論　説

# The Influence of Christian Thomasius on the Private Law System in Kant's Doctrine of Right

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## 1. Introduction

This study aims to explain the extent to which Immanuel Kant (1724–1804) deeply understood jurisprudence by referring to several jurists whose works Kant privately possessed or whose names were cited in those works, especially the influence of Christian Thomasius (1655–1728) on Kant's *Doctrine of Right* (in German: Rechtslehre, 1797) from a legal history viewpoint.

In his lecture at the University of Königsberg, Kant famously alluded to the fifth edition of Gottfried Achenwall's (1719–1772) *Natural Law* (in Latin: *Jus Naturae*).(1) Scholars have since compared it with the

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(1) Achenwall, Gottfried: *Natural Law*. Edited by Kleingeld, Pauline, translated by Vermeulen, Corinna. London 2020, xiii. In this study, for citing Achenwall, each part number is given in Roman numerals and each paragraph number in Arabic numerals (e.g., Pars 1, § 1 will be described as I1).

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*Doctrine of Right* and examined their similarities or differences. For example, Byrd (2010) saw Achenwall's strong influence on Kant in the concept of "permissive law" (in Latin: lex permissiva) because of a similarity in their theories.(2) Furthermore, backward reasoning has helped reconstruct Kant's theory from the assumption that Achenwall must have influenced him; for instance, according to Byrd (2010), "[i]f one combines Kant's ideas on holding or having something as one's own and Achenwall's element of intent, one can conclude that a person can take an external thing and have it under her control for a period of time with the intent that the thing be her own."(3)

However, in these cases, the possibility that Kant followed jurists other than Achenwall remains. In the latter issue of "holding" (in German: Detentio), for instance, Kant may have been inspired by the traditional distinction between natural and civil possession in Roman law, as the former means physical contact with things whereas the latter is concerned with the intent of proprietorship according to medieval jurisprudence,(4) and this popular definition is consistent with Kant's idea. Therefore, a similarity between Kant and Achenwall does not always mean that he referred to this versatile jurist.

This study mainly compares between several issues in which Kant disagreed with Achenwall and tests the possibility that Kant read

(2) Byrd, B. Sharon: Intelligible possession of objects of choice. In: Denis, Lara (ed.): *Kant's Metaphysics of Morals: A Critical Guide*. Cambridge 2010, 104.

(3) *Ibid*., at 106.

(4) Bruns, Karl Georg: *Das Recht des Besitzes im Mittelalter und in der Gegenwart*. Tübingen 1848, 103–113. The interpretation of Roman law that civil possession relates to the intent of proprietorship is also found in books of famous natural theorists. E.g., *see* Pufendorf, Samuel von: *De Jure Naturae et Gentium*. Lund 1672, Lib. 4, Cap. 9, § 6, 529f.

Thomasius's work *On Ownership and Its General Nature in View of German Private Law* (in Latin: *De Dominio et Ejus Natura in Genere Intuitu Juris Germanici Privati*, hereafter called *On Ownership*),(5) which was published in 1721 and referenced by Achenwall in *Natural Law*. Kant plausibly knew the title at least, as this work was prominently cited in the fifth edition of *Natural Law*.(6) However, this does not prove that Kant thoroughly studied this work; whether Kant knew only its title or earnestly read it requires additional evidence. Hence, Chapter 3 of this study will show some proof whereas Chapter 2 will explain why Thomasius's undistinguished work was cited in *Natural Law*. In addition, this study will prove that Kant widely read some legal books that he had in his private study, especially the work of German jurist Ludwig Julius Friedrich Höpfner (1743–1797), who played an important role in the conception of "mine or yours". This study concludes by explaining its contribution to future interdisciplinary research and showing that Kant studied jurisprudence more thoroughly than previously surmised.

## 2. Historical Background: Thomasius's Life Work *Institutiones Jurisprudentiae Germanicae*

*On Ownership* was published in 1721 as the dissertation of Johann Georg Franck (details unknown),(7) an ordinary advocate in Germany.

