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PROPERTY AND *NUDA POTESTAS* AS CONSTITUTIONS OF REINACH'S PHILOSOPHY OF LAW

Abstract. This contribution centers on the notions of *property* and *nuda potestas* in Reinach's philosophy of law. I aim to demonstrate how both terms ground an important part of Reinach's understanding of a priori condition for civil rights. Consequently, I assess the principle of property with a comparison to Luis de Molina, since he shows in his *De Iustitia et Iure* how *dominium* and rights justify some forms of property (lay and ecclesiastical) and political power (Molina 1659, disp2 n1; Kaufmann 2014, 129). Hence, the right of the person is discussed by following the *potestas*. In *Die apriorischen Grundlagen des bürgerlichen Rechtes*, Reinach implicitly refers to the *nuda potestas*, which is a kind of power that can be applied only formally and not in fact to something else and for that reason, it can only be caught a priori, since acts are performed by another person within it. This is the reason why the rights of a person can be divided between more people, and it is at first just a kind of property, which can be exercised upon the individual. Consequently, I divide my contribution as follows. First, in considering the social act, I show how its characteristics of *Anspruch* and *Verbindlichkeit* result from the commitment that human beings make to one another. In doing this, I discuss the particular condition of slavery through which it is possible to find the property and the *nuda potestas* since there is no enjoyment of the good to which it refers. Second, I apply both concepts by showing a parallel with Luis de Molina. This comes about in consideration of the case of *dominium*, in which absolute rights can be ascribed to their *relative* claim. Third and finally, I offer a critique of Reinach, in which I show how absolute rights and relative claims cannot be assimilated.

Keywords: dominium, nuda potestas, property, law, slavery.

1. INTRODUCTION

An example of a theory of right that can be interpreted according to a framework other than that required by the theory of positive law can be found in Reinach's work *The A priori Foundations of the Civil Law*. One may reflect upon the fact that Reinach completely rejects the principles of jurisprudence based on positive law. An explanation for this denial can be found in Reinach's admission of the existence of legal entities and structures, independent from positive law, which considers positive law as capable of grasping the meaning of the ontological categories of the things themselves, which according to Reinach permits the

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existence of law.¹ At the same time, the accusation that Reinach makes against positive law obliges him to introduce a new instrument, “the phenomenological a priori,” which is capable of overriding the difficulties afflicting the theories of the legal positivists, and which confirms the being of legal entities as independent from positive law.

But are we sure that Reinach achieves his goal? Namely, is he able to demonstrate that this a priori foundation, which follows the phenomenological principle, belongs to civil rights? On the one hand, as Dubois observes in “Adolf Reinach: Metaethics and philosophy of law,” his a priori phenomenological account differs from positive law in two respects (Cf. DuBois 2002): a) Reinach’s a priori laws are *states of affairs* grounded in the essences of legal entities, such as promise, property, obligation, etc. Consequently, they are not a result of divine or human law; b) Reinach’s a priori law has nothing to do with prescription in the sense of norms or principles to follow. On the other hand, we might admit that even if the framework of Reinach’s project is clear for all his researchers, it should be equally clear that several theoretical problems arise from his arguments concerning the concept of property [*Eigentum*], which represents for the jurist – to use Reinach’s own words – “the foundational right.” Reinach’s method of analysis – which is based on the *ius destruendi*,² namely, the disposal powers of the thing itself [*Verfügungsgewalt*] – brings his principle up against an ecological ethics, since human beings cannot own nature, and for that reason do not have any right to destroy it (Burkhardt 1987).

These considerations arise from three theses deriving from Reinach’s legal system, which can be detailed as follows:

A. Social acts have an a priori structure. This concerns the broad range of human experiences which do not belong to the self, but in which the self shows itself as active. Reinach defines these as spontaneous acts: they are experiences which refer to the “inner activity” of the subject. If several people perform “the act,” give commands, and express the performance, this results in an act “together with the other.” In this kind of participation, in which everyone is conscious of the participation of the others, there is one single act which is performed

¹ “The positive law can deviate as it likes from the essential necessities which hold for legal entities and structures – though it is of course a problem for itself to make understandable how such deviations are possible. We only assert one thing, though on this we lay great stress: the basic concepts of right have a being which is independent of the positive law, just as numbers have a being independent of mathematical science. The positive law can develop and transform them as it will: they are themselves found by it and not produced by it. And further: there are eternal laws governing these legal entities and structures, laws which are independent of our grasp of them, just as are the laws of mathematics. The positive law can incorporate them into its sphere, it can also deviate from them. But even when it enacts the very opposite of them, it cannot touch their own proper being” (Reinach 1983, 6).

