This point may require some explanation. Before COASE¹², economists understood that the best way to internalize externalities was to follow one of two paths: either direct state regulation; or through Pigouvian taxes¹³. If neither regulation nor Pigouvian taxes were used, the result of the transaction would be inefficient.

COASE changed all that. In the first place, he underscored the fact that traditional economic knowledge argued for Pigouvian taxes as a better solution than direct regulation. The traditional argument was that, under Pigouvian taxes, regulators (i.e., the State) did not have to know the cost of preventing the undesirable effects of a certain transaction, in order to be able to create a policy that would address efficiently an externalities issue.

Microeconomics, Prentice Hall, 2001, on p. 666. A deeper, readable, insight may be found in: MEDENA, STEVEN G. ZERBE, RICHARD, “The Coase Theorem”, in: BOUCKAERT, BOUDEWIJN; DE GEEST, GERRIT eds., *Encyclopedia of Law and Economics*, vol. I, The History and Methodology of Law and Economics, CHELTENHAM, EDWARD ELGAR, 2000, Entry 0730. My presentation will rely on this last source and on COOTER and ULEN’s, *op. cit.* on p. 75.

12 For the review of history before COASE, I follow: FRIEDMAN, DAVID, “The Swedes Get it Right”, available at: www.daviddfriedman.com/Academic/COASE_World.html

13 “Pigouvian taxes” refer to taxes designed to correct the negative social effect of a certain activity, by taxing that activity; for instance, a tax on polluting emissions or on cigarettes. Their name derives from ARTHUR CECIL PIGOU (1877 – 1959), a British economist who worked in welfare economics and is a key figure in the neoclassical school of economics.

For example, imagine that the reader's neighbour creates smoke that enters his/her house through the window. Direct regulation could be deployed, but in that case the regulator has to know how much it is worth to prevent the undesired effects of the smoke, in order to be able to design an efficient way to internalize the externality. On the other hand, the traditional approach argued, a Pigouvian tax is better because the regulator simply fixes a "price" for each unit of pollution, and the neighbour decides how much pollution he/she "buys".

For COASE, this is nonsense. He argues that externalities, in a way, are a shared enterprise. True enough; the neighbour is responsible for producing the smoke, but to a certain extent the reader is also responsible because, for instance, he/she did not decide to move to other neighbourhood.

The key aspect is not to understand this idea in moral terms, but to understand that through this premise, COASE was able to present his first argument. If both parties are somehow responsible, then the regulator should hold accountable of externalities the party that may avoid them at a lower cost. In that sense, Pigouvian taxes are only right if they tax the party that will cope with externalities more efficiently.

That is the first part of the argument, and the premise for what will be explained next: the argumentation that is known specifically as the COASE Theorem. We saw that the assignment of blame should be based on how prepared is each party to cope with externalities (or, in other words, which party is able to avoid them at lower costs). Therefore, a regulator that desires an efficient policy should know how costly is for each party to avoid the externality, in order to assign blame efficiently.

However, the regulator is unable to know that. If he would have that information, then direct regulation would be the answer to the problem, and we would be back at square one of our issue. In that sense, the only people who know how costly it is for the parties to avoid the externality are the parties themselves. As a consequence, parties should be left alone to decide who takes the blame for externalities, as they are the only ones who hold that information.

That is the point. If parties are left to negotiate their agreements, they will reach an efficient result, notwithstanding the way in which rights were initially assigned. Thus, direct regulation or Pigouvian taxes become irrelevant.

Note that this argument presumes that parties do not incur in any cost in the negotiation itself. That is, they have no transaction costs. If they have no transaction costs, they will reach an efficient outcome, regardless of the original distribution of rights. However, if they do have transaction costs, the bargain will turn to the lowering of those costs to each party, which may lead to scenario in which a party agrees to a transaction that is inefficient, but bears lower costs of transaction for her.

That is why COASE Theorem states: When transaction costs are zero, an efficient use of resources results from private bargain, regardless of the legal assignment of property rights¹⁴. This use of resources, in turn, will be efficient (efficiency hypothesis), and probably invariable (invariance hypothesis).

Now, the premise of zero transaction costs is a factual impossibility. That is, paradoxically, why COASE Theorem is important for my argument. Given that zero costs of transaction are impossible, COASE Theorem may be formulated negatively, in the following way:

Negative COASE Theorem:

“When transaction costs are high enough to prevent bargaining, the efficient use of resources will depend upon how property rights are assigned¹⁵”.

In that case, property rights should be clearly defined. That is the first conclusion that will be drawn, for the ends of this argument, from the COASE Theorem: property rights are justified when transaction costs are high enough to prevent bargain. That is the origin of the fences.

14 This way of formulating the Theorem is included in: COOTER, ROBERT; ULEN, THOMAS, *op. cit.* on p. 85.

15 *Source: Ibidem.*

2.2. AN UNLIKELY DUET

When presented in the terms expressed above, COASE Theorem seems to be only partially related to the problem addressed in this paper. Yes, one may argue, property is justified when transaction costs are high. Does that have anything to do with international law, or for that matter, law at all?

Well, it does have something to do. As the matter was presented above, transaction costs seem something external to the law whereby one establishes property rights. It would appear as if the regulator were a third objective party, which observes transaction costs and after a previously defined threshold is surpassed, imposes property. However, given that one of the main costs of transaction is law itself, the latter is certainly not the case¹⁶.

Indeed, on a descriptive level, COASE Theorem is somehow inapplicable, as the premise of zero transaction costs is unreachable. Nonetheless, on a normative level, COASE Theorem presents important challenges. Given that law itself is an important transaction cost, a valid objective of the law is to reduce as much as possible those costs¹⁷.