(5) The author translated the dissertation into Japanese. Thomasius, Christian and Franck, Johann Georg: 翻訳 ゲルマン私法からみた所有とその自然本性一般について. Translated by Izumo, Takashi. *Nihon Hogaku* Vol. 86, No. 4 (2021) 31–61.

(6) *See* the reference in Achenwall, Gottfried: *Jus Naturae*. 5th ed. Pars 1. Göttingen 1763, 117. Achenwall cited the reprinted edition, which was published in 1730. Also *see* Achenwall, *supra* note 1, at 49.

(7) The famous theologist Johann Georg Frank (1669–1747) was probably a different person with the same name, as he was not a lawyer.

As Schubart–Fikentscher (1970) pointed out,(8) dissertations in the early modern ages were not always written by candidates; rather, their chief examiners sometimes helped them directly or indirectly—a collaboration that academic rule today regards a dishonest act. Of course, whether a chief examiner helped their candidate cannot be easily verified; however, in the case of Franck's dissertation, Thomasius clearly did; more precisely, he publicized his own views through Franck in the following process.

Thomasius planned to write a comprehensive commentary on German private law as his life work with the title of *Institutes of German Jurisprudence* (in Latin: *Institutiones Jurisprudentiae Germanicae*, hereafter *IJG*) or *Institutes of German Private Jurisprudence* (in Latin: *Institutiones Jurisprudentiae Germanicae Privatae*).(9) However, this commentary was not published although he showed its draft to his doctor student Bastineller and cited part of the draft in his own book *Foundations of Law of Nature and of Nations* (in Latin: *Fundamenta Juris Naturae et Gentium*) as a note added in 1718.(10)

In 1721, Thomasius let his two candidates, Nesen and Franck, write their dissertations in the form of a part of that commentary. This can be seen in the introduction to Nesen's dissertation *On the Differences of Things in View of German Private Law* (in Latin: *De Rerum Differentiis Intuitu Juris Germanici Privati*, hereafter it is called *On the Differences of Things*);

(8) Schubart-Fikentscher, Gertrud: *Untersuchungen zur Autorschaft von Dissertationen im Zeitalter der Aufklärung*. Berlin 1970, 32f. and 43.

(9) About this uncompleted work, *see* Izumo, Takashi: *Die Gesetzgebungslehre im Bereich des Privatrechts bei Christian Thomasius*. Frankfurt am Main 2016, 43–45.

(10) Thomasius, Christian and Bastineller, Johann Friedrich: *De Usu Practico Accuratae Distinctionis inter Emtionem cum Pacto de Retrovendendo et Contractum Pignoratitium*. Halle 1707, § 29 (n), 37. Thomasius, Christian: *Fundamenta Juris Naturae et Gentium*. 4th ed. Halle and Leipzig 1718, Lib. 2, Cap. 10, * § 21, 240.

that is, Nesen unexpectedly announced to write *IJG*.[11] This introduction cannot have been approved without Thomasius's instruction, as it would be implausible that Thomasius overlooked his student's obvious plagiarism of his own work. Franck's *On Ownership* followed the conception of *IJG* as well and concluded by leaving the subject of possession to posterity as follows: "These [i.e., the discussions so far] are sufficient for the theme over the nature of dominion. *The method of acquisition* of single dominion [i.e., the method of acquisition when one person alone will own something by excluding others] is worthy of specific considerations only after the theme over *possession* and rights which are derived from it would be detailed. I would like to relinquish it to others' diligence" (translated by the author, italics by Thomasius).[12] Unfortunately, the third dissertation, about dealing with possession, was never written.

These dissertations did not take attention from other jurists, even from Thomasius's own disciples.[13] Why did Achenwall suddenly cite one of

(11) Thomasius, Christian and Nesen, Johann Conrad: *De Rerum Differentiis Intuitu Juris Germanici Privati*. Halle 1721, §1, 1. The author translated the dissertation into Japanese. Thomasius, Christian and Nesen, Johann Conrad: 翻訳 ゲルマン私法からみた物の差異について. Translated by Izumo, Takashi. *Nihon Hogaku* Vol. 86, No. 2/3 (2020) 1–35.