² Within this juridical concept is the right to destroy your own. Luis de Molina, for example, recognized this right with physical things (Cf. Molina 1602; Kaufmann 2013).

by two or three people together, and its effect changes accordingly. A kind of command structures it, and this produces an *Anspruch* (claim) and *Verbindlichkeit* (obligation) connected to the idea of a social act performed and directed together by several people.

B. The promise is a reason for obligation. Recognizable in this kind of "obligation" – which Reinach does not define as something moral – is a kind of property [*Eigentum*] between a person and a thing. This brings me to my second thesis. Obviously, the sense of belonging clarifies this connection: A belongs to B. Nevertheless, it might be asked if property can be considered something that includes the sum of all rights. The answer to this question can only be negative. Reinach rejects the idea that properties are the *sum* or unity of *all* rights. How then should property be understood? If property in itself has no right over a thing, and is rather a *relation* toward a thing, a connection according to which all rights are grounded, then this relation cannot be broken. And this means that it remains intact even if all those rights are grounded by another person. Perhaps, the property's right is characterized by some restriction on the relation of belonging; this is not always the powerful relation and is not always characterized by a right to use. In that sense, the meaning that Luis de Molina gives in his *De Iustitia et Iure* to the *dominium iurisdictionis*, which is fundamental for political power, further clarifies the answer to this question, since it points out its meaning on the basis of the commutative right.

C. The absolute rights of the owner and relative claims cannot be assimilated. By the right over a thing, Reinach assumes that only if this right is grounded in property can it be divided up by dividing the rights. This is the reason why the division of owning in itself is not admitted. Nevertheless, it might also be pointed out that positive law excludes the possibility of a *protected* power relation between owner and thing because the right over a thing is always limited. Reinach indicates the relation of transferred right as *nuda proprietas*. I argue that the power to which Reinach is referring has to be understood as *nuda potestas*, because the legal use of naked power is characterized by a certain "indefiniteness" that characterized Reinach's understanding of natural power. Thus, as Reinach observes, "a person's sphere of power is enlarged to an extraordinary extent as culture develops, does not *modify* the concept of power, but only the *range of things* which falls under it" (Reinach 1983, 53). Because of this assertion, it is possible to argue that the power on which Reinach focuses is naked. The legal definition of this concept clarifies that the *nuda potestas* does not have any corresponding interest in the well-being or continuation of that person or thing. Rather, it only *modifies the range of the thing* to which it is referring (Reinach 1983).

In the following sections, I aim to show the results of these three theses in Reinach's phenomenological analysis. First, I analyze the reason why claim and obligation ground social acts like promises.