We have seen that the basic COASE Theorem states that low transaction costs allow an efficient allocation of resources; in that order of ideas, a valid objective of the lawmaker, when allocating property rights, is to reduce costs of transaction, in order to facilitate bargaining and, consequently, reach an efficient transaction.

16 The law as a transaction cost is a point understood, both intuitively and rationally, by most of the people. On a personal level, it has always amazed me how owners of the smallest informal vegetable markets in Bogotá keep a separate, preventive, fund for lawyer fees, whose price is added to the price of the final product. That is a good example of intuitive internalization of those externalities (i.e., costs of transaction), whose burden will be carried by the final customer. This intuition is developed by POSNER under the economic theory of legal process, *in*: POSNER, RICHARD, *op. cit.* on p. 489.

17 The normative COASE Theorem is also widely recognized in literature related to the issue. For a simple mathematical formulation of it, *see*: MEDENA, STEVEN G.; ZERBE, RICHARD, *op. cit.* on entry 0730.

Now, it should be noted that the idea behind the normative version of COASE Theorem is that the lawmaker should try to eliminate failure to cooperate among individuals. That is, if high transaction costs are undesirable, as they lead to inefficient allocation of resources, then the logic corollary is that reduction of those costs would increase cooperation, which in turn would result in an efficient allocation of resources. Therefore, it is desirable to increase cooperation among individuals.

The sharp reader will have noticed, by now, that this line of argumentation is really not that original. Long before COASE, there was someone who had already argued, from a different perspective, that it is efficient to increase cooperation among individuals: THOMAS HOBBS¹⁸.

HOBBS argued that under the state of nature, the human being had the “right of nature”, which consisted in:

“(…) The liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life, and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto (...)”¹⁹.

Now, this point is of high importance to understand the relation between HOBBS and COASE. In essence, HOBBS²⁰ argues that, under

18 COOTER and ULEN have already noted this striking similarity. *See*: COOTER, ROBERT; ULEN, THOMAS, *op. cit.* on p. 94. COOTER has gone very deep in his exploration of this common point, *see*: COOTER, ROBERT, “The Cost of COASE”, in: *Journal of Legal Studies*, vol. 11, 1982, on p. 1. This point has also been noted by JOHN RAWLS, who argued that HOBBS’ state of nature was a typical example of the prisoner’s dilemma (RAWLS, JOHN, *op. cit.* on p. 252, especially footnote 9). A similar approach will be adopted in advancing my argument, as will be seen next.

19 HOBBS, THOMAS, *op. cit.*, chapter XIV.

20 To present HOBBS’ argument, I will follow his *Leviathan (op. cit.)*, especially chapters XIII and XIV. Furthermore, my interpretation of the text has built extensively on: SORELL, TOM, *Hobbes*, Routledge, 1991, on p. 111; and on: RAWLS, JOHN, *Lectures on the History of Moral Philosophy*, edited by BARBARA HERMAN, Harvard University Press, 2000, on p. 365.

the state of nature, individuals are allowed to do anything necessary to guarantee their survival. And, for HOBBS, anything means literally anything:

“Every one has a right to every thing, even to one another’s body²¹”.

In this order of ideas, property is out of the question under the state of nature. Although this point is clear enough, a qualification is needed: property is not conceivable under the state of nature, not because it is inherently contradictory with it, but because there is no use for it under that state. Under the state of nature, everyone is entitled to everything needed to survive; hence, since the only goal under the state of nature is to survive, property is not needed.

However, according to HOBBS, it is imperative for men to rise from such a state because, as we have seen, the state of nature establishes perpetual warfare. To achieve this, HOBBS proposes in the *Leviathan* his three laws of nature, which will show useful to further advance my argument²². The first law of nature states that:

“(...) every man ought to Endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek and use all helps and advantages of war (...)”²³.

21 HOBBS, THOMAS, *op. cit.*, on chapter XIV.

22 It is commonly accepted that HOBBS derived this “natural laws” language from Grotius (*see*: SORELL, TOM, on p. 58). Following a geometrical pattern, HOBBS deduces 13 further laws of nature from the first 3. *See*: HOBBS, THOMAS, *op. cit.*, chapters XIV – XVI. The reference to “laws of nature” should not lead the reader to consider them as “natural law”. HOBBS considers that all that natural law establishes is (a) the right of self preservation; and (b) the causal relation of an act with the achievement of a potential object of desire. But it states not what is wrong or what is right: this decision is taken by men, based on their own self interest. HOBBS is, in that sense, the quintessential positivist. *See*. KOSKENNIEMI, MARTTI, *From Apology to Utopia: The Structure of the International Legal Argument*, Finnish Lawyers’ Publishing Company, 1989, on p. 60. BOBBIO, NORBERTO, *op. cit.*, on p. 99.

23 HOBBS, THOMAS, *op. cit.*, chapter XIV.

From this premise, HOBBS derives his second law of nature, which holds that:

“(...) a man be willing, when others are so too, as far forth as for peace and defense of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself (...)”²⁴.

This idea, nonetheless, requires a practical means to be implemented. That is, a tool is needed in order to lay down certain rights, in the measure indicated by the second law of nature. That tool is the contract, whose only use derives from the expectation that it will be respected. Hence the third law of nature states that:

“(...) that men perform their covenants made: without which, covenants are in vain, and but empty words; and the right of all men to all things remaining, we are still in the condition of war (...)”²⁵.