(12) Thomasius, Christian and Franck, Johann Georg: *De Dominio et Ejus Natura in Genere Intuitu Juris Germanici Privati*. Halle 1721, §56, 22: "Haec de natura dominii sufficiant. *Modi acquirendi* dominii singuli peculiares meditationes merentur, si prius de *possessione* et jure inde oriundo paulo distinctius actum fuerit, quod aliorum diligentiae relinquo."

(13) It estranged them from Thomasius that they did not adopt his property–law–based system, to be more precise, they followed *Institutiones Justiniani* of Roman law by placing jus personarum before jus rerum. Compare the sequence of themes in the following books with that of Thomasius. Gundling, Nicolaus Hieronymus: *Ausführlicher Discours über das Natur– und Völcker–Recht*. Frankfurt and Leipzig 1734.; Heineccius, Johann Gottlieb: *Elementa Juris Germanici*. Two volumes. Halle 1736–1737.; Cocceji, Samuel von: *Project des Corporis Juris Fridericiani*. Two volumes. Halle 1749 and 1751.

them in *Natural Law*? It is improbable to assume that Achenwall was an ardent follower of Thomasius since Achenwall did not highly regard him: "A different road was taken by Christian Thomasius, a fierce enemy of received opinions and defender of new ones who is not always consistent; he has offered much that had not yet been said, but it is not always better. It is different with Heinrich von Cocceji, who much later began to derive the precepts of natural law from a new source and to first establish its boundaries, carefully distinguishing them from the arguments of the other moral disciplines" (translated by Vermeulen).[(14)]

Johann Heinrich Christian von Selchow (1732–1795), a colleague of Achenwall's at the University of Göttingen, seems to have played a decisive role in bridging the gap between Thomasius and Achenwall. Selchow collected books and articles on German law enthusiastically and often referred to Thomasius's dissertations in his own work.[(15)] He became an extraordinary professor at the University of Göttingen in 1757 and an ordinary professor in 1762, while the fourth edition of *Natural Law* was published in 1758 and the fifth in 1763. This means that every time Selchow was promoted, a new edition of *Natural Law* was published afterward. The Thomasian work was cited in the fourth edition for the first time. In the seventh edition, published in 1774 after Achenwall's death in 1772, Selchow's name appeared on the title page: "with a preface of Johann Heinrich Christian de Selchow" (in Latin: cum praefatione Ioannis Henrici Christ. De

(14) Achenwall, *supra* note 1, appendix VII, at 23f.

(15) Selchow, Johann Heinrich Christian von: *Institutiones Jurisprudentiae Germanicae*. Hannover 1757, § 8, at 7, § 18, at 13, § 33, at 23, § 44, at 32, § 50, at 38, § 55, at 41, § 85, at 63, § 127, at 89, § 203, at 128, § 208, at 131, § 210, at 133, § 221f., at 140f., § 252, at 157, § 255., at 158., § 273, at 171, § 341, at 215, § 347, at 218, § 351, at 221, § 353, at 222, § 363, at 230, § 382, at 242, § 407, at 256, § 419, at 264, § 441, at 276, § 465, at 291, and § 484, at 304. The title of this book may have been inspired by Thomasius's *IJG*.

Selchow). This implies that Selchow hid his name while helping Achenwall revise *Natural Law* from its fourth edition, and the former's contribution was announced after the latter's death.

These facts show that the reference to *On Ownership* in *Natural Law* seems to have been added not by Achenwall but by Selchow, or at least Selchow advised Achenwall to do so.