2. THE A PRIORI EXISTENCE OF PURE RIGHTS

2.1. *Anspruch* and *Verbindlichkeit* as part of the constitution of social acts

The first task that we must complete in order to determine the meaning of social acts is to understand the difference between a command, as an order of ordinance [*Befehl*], and a regulation [*Bestimmung*]. According to Reinach, both of these are social acts (Reinach 1905, 54): a state has the right to command and issue orders, but these acts have a regulative form, since a command refers to a particular situation and a particular object. A state can command that a certain neighbourhood respect a new-waste removal protocol and in this case the structure of the act assumes the form of a prescription that has to be followed. As Antonio Calcagno remarks in “A place for the role of community in the structure of the state – Edith Stein and Edmund Husserl,” the act on which Reinach and Stein develop their legal argumentation obtains its completion in its being performed by the follower of the command (Calcagno 2016). Regarding this, it is important to distinguish between *having* a resolution and *making* a resolution, because it is only by *making* a resolution that we have a doing of the self and a spontaneous act. This is why Reinach understands commanding as follows: “Commanding is rather an experience all its own, a doing of the subject which according to its nature has in addition to its spontaneity, its intentionality, and its other directedness, also the need of being heard” (Reinach 1905, 19). Social acts that are performed by human beings form an inner unity of voluntary act and voluntary utterance: their prerequisite is the turning to another subject and the need for being heard. Something different happens in the internal act: this requires one subject, the actor, and a second subject within the acting person. In her essay “Ein Beitrag zur Ontologie der sozialen Gemeinschaft,” Gerda Walther clarifies how, in the habitual experience of community, there exists a temporal gap between one’s actions in the moment and the repeated memories that give rise to such actions (Walther 1922). In other words, one may perform certain acts or repeatedly live through certain experiences like community while the original source of such acts or experiences is not present. When one is no longer conscious of the object of intentional experience or when one object replaces another in the flow of experience, a distance arises between the I and its subject. In the case of community, the union – that one important element of Walther’s constitution of community – understood as the intentional object, may no longer be conscious. It may, however, re-emerge through memory or in association with another act, person, or event (Walther 1922, 40).

Reinach understands the social act in a similar way by claiming that experiences [*Erlebnisse*] do not belong to the “I”, but instead the self shows itself as active through them (Walther 1922, 9). In this regard, Alessandro Salice, in his

essay "Obbligazione e pretesa in Adolf Reinach: due relazioni sociali," remarks that psychological (i.e., connected to the experiences) and social acts have to refer to the psychological object (Salice 2008). But, as Reinach clarifies, "while it is always a person whom I make a promise to or command, I simply waive a claim or I simply issue a legal norm to the effect that something ought to be so" (Reinach 1983, 106). Then obligation and claims depend on the social act of promise and not *tout court* on the social act as such. Thus, the meaning that Reinach gives to promising presupposes an inner experience as the content of the promising self as its intentional object. Reinach connects promising and will, which is directed toward the action itself. For that reason, promises and intention are also connected, if the declaration of promises and declaration of intent do not always correspond (Duxbur 1991, 324). To clarify this kind of assumption, we might examine the example of promising to call someone named Ferdinand. This expression is as follows: "I will call Ferdinand tomorrow." This kind of statement, in which a subject asserts something – in this case their will to make a call – could be interpreted in two ways: namely, as a declaration of a promise or as a declaration of intention. The meaning changes according to the way in which it is expressed and depending on the person to whom this kind of phrase is addressed.

Reinach ascribes the same kind of structure to the promise and to the social act. Accordingly, he observes,

Like all social acts, promising presupposes an inner experience which has the content of the promise as its intentional object. As with commanding, this inner experience is that of intending that something occur, not of course through the addressee but through the promisor himself. Every promising to do this or that, presupposes that one's will is directed to this action (Reinach 1983, 26).

Nevertheless, intention and will remain on two different levels, because Reinach considers promising a spontaneous social act, whose expression has to be made in terms of the promise itself. Reinach establishes that social acts can be performed by a number of people: this admits the possibility of commanding two or more people together (Reinach 1983, 24). But what happens if several people perform one social act together? The answer to this question is twofold. On one side, each of the people will be oriented to perform this act. On the other, because each person performs the act together with others (togetherness), a kind of consciousness emerges that is characterized by the commonality of the participants in the action. For this reason, promising follows this kind of criterion, since it can be directed or performed by several people together. Moreover, promises can be conditional, so that unconditional promises and conditional content can be distinguished through their understanding (Duxbur 1991, 324). Reinach demonstrates that another aspect emerges from making a promise: this regards *Anspruch* (claim) and *Verbindlichkeit* (obligation), both of which emerge only through the realization of the act of promising. Because the promise is to be recognized as a social act, the question moves to the addressee of the promise