If we read the three laws together, we will find that through covenants, men lay down the rights necessary to achieve peace. It should be noted, though, that the incentive to comply with the covenant in the state of nature is quite low. In that state, even if one accepts that peace should be reached, one will always doubt whether the other party of the agreement will comply. And given that in the state of nature we are all equal, none will have the superior strength to force anyone to comply. Therefore, the fear will remain constant.

To solve this paradox, HOBBS proposes that men should lay down their rights, not in favour of each other, but in favour of a third party, which would be strong enough to enforce compliance with the covenants²⁶. In this way, security is guaranteed through the

24 *Ibidem*.

25 HOBBS, THOMAS, *op. cit.*, chapter XV.

26 A famous paradox within this proposition refers to the enforcement of covenant whereby one lies down the rights in favor of the enforcer. According to SORELL, this is not an answer begging question, since the idea of the covenant is to overcome the state of nature, “and with it, the obstacles the state of nature puts in the way of binding

delegation of those powers to a third party. The compromise of men, on the other hand, is to keep their side of the deal: obedience is due to that third party, under the third law of nature.

Under this logic, then, the third party referred to ends up being a commonwealth, defined as:

“(…) One person, of whose acts a great multitude, by mutual covenants on with another, have mad themselves every on the author, to the end he may use the strength and means of them all, as he shall think expedient, for their peace and common defense (...)”²⁷.

That is HOBBS’ solution to the problem: transfer of security rights to the commonwealth. In other words, in the state of nature, men are at constant war; hence costs of transaction are so high that an efficient allocation of resources is impossible. That is, peace is not reachable.

However, according to the first law of nature, an efficient allocation of resources (peace) is by definition desirable. Given this background, HOBBS then proposes a formula already known to us as the negative COASE theorem:

“When transaction costs are high enough to prevent bargaining, the efficient use of resources will depend upon how property rights are assigned”.

That is the point where it all comes together. The transfer of rights in favour of the commonwealth is a way of reducing transaction costs, typical of the state of nature. However, this equivalence needs to be qualified, in order to be reliable. Indeed, we have seen that, according to COASE Theorem, transaction costs are lowered through property rights, in order to encourage bargaining. HOBBS, on the other hand, presents a different answer: high transaction costs (the

agreements” (SORELL, TOM, *op. cit.*, on p. 116). It is, nevertheless, interesting to realize logical inconvenience of the unenforceability of that first covenant.

27 HOBBS, THOMAS, *op. cit.*, chapter XVIII.

state of nature) are to be lowered through the creation of the commonwealth, which is to be kept.

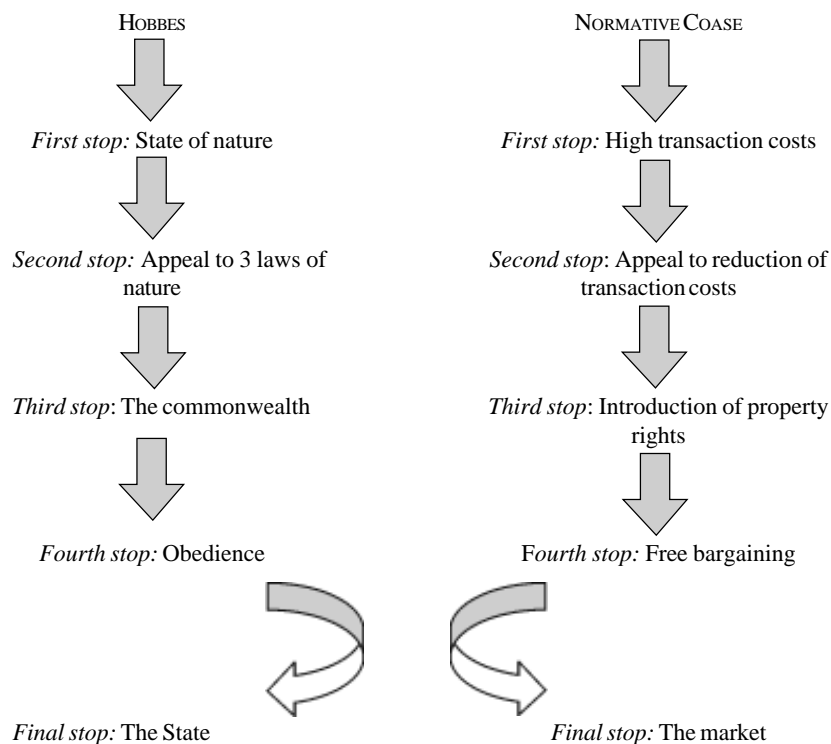
In this order of ideas, it is clear that both HOBBS and COASE face the same problem, and develop a similar argument to solve it. Departing from a situation where costs of transaction prevent an efficient outcome of the transaction, both propose the creation of a third element whose objective is the reduction of such costs. HOBBS proposes the commonwealth; COASE, in turn, proposes the establishment of clear property rights, both sharing the same objective.

It is possible to read the same argument in the inverse sense; that is, searching for the origin of each author's conclusion. In that sense, the commonwealth shares a *raison d'être* with property rights: the reduction of costs of transaction costs. These costs lie deep inside the birth of both institutions, and explain how the creation of the commonwealth follows the same pattern and seeks exactly the same ends as the establishment of property rights.

This conclusion does not seek to imply that the practical consequences of both approaches are equivalent. On the contrary, an interesting paradox rises in this point. COASE and HOBBS follow the same line of arguments to solve the same problem (seen from different perspectives). Their solutions, though, become incompatible when taken to their last logical consequences. In that sense, property rights and the commonwealth is the last common stop of these two trains, whose path diverges after this point.