## 3. Circumstantial Evidence of Thomasius's Influence on Kant

### (1) Previous Research

In the context of private law, one must note that Thomasius's influence on Kant does not seem to be significant as those of other jurists; for example, Kant did not mention him in his letters but referred to Grotius, Pufendorf, and Wolff (Br Register, AA 13: 630, 667, 690).[16] However, previous research appropriately assumed that Kant must have referred to Thomasius, and their similarities must have confirmed such a relationship; that is, an argument by Kant seems to resemble one by Thomasius. For example, Wilson (2006) argued that "Kant's distinction between cosmopolitan philosophy and scholastic philosophy mirrors this distinction [i.e., the distinction between university learning and learning derived from experience] from Thomasius."[17] Wilson (2006) expounded on this in Chapter 6 of her monograph and concluded as follows: "Rather than repeat the distinction made by the Wolff and Baumgarten schools, which differentiated philosophy as rational and empirical psychology as empirical, Kant makes the distinction between the interest people have in the two fields of philosophy. According

(16) However, it should be noted that Kant did not mention Achenwall too (Br Register, AA 13: 603); his letters do not show directly whose works he was interested in.

(17) Wilson, Holly L.: *Kant's Pragmatic Anthropology: Its Origin, Meaning, and Critical Significance*. New York 2006, 12.

to Kant, the distinction between critical philosophy and anthropology is characterized by the distinction between philosophy according to the *Schulbegriff* and philosophy according to the *Weltbegriff*."(18) Wilson's (2006) use of the verb "mirror" here grounds this argumentation on the similarity of the knowledge classification between Thomasius and Kant in contrast with Christian Wolff (1679–1754) and Alexander Gottlieb Baumgarten (1714–1762) and not on any citations or references to Thomasius by Kant. In another example, Byrd and Hruschka (2008) found Thomasius' influence on Kant about the concept of presumption as follows: "The difference between the presumption of goodness or of innocence and the presumption of badness is that the former two presumptions, as presumptions of law, relate to a human being's external actions, whereas the presumption of badness, as a presumption of ethics, relates to the human being's attitude. Thomasius had already drawn this distinction and Kant simply uses it in his own work."(19) Therefore, according to previous research, Thomasius's influence on Kant can be determined even without a direct mention, or at least deducing influence from their similarity is allowed.

### (2) Recent Gaps and Research Methodology of this Study

However, the above method poses the risk that Kant did not really refer to Thomasius but rather read another jurist's text or that he simply applied the common knowledge of that period. This possibility can be demonstrated through several examples, such as Kant's focus on the term "use" for characterizing possession; that is, he defined possession as "[t]he subjective condition of any possible use" (translated by Gregor, MS RL

(18) *Ibid*., at 111f.

(19) Byrd, B. Sharon and Hruschka, Joachim: From the State of Nature to the Juridical State of States. *Law and Philosophy*. Vol. 27, No. 6 (2008) 599–641, 619.

§1, AA 06: 245.11–12).[20] Such characterization can be interpreted in three ways: First, Kant took inspiration from Achenwall's *Natural Law*, which repeatedly applied the term "use" (in Latin: usus) to explain possession, especially in the 145th paragraph of the first volume.[21] Second, however, since Achenwall cited Thomasius's *On Ownership* just there, Kant may have also read *On Ownership* and adopted the following explanation by Thomasius: "If you consider ownership, when ignoring the doctrine of Roman law, moreover, when ignoring various restrictions originating in the disposition of civil laws or consentient agreements, then *proprietorship is the power to use* (corporeal or incorporeal) *things arbitrarily* (in view of its owner) *and to exclude other persons from its use* (in view of them)"[22] (translated by the author, italics by Thomasius). Third, Kant may still have not referred to either Achenwall or Thomasius but knew that jurists usually mentioned the right to use when describing proprietorship or dominion.[23] Simply put, the term was common knowledge in those days. There is no decisive evidence as to the way Kant conceived to define possession as the subjective condition of use; hence, judging Thomasius's influence on Kant here is not plausible.

For filling this gap, this study bases its comparison not only on their

(20) Kant, Immanuel: *The Metaphysics of Morals*. Revised ed. Edited by Denis, Lara, translated by Gregor, Mary. Cambridge 2017, 41.