itself. It is sure that their answers can be different: it can be accepted or rejected. Reinach advances the problem of the inner capacity of the individual, which he describes as *Zurückweisen* in the case of the act declining, and as *inner* accepting in the case of an act of acceptance,³ that is interpreted as a confirmation. The center of this procedure is the social act, which has the function of completing the act of promising. The content of the promise is certainly intentional, if its realization assumes the form of the completion of the promise. Even if the promise and its realization have parts that are ontologically independent, they intentionally maintain an internal relationship of initiation/compliance, which integrates them in the same structure of the social act in which the declaration of the promise was inserted, that underlying the state of mind and its apprehension by the other who is acting (Ferrer 2015). As a result, and as Reinach suggests, this corresponds to the “I will” and “I accept” (Reinach 1983, 29). This means that there is a deviation from the plan, since the question moves from an internal experience to an external social act. The question is also interesting from a linguistic perspective,⁴ since for Reinach the *expression* of acceptance has to be interpreted as an act of informing. Unlike the social act of accepting, promising has a strictly prescriptive reference point, since it refers to the person who makes the promise. Indeed, by making a promise, someone has to carry out an obligation from which she cannot be exempted, so that the social act of promising presupposes the intent to follow that is expressed through the promise, and the effective performance of the promise means that this has been accepted (Smith 2017, 52). Perhaps the will and the correlating intention are together not enough to create something like promise

³ Reinach distinguishes between five types of acceptance: “Acceptance can first of all be taken as the positive response to a proposition, to an “offer” of some kind or other. In this very formal sense the most various kinds of social acts can function as acceptances, for instance a promise just as well as its being accepted. If A responds with “yes” to the request of B to promise him something, we have in this “yes” just as much an acceptance in the formal sense, as when A responds to the promise of B with “good.” But materialise the “yes” contains a promise and the “good” the acceptance of a promise in a quite new sense. This material acceptance refers only to promises. With regard to it we still have various things to distinguish. There is first of all acceptance as a purely inner experience, an inner “saying yes,” an inner assent to the promise which is heard. From this we distinguish acceptance in the sense of the expression of the acceptance, as it can occur in actions but also in words. Something new is added when the expression of acceptance takes on an informing function, when it is directed to a person. Finally, as the fifth and most important concept we point to acceptance as a social act in its own right which is not reducible to an informing” (Reinach 1983, 29).

⁴ In Husserl’s unpublished manuscript A I 3 “Noetik als noethische Rechtslehre. Begründungen. Auch zur Wahrscheinlichkeitslehre“ from 1906–1910, the question concerning evidence and the a priori can be found. Husserl writes the following, “Der Evidenzcharakter verbürgt die Wahrheit. Wie sollen wir, wenn wir nicht direkt Evidenz haben und sie nichts ohne weiteres uns erschaffen können, bzw. wenn wir noch kein Wissen haben, das ist, wenn nicht akt. Evidenz, so schon etwas uns indirekt die Evidenzmöglichkeit verbürgendes, indirekte Evidenzkriterien gewinnen” (Cf. Husserl, Manuscript A I 3, 4).

and obligation. It is rather “a distinctive psychic acting which is grounded in the will and which must be externally expressed for the sake of announcing itself to another. In this act, and only in it, are claim and obligations grounded” (Reinach 1983, 41).

With this assumption, Reinach describes the logical structure in which the physical capacity grounds the promise and becomes the expression of will. For this reason, will requires the promise of an a priori structure about the content of the promise itself (Duxbur 1991, 331). This opens the circuit (and therefore counts as a command act), without assuring that the circuit will be completed. In this respect, we must ask how a social act of legal issuance is intended: it must be communicated and understood (Paulson 1987, 40). The more important distinction concerns the personal command and legally issued norms. Reinach writes “While it is always a person whom I make a promise to or command, I simply waive a claim or I simply issue a legal norm to the effect that something ought to be so” (Reinach 1983, 106). This assumption brings me to my second thesis, which considers the promise as a reason for obligation.