Indeed, as can be seen in figure 1, HOBBS and COASE follow a similar argumentation to reach the solutions we have studied, which are equivalent as well. However, if we take HOBBS conclusion to its next logical consequence, it is clear that obedience is owed to the Commonwealth; without obedience, the covenant whereby men laid down their rights would be broken, an action unacceptable under the third rule of nature. COASE Theorem, on the other hand, proposes the establishment of property rights with the aim of reducing transaction costs, in order to allow people to bargain freely.

FIGURE 1. The path we have walked



This paradox, however, does not prevent us from concluding that property and the Commonwealth share a common origin and logic. Note, however, that the presentation of the issue, as laid down in Figure 1, presents a particularity in the proposed equivalence. Whereas in the Hobbesian third stop reference is made to an institutional arrangement, on the Coasian side reference is made to a bundle of rights, generally referred to as “property rights”.

In that sense, one could argue that, according to HOBES, the definitive moment of the Commonwealth’s creation is the moment whereby each and everyone will lie down his rights in favor of the Commonwealth. But, HOBES continues,

“(...) this is more than consent, or concord; it is a real unity of them all in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man: I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner. This done, the multitude so united in one person is called a COMMONWEALTH; in Latin, Civitas. This is the generation of that great *Leviathan*, or rather, to speak more reverently, of that mortal god to which we owe, under the immortal God, our peace and defence (...)”²⁸.

This moment of unity creates the Commonwealth. The Commonwealth, though, is not power in itself, but is entitled to power. It is an institutional creation: “someone”, if one wills, not “something”. Property rights, on the other hand and as presented by COASE, are “something” recognized to “someone”: a bundle of rights, and in this sense, of negative power (power to resist hindering of those rights), that are given to human beings in order to reduce transaction costs. One is an attribution (COASE); the other is the subject of an attribution (HOBBS).

Indeed, for HOBBS, the Commonwealth is:

“(...) One person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence (...)”²⁹.

We have, therefore, that the solutions presented by HOBBS and COASE are, in nature, different. That is an important point to make. Does it mean that the equivalence that I have elaborated throughout this section is useless? That is, certainly, not the case. This counterargument requires that I present the last element of my first point. It is necessary now to discuss the issue of sovereignty.

28 HOBBS, THOMAS, *op. cit.*, chapter XVII.

29 *Ibidem*.

3. WHAT MAKES A GOD MORTAL?

As said before, HOBBS refers to the Commonwealth as entitled to certain powers, bestowed on her through the tools analyzed before, set forth by the laws of nature. The subject of those powers is everyone³⁰. And the substance of that power is sovereignty:

“And he that carryeth this person is called sovereign, and said to have sovereign power; and every one besides, his subject³¹”.

Sovereignty is a basic concept in the construction of the language of international law, and it has been evaluated, defined and redefined from different perspectives, for centuries. Now, the traditional way of introducing the issue normally relates to two ideas: independence (“*external sovereignty*”) and self-determination (“*internal sovereignty*”). This, of course, is saying it all and saying nothing at the same time as: What are independence and self – determination, but similarly void concepts? What if two states make a contradicting sovereignty argument over the same legal point?³².

These sorts of questions, which are inherent to the concept itself, are normally overlooked by textbooks. That strategy, whereby the definition of certain concepts is simply implied in order to present further points, allows sovereignty to be as expandable or retractable as the analyst desires. Hence, the possibility of stating, with IAN BROWNLIE, that:

“The analogy between sovereignty and ownership is evident and, with certain reservations, useful. For the moment it is sufficient to establish certain distinctions. The legal competence of a state includes considerable liberties in respect of internal organization and the disposal of territory. The general power of government, administration, and disposition is

30 *Ibidem*.

31 *Ibidem*.

32 This introduction and the argument to come are based upon: KOSKENNIEMI, MARTTI, *op. cit.*, on p. 60.

imperium, a capacity recognized and delineated by international law. *Imperium* is thus distinct from dominium either in the form of public ownership of property within the state or in the form of private ownership recognized as such by the law³³”

Now, the above quoted text is the whole extent of BROWNLIE’S section on “*Sovereignty and Ownership*”. It is relevant at this point of my argument, because it provides a good example of the limitations of the traditional approach to sovereignty, when attempting to discuss a concrete consequence of the concept implied.

BROWNLIE’S strategy fits perfectly in the critique on the concept of sovereignty presented above. BROWNLIE discusses the issue to which I have referred up to this point. And he denies the equivalence of sovereignty and ownership on the basis that one is based on *imperium* (sovereignty) and the other on *dominium* (ownership).

This strategy is skillful: again, reference is made to an undefined concept to explain another undefined concept, and thereby draw the line with yet another undefined concept. Sovereignty is explained through *imperium*, which is explained as different from *dominium*. *Imperium* and *dominium* remain unexplained, and so does the consequent difference between sovereignty and property³⁴.

I am, however, far from suggesting that examples such as the one put forth above are a problem of weak legal analysis. The problem is, precisely, the opposite: why do competent lawyers advance arguments which may be so easily (and predictably) attacked? The answer is to be found in the structure itself of the concept of sovereignty.

33 BROWNLIE, IAN, *Principles of Public International Law*, sixth edition, Oxford University Press, 2003, on p. 101, other editions: part. 3, chapter 6, number 3.

34 Since Roman jurists left no general structure of roman public law, the nature of *imperium* and *dominium* remains widely debated. These concepts have no concrete meaning; or rather, they have several. It is clear, thus, that their use for drawing the line between ownership and sovereignty is limited. On the roman public law legacy and *imperium*, see: JOHNSTON, DAVID, “The General Influence of Roman Institutions of State and Public Law”, in: CAREY MILLER, D.L. ZIMMERMANN, R. eds., *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essay*, Schriften zur Europäischen Recht und Verfassungsgeschichte. Duncker & Humblot, 1997, on p. 87-101.

