

Critique of the Liberal State, Private Property and Legal Reform: Late 19th Century Experiences and Their Legacies

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The worldwide expansion of capitalist economy in the second half of the 19th century was inseparable from the commodification of labor and property. One of the central achievements of the liberal state was to enshrine the protection of private property as a constitutional right. Unequivocal, exclusive, and individual property relations were regarded as a safeguard of free trade, while trade itself was seen as a contractual relationship between the partners involved. The goal of state policies was the replacement of older 'imperfect' common and overlapping property rights into a dualist scheme, beneficial above all for the worldwide expansion of a commodified land regime (Ubink et al 2009). However, the commodification of landed property was accompanied by persisting rival communal, feudal and public property relations, manifest in litigations (Cottyn 2019). Politicians and intellectuals diagnosed the detrimental effect of commodification on the less affluent parts of society, without the means and skills to join the new capitalist economy.

The socially heterogeneous and composite polity of the 19th century Habsburg Monarchy is an ideal vantage point for a comparative analysis of the strategies of contemporary national legislative systems to ensure the liberalization of property and the criticisms of their work. In the Habsburg lands the commodification of landed property had begun already in the 18th century, while the legal codification itself started in 1848 and took regionally varying patterns. By the time

the economic crisis of the 1870s hit the Monarchy, the conflict-ridden transformation of the property regime came to be seen as a manifestation of the 'social question' and a cause of growing mass poverty (Harmat et al. 2010).

The project analyzes the critique of the late-19th century liberal state as a deficient agent of capitalist economy from the hitherto hardly studied perspective of legal scholarship. Taking as its starting point the Habsburg Monarchy, it explores the assemblage of state criticism and civil legal reforms, involving the stakeholders, their strategies and decision-making processes in a transnational and comparative perspective. The analysis proceeds in three modules:

The first module charts the national dynamics and composition of the legislative fields involving legal scholars, bureaucrats, politicians, and legal/expert organizations, united by their criticism of modern private property and by the alternatives they presented (socially protective law, international private law, communal property etc.). Their activity shall be analyzed in relation to the practices and politics of state rule on the ground. One of the earliest cases of legal reform of land ownership and tenure occurred in post-Mutiny India in the 1860s, involving the internationally renowned legal scholar Henry Sumner Maine (1822-1888). Indeed, the Cambridge professor and legal advisor of the colonial government in post-Mutiny British India (1862-69) was one of the earliest and most prom-

inent critics of the liberal economic property regime in India (Mantena 2010). Well documented is also an Italian case in the 1880s-1890s, which owed a lot to the circulation of ideas set into motion by Maine. The third case study is fin-de-siècle Habsburg Monarchy, featuring the legislative work of the later Minister of Justice Franz Klein (1854-1926). The framework of the Habsburg and Italian legislative field was the emerging Central European *Sozialpolitik*, and the demand for social citizenship (Becker 2018). One of the most vocal critics of the very functioning of state legislation was Eugen Ehrlich (1862-1922), professor of Roman Law and rector of the University of Czernowitz in the Crownland Bukovina, whose work likewise reflects the impact of Maine.

The second module reconstructs the transnational communication between the selected national legislative fields, involving the legal experts, where the criticism of the liberal private property regime was taking place. It asks about successful collaboration and learning processes over time, also about discontinuities and cognitive dissonances. What were the central political and epistemological elements of the critique and how did they change over time? Maine is a central figure in this transnational circulation of ideas, and created an influential anthropological model of the native Indian 'society of status' in need of protection from the destabilizing encounter with modern liberal trade. He saw the transformation into a 'society of contracts' as an inevitable process, which was, however, accelerated and destructively enforced by colonial rule. His theoretical and practical work in the post-1857 colonial legislation and its reception constitutes the core of this second module. Indeed, in European legal scholarship on the modern property regime the legacy of Maine was paramount. In Italy his expertise was embraced in the context of an interaction between scholars and legislators that yielded positive results. The negotiations led to a corrective of private property legislation by enshrining alternative forms of communal property (Grossi 1981).

Which elements of the criticism of the liberal property regime, particularly those of Maine and Ehrlich, were transported into the 20th and 21st century? The global dimension of the adaptation of this legacy constitutes the *third module* of the project, which leads to the more recent (re)discovery of Ehrlich in legal sociology and the post-colonial anthropology of the state, (Hertogh, M. L. M., 2009) while diagnosing the 'forgetting' of Maine. The module analyzes the commonalities in the scholarly and political vision of the two scholars, while stressing their indebtedness to a century-long critical, comparative ethnographic and historical expertise. Like Maine, Ehrlich too was profoundly critical

of the effectiveness of the state legislation (Ehrlich 1967). Both of them regarded their respective administrations as epistemologically unfit to see the legal configuration of the society. But while Maine's theoretical focus lay on the historical changes of property regimes, in Ehrlich's sociology of law this receded to the background of his 'living law' guiding both urban and rural societies, aside the state. The module argues that it was this rootedness into a century-long critical legal tradition that made Ehrlich's theory inspire conceptualizations of present legal pluralism both in the urban sphere of global trade, and in the post-colonial village communities of the Global South (Teubner, 1997; Zenker and Hoehne 2018).

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