2.2. The promise as a reason for obligation

According to Reinach, the obligatory force of the promise cannot depend on the will alone, because this kind of act has an a priori structure that exists without the necessity of a corresponding experience. However, there can be no promise without an obligation. So, it might be argued that it belongs to the essence of promise to produce a claim and obligation once the act is successfully realized. In contrast, the mere assertion that I am willing to do something does not put me under an obligation to act accordingly (Salice, Schmid 2016, 7). Hence, somebody can feel obliged or entitled to do something without actually doing it. Reinach develops the question concerning obligation and promise in such a way as to position them against the principle of natural law. For example, Hugo Grotius (1583–1645), who can be considered “the father of natural law,” established the connection between obligation and natural law as necessary, insofar as “no other natural method can be imagined” (Grotius 2012, 5). Reinach, as has been clarified, switches his analysis concerning civil rights to the a priori structure of promising as a social act.

But how might we consider this correlation between promise and obligation if this kind of schema cannot follow the principle of natural law? Wojciech Zelaniec suggests an answer to this question. According to him, this correlation will “single out promise-generated an obligation from others (Zelaniec 1992, 162). Kant solves this problem concerning natural law and a priori in his *Philosophy of Law*, and his solution influenced Reinach's thesis of the a priori foundation of civil law. By clarifying the difference between ethics and jurisprudence, Kant establishes not

only that “the promise made and accepted must be kept,” and therefore the binding nature of promises in jurisprudence (Kant 1887, 22), but also that the acquisition of personal right is influenced by this structure, because the acquisition of the law of right is “always derived from that which the other has on his own” (Kant 1887, 1). For this reason, the juridical act determines that the personal right can be acquired by positive transference or conveyance. However, this kind of right presupposes a common will, in which the act grounds what Kant recognized as the contract.⁵ Hence, the acquisition of a contract is possible through the philosophical transcendental deduction, which removes all difficulties regarding the possession of the free will of another, because, as Daniela Falcioni remarks in “Immanuel Kant und Adolf Reinach: Zwei Linien des Widerstandes,” it guarantees the legal character of the acquisition as a right to exclude the arbitrariness of the contractual partner (Falcioni 2002, 358). In §30 of *Philosophy of Law*, Kant defines this as “private right.” Such a right is explained by considering the relation between master and servant. In this relationship, “another mode of obligation” exists, given that the *societas herilis* is determined by both the *possession* and the *contract* of the servant in his household. Because property and reason are connected for Kant (Simmacher 2018, 97; Kant 1887, 64), we must distinguish between the *meum iuris* and the external *thine*, since from a juridical point of view the *subjective condition* of the use of something is strictly connected to me, insofar as if somebody else uses this thing without my consent it would injure me.⁶ Kant also extends this postulation through the case of the criminal remanded for life, which is the result of the injury he has committed on an instrument of the will of another, whereby the legal institution is represented by the state or embodied by a particular citizen. Through the juridical judgment, the criminal is practically a *dominium proprietatis* of his owner (Kant 1887, 193). This distinction that Kant makes between the physical (empirical) and intelligible forms of possession is akin to the owner of something saying, “I am the owner of this apple.” Possessing the will of somebody is something that can also be found in the work of Luis de

⁵ Kant found the existence of four juridical acts of will: two of them being preparatory acts and two of them constitutive acts. The two preparatory acts, as forms of treating in the transaction, are offer (*oblatio*) and approval (*approbatio*), and the two constitutive acts taking the form of concluding the transaction, are promise (promising) and acceptance (*acceptatio*) (Kant 1887, 101).

⁶ Kant further develops his argumentation in observing that by the exposition of the external “mine” and “thine,” it is possible to distinguish only three external objects of the own will. While the first regards a corporal thing external to me (which cannot be possessed in a physical way), the second focuses the possession of the will on another. Kant demonstrates that only by asserting, “I am in possession of the will of another,” the promise belongs to the nature of things possessed, and because it is possible to distinguish in it a kind of active obligation, then this thing can be recognized as something mine. Consequently, the third case regards the domination of a member of a family or slave as something that is in my possession. In that case, Kant asserts that the “purely juridical possession” is also possible if this person is not possessed empirically, since they can be possessed by the mere will of the owner (Kant 1887, 63–64).