Sovereignty is, according to KOSKENNIEMI, not an exception of the general structure of the international legal argument³⁵. International law in general, he argues, is trapped between utopia and apology:

“A law which would lack distance from state behavior will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behavior, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way³⁶”.

That general, inherent, paradox of international law is also reflected in the issue of sovereignty. *From Apology to Utopia* presents how the problem of sovereignty is structured between two strong poles: SCHMITT’s factual concept of sovereignty and KELSEN’s normative approach to the matter³⁷. Each one of these approaches reflects, respectively, the ascending and descending perspective of statehood which, in turn, feed the whole system of international law.

SCHMITT’s “pure fact” approach states that “*law is secondary to the factual decision*”³⁸, hence sovereignty is a matter of factual verification, from where normative propositions are derived. KELSEN’s “legal” perspective, on the other hand, proposes that the state as a sociological entity is not related to the normative reality. Sovereignty is only inasmuch as it is in the general juridical system. Facts are not relevant, at least in principle: first, validity in the normative sense, and then the facts.

35 KOSKENNIEMI, MARTTI, *op. cit.*, on p. 192.

36 *Ibidem*, on p. 2 Following WALTER ULLMAN, KOSKENNIEMI describes each of these two dynamics as *ascending* and *descending* argument. The descending arguments “are taken as a given normative code which precedes the State and effectively dictates how a State is allowed to behave, what it may will and what its legitimate interests can be”. The ascending arguments, on the other hand, “base order and obligation on state behavior, will or interests”. (*Ibidem*, on p. 40).

37 *Ibidem*, on p. 194.

38 *Ibidem*, on p. 194.

Now, within KOSKENNIEMI'S framework, HOBBS'S presentation of sovereignty could be understood as an argument of the ascending type³⁹. HOBBS'S Commonwealth derives its sovereign power from the factual reality that human beings lay down their rights in its favor, in order to survive. There is no abstract normative order from which the sovereign derives his powers. The Commonwealth exists because it is on the self interest of all that it does, and the law simply recognizes this fact.

However, this would be too restrictive an approach to HOBBS'S contribution. Even though his view of the sovereign may be understood in the above mentioned sense, that conclusion has to be read from the general perspective of HOBBS'S contribution to the structure of the legal argument itself⁴⁰.

HOBBS'S argument is not simply ascending. He moves in an ascending – descending fashion: truth, the sovereign's powers are explained in an ascending fashion, referred to equally free and egoistic individuals without any normative background who lay down their rights in their own self interest⁴¹.

39 KOSKENNIEMI seems to hint this conclusion in: *Ibidem*, on p. 199, footnote 21.

40 The presentation of HOBBS'S general contribution to international legal argument is based upon: *Ibidem*, on p. 53–67, and: KOSKENNIEMI, MARTTI, "The Hobbesian Structure of International Legal Discourse", in: AIRAKSINEN, TIMO; BERTMAN, MARTIN A. (eds.) *Hobbes: War Among Nations*, Avebury, 1989, on p. 168–177.

41 It could also be argued that the assumption of egoistic, equally free and rent-seeking individuals is also a descending argument within the ascending departure point. Indeed, imaging the state of nature is an evident exercise of normative reasoning, where one argues as necessary premises a series of psychological characteristics that may be seen as normative. After all, who says that we are, indeed, free, equal and egoistic? HOBBS'S skill is to evade such questionings by appealing to causality. HOBBS, it should be remembered, worked also extensively in natural sciences, especially in optics. The reference to causality is truly amazing because, as understood by HOBBS, causality is not a matter of natural law, that is, a normative principle which says what is good or bad. A seventeenth century Englishman for whom Natural Law had an evident Catholic Pope aftertaste, HOBBS would have none of that: a natural law argument would be unacceptable. Causality, on the contrary, is just the tool through which the sovereign is established. It is simply necessary: for reasonable individuals, a sovereign is just better than no sovereign. In this order of ideas, the possible descending argument within the state of nature is irrelevant. The sovereign is necessary, because its creation is causal; it's the effect of a cause. Not because it is good or bad. (On causality in HOBBS, see: SORELL, TOM, *op. cit.*, on p. 83).

Nonetheless, every single wish of each individual cannot be respected. Therefore, there is a “greater good” argument in HOBBS. Individual wishes and desires should be restricted in as much as the greater good is protected, the latter being, of course, peace. This greater good argument is a typically descending argument: the initial ascending logic of the individualistic human being is complemented through a descending logic, consisting on the limitation of individual will for the achievement of this greater good.

This qualification of the Hobbesian argument is characteristic of the international legal argument. International law is Hobbesian and HOBBS, although never speaking expressly of international law, is the quintessential international lawyer. This idea is not new: KOSKENNIEMI, already fifteen years ago, verified that, since HOBBS, international lawyers have been incapable of accepting a fully objective or a fully subjective international legal order⁴².

Indeed, as KOSKENNIEMI puts it:

“The Hobbesian legal mind is suspicious of, and even hostile to political solutions to legal questions. This leads the Hobbesian approach to incorporating both subjectivism and objectivism into its arguments. Law is not utopian because it is based on (concrete) State will. It is not apologist, either, because it is binding regardless of such will. As a matter of legislation, law is subjective; as a matter of adjudication, law is objective. But the two strands constantly threaten each other⁴³”

That is the problem. Due to the structure of the argument, my presentation of Hobbesian sovereignty is bound to be one sided. True, the ascending argument is convincing, but a descending argument is required to balance. Both aspects are inconclusive: both are required, none is final.