(21) Achenwall, *supra* note 1, at 51f.

(22) Thomasius et al., *supra* note 12, §16, at 8f.: "Si dominium consideres, abstrahendo a doctrina juris Romani, item a restrictionibus variis, ortis vel ex dispositione legum civilium vel ex pactis conventis, *proprietas est potestas* (intuitu domini) *pro lubitu utendi rebus* (sive corporalibus sive incorporalibus) *et* (intuitu reliquorum hominum) *alios quoscunque ab eo usu arcendi*."

(23) The opinion that the essence of ownership is "right to use and to abuse" (in Latin: ius utendi et abutendi) originated in the 16th century. *See* Coing, Helmut: *Europäisches Privatrecht*. Vol. 1. München 1985, 292.

similarities but also on their uniqueness; in other words, the study will assess whether or not an opinion is unique for Kant and Thomasius. Certainly, this study cannot be expected to find opinions solely declared by them, but their uniqueness should be affirmed when the following two requisites are satisfied: (a) a work by Thomasius being cited by Achenwall (i.e., Kant certainly knew the work by reading Achenwall's *Natural Law*) and (b) Kant adopting a theory in the work despite not being a major one according to works that Kant possessed in his private bookshelf (i.e., Kant probably noticed that such theory was not common).[24] About *On Ownership*, the first requisite has already been satisfied as explained in Chapter 2; therefore, the second will be evaluated in section (3) of this chapter. This study will especially compare the following jurists with Thomasius and Kant: Ludwig Julius Friedrich Höpfner (1743–1797, German jurist), Johann August Heinrich Ulrich (1746–1813, German philosopher), Ludwig Heinrich von Jakob (1759–1827, German philosopher), Gottlieb Hufeland (1760–1817, German jurist), and Theodor Schmalz (1760–1831, German jurist).[25]

(24) The law books that Kant possessed are recorded by Warda, Arthur: *Immanuel Kants Bücher*. Berlin 1922, 41f.

(25) Höpfner, Ludwig Julius Friedrich: *Naturrecht des einzelnen Menschen der Gesellschaften und der Völker*. 5th ed. Gießen 1790.; Ulrich, Johann August Heinrich: *Initia Philosophiae Iusti seu Iuris Naturae Socialis et Gentium*. 3rd ed. Jena 1790.; Jakob, Ludwig Heinrich von: *Philosophische Rechtslehre oder Naturrecht*. 1st ed. Halle 1795.; Hufeland, Gottlieb: *Lehrsätze des Naturrechts und der damit verbundenen Wissenschaften*. Jena 1790.; Schmalz, Theodor: *Das reine Naturrecht*. 1st ed. Königsberg 1792. The editions of these books are identical to those which Kant privately possessed. This study excludes Daniel Nettelbladt (1719–1791, German jurist) despite his outstanding fame, for his concept of natural law was too different to be compared with Kant's, that is, Nettelbladt believed that there would be natural feudal law and natural ecclesiastical law. *See* the table of contents of Nettelbladt, Daniel: *Anfangsgründe der natürlichen Rechtsgelehrsamkeit*. Halle 1779.

### (3) Comparison

#### a. Ownership-Based Private Law System

The first evidence of Thomasius's influence on Kant by *On Ownership* is the phrase "mine or yours" (in German: Mein und Dein; Gregor translated it into "mine or yours" in line with the English idiom, which the author followed[26]). This term is unique from a legal history viewpoint, as other jurists normally used the term "proper" (in Latin: proprium) or "one's own" (in Latin: suum) when describing a situation where something is a subject being owned. These two adjectives can be found in Achenwall's *Natural Law* as well,[27] using "mine or yours" only once as follows: "Thus through occupancy dominion of things was introduced and first emerged, and hence the word THING is used specifically for that which is susceptible to our dominion: for the main subject in law is mine and yours, and hence also with respect to things, the things that are mine or yours"[28] (translated by Vermeulen; only the word "thine" in her translation is replaced with "yours" by the author for consistency with Gregor's term). Achenwall also used the phrase "one's own thing" (in Latin: res sua) in the title of Volume 1, Title 5, of *Natural Law*, where he dealt with ownership.[29] In addition, the word "mine" (in Latin: meum) is not always the opposite of "yours" (in Latin: tuum); for example, Ulrich combined "mine" with "another's" (in Latin: alterius) as follows: "What is mine does not cease to be mine and cannot become another person's, as long as I live, unless my will, some act, or a conflict of rights intervenes"[30] (translated by the