Molina. As Danaë Simmermacher notes in her book *Eigentum als ein subjektives Recht bei Luis de Molina (1535–1600)*, Kant's physical form of possession can be compared to Molina's analysis of natural possession (Simmermacher 2018, 98), which for him corresponds to civic property. A possible hypothesis for this kind of parallel between Kant and Molina is Molina's influence on Kant's philosophy of law (Simmermacher 2018; Kaufmann 2005, 73–88). Perhaps indirectly Molina's *De Iustitia et Iure* can be considered a crucial oeuvre through which to grasp the meaning of this juridical aspect concerning property. In this work, Molina justifies the possession of one man by another in legal terms, which he does not clarify as a kind of natural relation between human beings. In distinguishing between two kinds of *dominium*, namely property and jurisdiction, Molina remarks that natural *dominium* is grounded in the possession that the human being has – namely, his free will – even if this context remains the ordinance of God. Something different happens in his development of *dominium iurisdictionis*, in which a kind of *potestas* is present. While jurisdiction implies its understanding in terms of rights, it cannot be infringed by third parties (Molina 1602, 33). Thus, the same power is ascribed to authority and eminence over others according to its rules and government. What does Molina think about the question of slavery? Is it something that exists according to the laws of nature? The answer to this question is negative. In the 33rd Disputation of *De Iustitia et Iure*, Molina focuses on the condition of freedom for a human being as the owner thereof. According to the conditions of natural law, man sells his freedom and negotiates his condition as a slave. This explains why a slave's *potestas* can be legally transferred in every form.

Both Molina and Kant's arguments concerning slavery might be helpful to understand what Reinach means by property [*Eigentum*] in the 5th chapter of *The Apriori Foundations of the Civil Law*, entitled “Basic themes of the A-priori theory of Right.” According to Reinach, “moral entitlements and moral duties are not correlated to each other as positive and negative, rather both are positives which completely differ in kind from each other” (Reinach 1983, 51). Following Molina and Kant's theoretical assumptions concerning the question of *dominium*, Reinach distinguishes between *absolute right* and *right over something*. While absolute right entails that its content refers to one's own actions and produces an immediate effect in relation to right [*Gestaltungsrechte*], the right over this thing indicates the right to use a thing, to enjoy its fruits (*usus fructus*) and to cultivate or make something of it. There is a coincidence between thing and bodily object, even if “positive enactments would restrict to it” (Reinach 1983, 53), so everything is considered usable. Reinach points out that among the rights over a thing, the most important is property. This kind of a priori relationship can be distinguished in two different ways: a physical power over the thing reflected in the ability to manipulate it and a legal power reflected in the ability to revoke and waive the thing itself. At least, “a thing can be in my power without belonging to me. It can belong to me without being in my power” (Reinach 1983, 4). This unnecessary

simplification of the juridical meaning of property based on the relational aspect of owner toward his thing that Reinach makes, follows the principle of Kant's *Metaphysics of Morals* of Lockean tradition (Flikschuh, Ypi 2014). Notoriously, Kant grounds his analysis of the property of a thing on the difference between the intelligible possession [*possession noumenon*] and the empirical possession [*possession phenomenon*]. While the *possession noumenon* regards an external thing, which does not result from its physical link, but rather from the a priori connection between the object and the understanding of any spatial-temporal condition (Kant 1991, 245–312), the *possession phenomenon* provides the “protective” and “actual” way to possess a thing. Reinach uses Kant's intelligible possession for his analysis, because it represents the “practischen Categorische habere” – to use Kant's words (Kant 1991, 326–327) – of this relation. Otherwise, as Hruschka and Sharon explain in “The natural law duty to recognise private property ownership,” in considering the connection of property and natural law in Kant's thought, Reinach also shows that we all have a *natural* duty to choose our ownership of private property, if we are committed to the individual right of freedom (Byrd, Hruschka 2006). In the next section, I analyze the question of *dominium* by considering the difference between a relative claim and absolute right. As Di Pierro points out in “The Influence of Adolf Reinach on Edith Stein's Concept of the State: Similarities and Differences,” the a priori rules of civil law are not simply within those who structure a society and even less in those who interpret it, but are already in the objects as their property, before they are in the subjects that grasp them (González-Di Pierro 2016).

In what follows, I show why *dominium proprietatis* and *nuda potestas* can be considered the constitutive elements of Reinach phenomenological analysis.