42 KOSKENNIEMI, MARTTI, “The Hobbesian Structure of International Legal Discourse”, in: AIRAKSINEN, TIMO; BERTMAN, MARTIN, *Hobbes: War Among Nations*, Averbury, 1989, on p. 168.

43 *Ibidem*, on p. 177.

Therefore, sovereignty is indefinable. Not because legal publicists are not competent enough to define the concept, but because it is in the deep structure of the concept to be indefinable, in that sense. One could imagine, if one wills, two holes in a wall, connected with a tube, both pumping out water. If one hole is blocked, all water will go out through the second. It is, simply, not solvable. Sovereignty feeds from two sources, and limiting one of these will only result in using the second one.

In that order of ideas, attempting a definition is, in itself, vain. Following to its logical conclusion KOSKENNIEMI's argument:

“The expression “sovereignty” or any definition thereof cannot have such fixed content as to be “automatically” applicable. It is not only that they are ambiguous or have a penumbra of uncertainty about them. There is simply no fixed meaning, no natural extent to sovereignty at all⁴⁴”.

This patent impossibility of definition leaves my argument in a tight spot. Indeed, I have been arguing that COASE's explanation of property rights shares a common logic with the creation of the Hobbesian Commonwealth. However, we saw as well that, while the Commonwealth is an institutional arrangement, property is not. Therefore, they are not comparable. The attributions of that Commonwealth would be comparable, though. And the main attribution of the Commonwealth is sovereignty. But we have reached the conclusion that sovereignty is, basically, impossible to define.

In that order of ideas, up to this point, I am still lacking the criteria to find equivalences between the two arrangements. I will turn now to some elements of comparative law, where I shall find the final argumentative tool that I need.

44 KOSKENNIEMI, MARTTI, *From Apology to Utopia...*, *op. cit.*, on p. 209.

4. SOVEREIGNTY IS PROPERTY, THE OWNER IS SOVEREIGN

It has been discussed extensively that the underlying idea of the similarity between property and the Commonwealth is their common objective. That is, they are useful for the same end: they share the same function. And equivalence of function of two legal institutions is, as we shall see next, the only relevant question to be asked when comparing their juridical nature.

In effect, comparative lawyers have been concerned for centuries about the possibility of comparing legal institutions. What is comparable and what is not? That basic question has been discussed widely, from different perspectives.

Suffice it to say that, in essence, three important approaches have been taken to answer that question⁴⁵. The first one is what FRANKENBERG calls “*juxtaposition plus*”, according to which the legal analyst is allowed to compare legal institutions from an objective perspective, typically by creating “*families*” of legal systems.

This approach is easily targeted as subjective and, given the origin of the theory, as Eurocentric. Indeed, the “*juxtaposition plus*” approach treats law

“as a given and a necessity, as the natural path to ideal, rational or optimal conflict resolutions and ultimately to a social order guaranteeing peace and harmony⁴⁶”.

This is not necessarily truth, hence the wide criticism of such approach.

45 The presentation of the different comparative law approaches is based on: FRANKENBERG, GÜNTER, “Critical Comparisons: Re-thinking Comparative Law”, in: *Harvard International Law Journal*, vol. 26, 1985, on p. 411–455. FRANKENBERG undertakes in that article the mission of “rethinking” comparative law and, in a large degree, he actually succeeds.

46 *Ibidem*, on p. 445.

On the other hand, we find the concept of comparative legal functionalism, represented by the approach of KONRAD ZWEIGERT and HEIN KOETZ⁴⁷. According to this approach, law is but a set of solutions to social problems. This claim may sound logical to a point, but it has been also subject to well founded criticism.

Indeed, the problem of strict functionalism lies in the fact that it ignores a circumstance that is known to us at this point of the argument: sometimes, law is not the answer to problems, but part of the problem. Law, to put it in similar terms as said before, may raise costs of transaction.

That is the reason why FRANKENBERG, in his review of the main schools of comparative law, states that

“by stressing the production of ‘solutions’ through legal regulations, the functionalist dismisses as irrelevant or does not even recognize that law also produces and stocks interpretive patterns and visions of life which shape people’s ways of organizing social experience, giving it meaning, qualifying it as normal and just or as deviant or unjust⁴⁸”.

In this order of ideas, functionalism typically tries to ignore the problem that, as a method, it requires a minimal underlying understanding of what is the law. From there, it is possible to compare the “*legal*” solutions given to certain social issue.

The problem is that the functionalist agenda never undertakes such task. Hence, the functionalist comparativist ends up being a formalist who, lacking a substantial definition of the law that may be used in his comparison, finds only legal solution in the shape of formal law. In this way, the functionalist program is frustrated, as it began precisely as way to question from the root the legocentric approach to comparative law⁴⁹.

47 ZWEIGERT, KONRAD; KOETZ, HEIN, *An Introduction to Comparative Law*, Oxford University Press, 1998.

48 FRANKENBERG, GÜNTER, *op. cit.*, on p. 438.

49 In that sense, FRANKENBERG holds that: “The functionalist negates the interaction between legal institutions and provisions by stripping them from their systemic

Now, this brief review of comparative law schools is quite useful for the advancement of my argument. By criticizing the two hereinabove mentioned schools of comparative law, FRANKENBERG presents a third option: what he calls “*distancing and differencing*”. The key, in this sense, is not search for the common ground between “*families*” or “*institutions*”, but the acceptance of difference as necessary.

The idea, according to FRANKENBERG, is that the comparativist should be conscious of his/her own subjectivity and bias, and through this consciousness, break his own ethnocentrism. FRANKENBERG then proposes a method for achieving distance and difference, which has been widely debated among comparative lawyers⁵⁰.