(26) Kant, *supra* note 20, at 41.

(27) Achenwall, *supra* note 6, I136, at 117 (res mihi propria); I137f., at 118f. (res propria); I142, at 122 (res sibi propria).

(28) Achenwall, *supra* note 1, I142, at 51.

(29) *See* the title of "*De Jure Disponendi de Re Sua*" in Achenwall, *supra* note 6, Lib. 1, Sec. 2, Tit. 5, at 134.

(30) Ulrich, *supra* note 25, § 210, at 150: "Quod meum est, citra meam

author). Thus, the following question must be answered: Why did Kant choose the minor term "mine or yours" in the title of private law despite the existence of "proper" as a technical term for natural law theorists?

There are three possibilities. First, Kant read Thomasius's dissertation *On Ownership* and adapted the distinction between mine and yours as the basis of private law, as Thomasius wrote, "[s]ince whole private law is concerned with what is mine and what is yours, and since all the differences between what is mine and what is yours derive from the ownership, we should strive diligently to give a firm foundation to the concept of ownership. For all the teachings of private law are either in view of ownership or are derived from its nature"(31) (translated by the author). Second, Kant used the phrase "mine or yours" because of the collaboration between Höpfner, whose book *Natural Law of Each Human Being in Societies and Nations* (in German: *Naturrecht des einzelnen Menschen der Gesellschaften und der Völker*, 5th ed., 1790, hereafter called *Naturrecht* in German to avoid confusion with Achenwall's book) was part of Kant's private collection, and Karl Wilhelm Robert (1740–1803, German theologist and jurist), who had a short lecture recorded on the theme of "mine or yours" in 1784 and was cited in Höpfner's work.(32) Third, Kant





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voluntatem, aut factum quoddam, extra collisionem, me vivo, meum esse non desinit, nec alterius fieri potest."

(31) Thomasius et al., *supra* note 12, § 1, at 3: "Cum totum jus privatum sit occupatum circa meum et tuum, differentia autem omnis mei et tui ex dominio oriatur, opera danda est sedulo, ut in conceptu dominii solida fundamenta ponantur, quia omnes doctrinae juris privati vel ad dominium respiciunt, vel ex ejus natura derivantur."

(32) Robert, Karl Wilhelm: *D. Carl Wilhelm Robert der Rechte und der practischen Weltweisheit ordentlicher Lehrer zeiget die zum Gedächtniß der Gnädigsten Bestätigung der hiesigen Litteratur–Gesellschaft, am 1ten Sept. Nachmittags um 2 Uhr im philosophischen Hörsaale zu haltende Rede an. Vorher werden einige Gedanken über die allgemeinen Begriffe*

was influenced by all these jurists and integrated them. This study adopts the third interpretation; that is, Kant adopted the ownership–based private law system from Thomasius where he critically reconstructed Robert's definition of "mine or yours" partially based on Höpfner's idea.

In the early modern centuries, the notion that private law should be based on ownership or proprietorship is not popular; rather, tort law or the concept of "injury" (in Latin: laedere) was used for explanation before property law.[33] This means that the requisite (b) is satisfied, therefore,

*vom Mein und Dein mitgetheilt*. Marburg 1784. This lecture was cited in Höpfner, *supra* note 25, § 37, at 32. Kant possibly knew Robert personally, since Robert was mentioned as an "admirer" (in German: Verehrer) of Kant in a letter from Johann Bering (1748–1825, German philosopher) to Kant in 1793 (Br, AA 11: 414.26–28; Br Register, AA 13: 671): "Auch ist der ehemalige Professor Theologiae nunc Juris Robert von mir bekehrt und Ihr großer Verehrer".