3. DOMINIUM PROPRIETATIS AND NUDA POTESTAS AS THE FUNDAMENTAL ELEMENTS OF REINACH'S PHENOMENOLOGY OF LAW

The question of *dominium* and *nuda potestas* forms an important part of the juridical and political debates that began in antiquity, but which are still important today. The reason for this issue's longevity derives from the double connotation that the word *dominium* has in the juridical debate, namely, that it means both “power” and “property.” A comparison with the official theological and legal dispute between Pope John XXII and the Franciscan order concerning poverty further clarifies the related use that Church authorities have made of this word in juridical contexts. An exemplar, in this sense, is Pope John XXII's bull *Quia vir reprobus* from 1329, wherein he uses religious justification to challenge the Franciscan perspective that Jesus and the apostles had been poor. In fact, through God, property existed before all human legislation (Brunner 2014).

In defining the word *dominium* as “property and power” according to its two meanings, John argues that *property* belonged to Adam before Eve's creation so that *dominium* loses its significance as common ownership based on power, and becomes individual property (Kaufmann 2016, 2). Continued in the legal debate, the *nuda potestas* designated a kind of power which can be applied only formally and not in fact to something else. An exemplification of this concept is offered by Huguccio Pisanus in his *Summa Decretorum* of 1188. In considering the powers of the emperor and of the pope, Pisanus argues that a superior authority in temporal matters belongs to the emperor, in which the interference of pope is allowed only with the prince's permission. So, in fact, the power the pope wishes to exercise belongs to him only formally, because he owns only bare power, the *nuda potestas*.

The double significance of the word *dominium* as “power and property” and the meaning of *nuda potestas* is found in §5 of Reinach's *The A priori Foundations of Civil Law* entitled “Right and obligations. Property.” Both concepts can be considered fundamental aspects of Reinach's a priori legal analysis. The reason for this arises from the assumption that Reinach makes in considering the “right over a thing” “as an ultimate, irreducible relation, which cannot be further resolved into elements” (Reinach 1983, 55). With Reinach's own words, it can be concluded that in the relation between the owner and a thing, the subject *dominates* the thing he possesses absolutely. However, in this bond between owner and possessed thing, it is possible to perceive a kind of closeness and *potestas*, arising from the power that an owner can exercise upon the thing that belongs to him, whose relation is defined by Reinach as the “powerful one.” So that it might be argued that the word *dominium* as *Eigentum* in its double significance as “property and power” characterized Reinach's property rights. Reinach's investigation establishes that “a priori statements are valid for legal entities and structures” (Reinach 1983, 5). For this reason, property rights derive from his a priori – namely, *das Faktum* – possession, whose right to possession [*Recht auf den Besitz*] as “owning” or “belonging” is independent from possession itself: so that, at least, these two terms remain different (Reinach 1983, 52–54). Nevertheless, in Reinach's understanding of property, the *potestas* preserves its naked character. This is because if it is emptied of its contents, it is impossible to gain any benefits from it, since it belongs to another subject, given that it also does not regard a physical thing. As an example of this, let us suppose two factors, A and B. Some right belongs to A which he transfers to B. B can later transfer this right back to A. B can also waive his right, in which case it disappears from the world for good. This is all quite different in the case of an absolute right over a thing belonging to A. According to this principle, Reinach rejects the idea that property is the *sum* or unity of *all* rights. How should it then be understood? If property in itself does not have any right over a thing and is rather a *relation* toward a thing – a connection according to which all rights are grounded – then this relation cannot be broken. This means that it remains