Now, FRANKENBERG’s methodology is relevant to my argument because, if analyzed carefully, my task in this point is that of the comparative lawyer. I seek to present the institution of property, and then construct a parallel with sovereignty. If seen from that perspective, it becomes clear that I have to face the comparativist dilemma: am I aiming to compare two things that are, in essence, incomparable? This problem, then, should be addressed through a review of my own comparative methodology.

FRANKENBERG proposes, as we have seen, that distance should be taken and difference, accepted. The first step is to reject the intuition of characterizing the issue as a legal issue, *per se*. Second, we have to let difference be; that is, accept differences and avoid emphasizing the similitude. Third, if possible, we should avoid the “legal talk”;

context and integrating them in an artificial universal typology of ‘solutions’. In this way, ‘function’ is reified as a principle of reality and not taken as an analytical principle that orders the real world. It becomes the magic carpet that shuttles between the abstract and the concrete, that transcends the boundaries of national legal concepts, that builds the system of comparative law, the ‘universal’ comparative legal science of ‘the general law’. *Ibidem*, on p. 440.

50 For a good review of the debate on FRANKENBERG’s approach, see: ZUMBANSEN, PEER, “Comparative Law’s Coming of Age? Twenty Years after Critical Comparisons”, in: *German Law Journal*, vol. 6, 2005, on p. 1073.

that is, avoid comparing the problem's solutions as rights and duties, or similar legal structures, and accept the possibility of a different environment for comparing the institutions⁵¹.

In this order of ideas, my comparative agenda should be advanced by using these methodological tools. Only in this way, my comparison will be reliable. This objective, nonetheless, is not too far away.

If we reformulate the approach that has been taken up to this point of my argument, it will become evident that the problem has not been posed under a legal framework of analysis. The argument has been economic: property and institutions are comparable, because they have similar economic effects: the reduction of transaction costs.

Therefore, I am not imposing my own legal preconceptions to find coincidences where they are inexistent, and erasing the differences where they are evident. Property and sovereignty are comparable inasmuch as they serve the same function, in economic terms. "Legal talk" is avoided as my comparison focuses in economics.

There are two possible counterarguments to what has been said up to now: (a) My approach is just a disguised form of comparative functionalism; and (b) my approach is even more biased than an average legocentric perspective, because I use an indeterminate concept such as "efficiency" to compare two institutions. "Efficiency" is as arbitrary a criterion of comparison as "justice" may be; hence, I would be, also, biased.

These counterarguments are made, with relative insistence, against comparative law and economics⁵². I shall only answer in reference to the limited scope of my own comparison (property – sovereignty), by stating that the concept of efficiency is not as indeterminate as it may seem. Efficiency is not justice: there are,

51 This is a brief presentation of FRANKENBERG's methodology. See: FRANKENBERG, GÜNTER, *op. cit.*, on p. 438.

52 For a general argument on this point, see: MATTEI, UGO, *Comparative Law and Economics*, University of Michigan Press, 1997.

actually, only two criteria of efficiency that are accepted by the mainstream economical thought (PARETO and KALDOR - HICKS⁵³) and stating that efficiency is an empty concept is, in turn, an empty charge. Hence, the second counterargument is not convincing: by using efficiency as a criterion of comparison, I am adopting a concept that does have a degree of objectivity. It is possible to measure both institutions from an efficiency point of view, and measure their results in reducing transactions costs. Hence, comparison is possible and not a simple biased exercise.

The first counterargument, though, is far more interesting. The law and economics approach to comparing legal institutions may be seen, indeed, as a way of functionalism. If thought thoroughly, the criterion of efficiency presumes that the law's objective is to solve problems in an efficient fashion, hence the possibility of

53 See: MATTEI, UGO; ANTONIOLLI, LUISA. ROSSATO, ANDREA, "Comparative Law and Economics", in: BOUCKAERT, BOUDEWIJN; DE GEEST, GERRIT eds., *Encyclopedia of Law and Economics*, vol. I, The History and Methodology of Law and Economics, CHELTENHAM, EDWARD ELGAR, 2000. Entry 0560. The two criteria are included in any microeconomics text book. See: PINDYCK, ROBERT S.; RUBINFELD, DANIEL L., *op. cit.*, on p. 321. According to their classic formulations, following the useful definition of Reckon, Regulation & Competition Economics (available at <http://www.reckon.co.uk/> last visit: 26.07.06), "in a trading system with a fixed set of participants, a change is a PARETO improvement if it means that at least one participant would favour the effects of change (would be "better off") and no participant would oppose the effects (be "worse off"). Within the same context, a KALDOR - HICKS improvement is defined as a change that is either a PARETO improvement or such that: a. the "winners" from the change would be able to compensate the "losers" and still be better off (KALDOR criterion); and b. the "losers" could not afford to bribe the "winners" to prevent the change (HICKS criterion). Crucially, the compensation element of the test for a KALDOR - HICKS improvement is a hypothetical one: the change is considered an improvement if the winners would be able to compensate the losers (regardless of whether the change involves any such compensation). A state of affairs can be said to be KALDOR - HICKS efficient if there exists no KALDOR - HICKS improvement away from that state. There are a number of ways in which these concepts can be customized or refined. For example, the efficiency test can be applied at the level of the individual decision or action (e.g. whether to operate a polluting factory) or at the rule-making level (e.g. whether to establish a system of pollution permits)".

comparing different legal institutions in their efficiency. This is approach is clearly functionalist, with a twist: the only acceptable function is efficient solutions.

In this order of ideas, the first counterargument is acceptable. However, this fact does not imply that my efficiency comparison of property and sovereignty is undermined by the weaknesses of traditional functionalism.

In effect, as we have seen, the central problem of functionalism is that it normally presumes most of its premises: it presumes what the law is, and what its functions should be. For instance, if I am a functionalist, and my intention is to compare divorce laws of state X and state Y, I would proceed in the following way:

- a. The first question to be answered is: “what is the function of divorce laws?”
- b. The second question to be answered is: “what are the divorce laws in state X and state Y?”
- c. The third question, then, would be: “which one of these laws (X or Y) achieves or comes closer to achieve the identified function?”

The problem with functionalism is that it presumes the answer to question (a) and the answer to question (b). Thus, it is not a hard task to arrive to answer (c). Following my example, I can say as a functionalist:

- a. Because of demographic (or political, or moral) considerations, the function of divorce laws is to keep couples together.
- b. Under the Civil Code of state X, the possibility of divorce is more restricted than under the Civil Code of state Y.
- c. Therefore, the law of state X comes closer to achieve its function.

The fallacy of this argument is easy to catch: (a) I am presuming a function of the law that is not necessarily accurate; and, (b) I am presuming what the law is. In this case, I am presuming that the divorce law is the Civil Code, whereas it could be found in other sources, unwritten sources, or even non-legal sources (for example, religious rules) that fulfill the same function. That is the problem with functionalism.

Once understood the problem of functionalism, it is possible to see why my comparative efficiency approach, though potentially functionalist, is not subject to such fallacies. It is functionalist, in the above seen sense of it being an economical approach to comparative law, because it does depart from the common function, shared by both property and sovereignty, of reducing transactions costs.

However, this function is not derived from questionable sociological observation. Therefore, my line of argumentation does not incur in the (a) kind of fallacy. Indeed, I am not arguing that reduction of transactions should be the function of the law, or that it actually is, as one would say: the function of divorce laws is to keep couples together. On the contrary: reduction of transaction costs may not be the function of the law, but property and sovereignty do have that function, that is why they share a common ground and are comparable.

This sounds more complicated than it actually is. The difference is between normative and descriptive discourse. Functionalism incurs in fallacy when it is used for normative purposes: the evaluation of which legal institution comes closer to achieve the function is a normative discussion. It seeks to answer the question: how should we design legal institutions in order to fulfill a function? My argument, on the other hand, is descriptive: two given legal institutions (property and sovereignty) share the same function, reducing transaction costs. Whether or not this is desirable is not the issue. The point is that, through an analysis of the two institutions, we can see that causal relation.

However, this relation does not have to be empirically proven. My argument is not that, statistically, transaction costs are actually diminished. My point is that, conceptually, property and sovereignty

are understood to reduce transaction costs, hence the common justification.

This belief does not depend on empirical data: we do not need to find the fossil of a human being who lived in the state of nature, to be able to use the concept of state of nature itself. In the same logic, it is not necessary to prove that transactions costs are actually reduced to be able to argue that, given that they are understood to be reduced by the two analyzed legal institutions, these two share a common goal, a common function.

This argument should not be confused with the normative COASE Theorem, described above. We saw before that COASE Theorem is not useful on a descriptive level, because transactions costs will never be, actually, zero. But on a normative level, COASE Theorem may imply that legal norms should be designed to reduce these costs. From there, I related COASE's explanation of property with HOBBS' argument for the Commonwealth.

My approach, if one wills, is a descriptive perspective of the normative COASE Theorem (and, in consequence, of HOBBS). Given the normative COASE Theorem, property rights are introduced in order to reduce transaction costs. On the other hand, HOBBS' Commonwealth is introduced on the basis of a normative argument as well: in order to reduce transactions costs. I only observe the coincidence: hence the descriptive nature of my argument. In this order of ideas, my argument is safe from the (a) fallacy of functionalist comparativism.

In second place, regarding the (b) kind of fallacy, it should be noted that I do not seek to define what is the law, nor its contents, nor its source. We have discussed extensively, with KOSKENNIEMI, how sovereignty is actually impossible to define. I do not seek to define the concept, or establish what sovereignty is. I do not ask myself question (b). Given the structural characteristics of the concept itself, I stop short at this point. Therefore, all there is the common function, which was proven in the terms before explained.

That is, all we have is two indefinable concepts that share the same function. A function that, given the descriptive approach that

I adopted, allows me the following conclusion: given this understanding of functionalism, when two legal institutions share the same function and lack substantial definition, these two institutions may be understood, for all relevant purposes, as equivalent. Therefore, for all relevant purposes, it can be said that property and sovereignty are equivalent.

5. CONCLUSION

This paper has been written with a clear objective: to argue that sovereignty is equivalent to property. To do so, I started by explaining the economic theory of property, based on COASE Theorem. Then, I noted how COASE Theorem is intimately related to HOBBS approach to the state of nature. I proceeded to explain how COASE's conclusion, property, shares a common logic with HOBBS's solution, the Commonwealth.

Afterwards, I discussed the relation between the Commonwealth and the concept of sovereignty, to conclude that property is not comparable to the Commonwealth as such, but to sovereignty. Given this framework, and using some elements of the methodology of comparative law, I reached the conclusion that sovereignty and property are equivalent institutions.

This conceptual similarity is of undeniable relevance. Given the theoretical framework that we have explored here, public international law as a system that regulates the behaviour of sovereign states may be seen as not much more than regulation of property: limits to the exercise of such a right and general norms regarding due respect to other owners, which would only be justifiable if efficient.

This perspective, one would believe, would not be accepted without wide debate. This paper is a way to start it.

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