intact even if all those rights are grounded by another person. Reinach indicates that this relation has to be understood as *nuda proprietas*, which means that the “thing [...] belongs to the owner in the interval in exactly the same sense as before and after” (Reinach 1983, 52–54). And because property is itself no right over a thing, its essence is given in the character that Reinach ascribes to this relation. This relation cannot be broken, even if all those rights have been granted to other person. For this reason, Reinach’s formulation of *nuda proprietas* can be translated in the juridical formulation of *nuda potestas*, because property belongs to the human being, insofar as we understand it. This thesis contained *in nuce* by Reinach can be further developed by considering the example of Robinson Crusoe. Crusoe establishes a particular relationship with the things that he produces for himself on his island. Hereby, claims and obligations arise from social and similar promises, completely apart from any positive law. So, it might be supposed that this relation of belonging to the things exists through what Reinach recognizes as “*rechtsleere Raum*.” Moreover, in reporting the case of Crusoe, Reinach aims to demonstrate that assigning the belongings-sphere to positive law, as some jurists and philosophers have done, has to be considered groundless, because these are structured, as he affirms in the a priori laws. Property is not considered a right over a thing, but is instead a relation to the thing in which all the rights over things are grounded. This relation exists according to its own identity, if it grounds the right. But how should this be understood in the case of divided property? Reinach answers this question by asserting that “property in itself, the relation of belonging, cannot be divided: thing and its whole value can never at the same time be owned by two different persons in two different *relations* of owning” (Reinach 1983, 56). So, as Reinach argues, it can be understood according to the traditional definition of *dominium*, the juridical definition of which appears in the middle of the first century and corresponds to principles deriving from Roman law. In this is recognizable an absolute and exclusive right to possession and control of a thing, in which the mastery of a thing and the *iura praediorum*, the servitude or usufruct of a thing have to be differentiated (Carron 2018, 92). Property rights can be divided differently, insofar as it is admitted that a thing belongs to several people together, in the sense that every person belongs to a determinate value and owns part of this divided thing. This is because the “division of the owning itself is impossible” and the reason for this is derived from the relation between the person and thing, which always has to be a priori, so that it can be assumed that the property as *dominium* and *nuda potestas* constitutes an important part of Reinach’s a priorical system based on the civil German code.

Nevertheless, as Alejandro Tellkamp observes in “Rights and dominium,” the lawful and just contract is one of the most important instruments used to establish property. For this reason, political power has to be based on contracts of this sort (Tellkamp 2014). Reinach focuses on this point by considering the contract

of a loan. He tries again to demonstrate that positive law needs the a priori philosophy of right, since only phenomenology is able to show the correspondence between the intention of the owner, who is loaning his thing, and the will of the beneficiaries who will receive the good that they will use (Falcioni 2002, 364). Nevertheless, starting in the Middle Ages, a loan under court law obliged the borrowing person not only to pay for the good, but also to pay taxes from personal dependency (Planitz 1949, 49). So, if as Reinach observes, positive law generates juridical concepts, in absolutely no way do legal entities depend upon it. They have their own independent being just as physical objects do.

4. CONCLUDING REMARKS

Reinach's theory of the a priori foundation of civil law also includes penal and administrative law. The following demonstrates this consideration: "Whilst we have limited ourselves here to the setting forth of some of the a priori foundations of the civil law, we are convinced that the other legal disciplines – especially the penal law and constitutional and administrative law – are capable of and require such a foundation also."

But is it possible for legal disciplines to get this kind of a priori constitution? This a priori legal system could be objected to, according to Reinach's construction. Namely, the information or being thankful in the name of the other does not imply the essential necessity of his act, which means any effect in the world of right (Reinach 1983, 85). Yet it may be argued that there are some differences, not only between revoking a claim and a proxy action, but also between social legal acts and performed acts. These differences show that there is *prima facie* a case to answer against the view that prior empowerment is always necessary for representative acts. This condition is grounded on presupposing that it was shown one prevents one making promises in the name of other people, rather that this may not be what sets limits to my performing legally indifferent representative acts (Paulson 1987, 129). My acts, in the absence of prior empowerment, will simply be rejected by my audience as performances of certain act types, and there are limits to the acts I can reasonably expect to get retrospective empowerment for.

But, to show that these factors merely limit – and do not rule out – the possibility of representative acts with only retrospective empowerment, what we need now is a clear example of such an act itself. Thus, my represented act cannot be a priori, since it has not yet happened. The same can be seen in a legal system. I suspect that penal and administrative law cannot have this kind of constitution, because it is not possible to have an a priori representation of what will happen. Moreover, the social act, which Reinach refers to as a variety of acts like requests, communication, and order. This is why claims and absolute rights are to be considered on the same level.

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