(33) Pufendorf, *supra* note 4, Vol. 3, Cap. 1, at 251ff. (tort law) and Vol. 4, Cap. 3, at 444ff. (property law); Wolff, Christian: *Institutiones Juris Naturae et Gentium*. Halle 1774, § 88ff., at 44ff. and § 141ff., at 75ff. (tort law) and § 183ff., at 97ff. (property law); Achenwall, *supra* note 6, I96ff., at 81ff. (tort law being restricted to defamation) and I110ff., at 93ff. (property law); Ulrich, *supra* note 25, § 144, at 112 (tort law being restricted to defamation) and § 153ff., at 115ff. (property law); Jakob, *supra* note 25, § 117, at 73 (tort law: "Niemand hat das Recht, den andern zu beleidigen") and § 237ff., at 142ff. (property law); Hufeland, *supra* note 25, § 152ff., at 70ff. (tort law) and § 178ff., at 84ff. (property law). Schmalz placed property law before tort law. *See* Schmalz, *supra* note 25, § 55ff., at 38ff. (property law) and § 80ff, at 53ff. (tort law). However, he began not with ownership but introduced the special concept of "modification of original rights" (in German: die Modifikation der Urrechte). *See* Schmalz, *supra* note 25, § 51, at 36f. By contrast with these authors, Höpfner showed a system like Kant's one, that is, started from property right and mentioned "one's own" (in German: das Seine). *See* Höpfner, *supra* note 25, § 37ff., at 32ff. From this comparison, the role of Höpfner can be highlighted and should be delved into in future research more deeply.

one would plausibly assume that Thomasius, who, as cited above, introduced the distinction between mine and yours and derived ownership from it as the basis of private law, influenced Kant in this point.

However, a problem remains when overestimating his contribution. He did not explain how the term "mine or yours" should be defined; furthermore, he did not write the third chapter of *IJG*, which would have discussed possession in detail. According to the author's current survey, Robert's short lecture in 1784 can address this deficiency. Although he was cited by Höpfner, their reference relationship is somewhat complicated, and its chronological order can be summarized as follows:

- Höpfner published the second edition of *Naturrecht* in 1783. It had no reference to Robert and only provided the following text: "A thing which a man can handle as he prefers by excluding others is called his own. Something his own is either innate [i.e., it is congenitally his own] or acquired [i.e., it becomes his own through an event, e.g., through a sale contract]. Infringement occurs when I deprive a man of his own or prevent him from the disposing of his own" (translated by the author).[34]
- Robert gave a short speech on the theme of "mine or yours" on September 1, 1784, in Marburg and referred to the above text.[35]
- Höpfner published the third edition of *Naturrecht* in 1785 and

(34) Höpfner, Ludwig Julius Friedrich: *Naturrecht des einzelnen Menschen der Gesellschaften und der Völker*. 2nd ed. Gießen 1783, § 37, at 32: "Womit ein Mensch nach Gefallen, mit Auschliessung anderer, zu verfahren befugt ist, heist das Seine. Es ist entweder ein angebohrnes, oder ein erworbenes Seine. Beleidigung ist es, wann ich einen Menschen etwas von dem Seinigen entziehe, oder ihn in der Disposition üder das Seine hindere."

(35) Robert, *supra* note 32, § 2, at 3.

mentioned Robert's speech.[36] He did not clarify whether he agreed with Robert's opinion, but he clearly disagreed with him in the sixth edition, published in 1795, through the following comment: "If it were possible to give real definition to what is mine and what is yours, then it would be of great benefit to natural law. For this definition would enable us to decide in each actual case whether something belongs to me or not. The most important disputes, such as the dispute concerning the reprinting of books, depend on it. But as far as I know, no one has yet given [the real definition], although many people have worked on it"[37] (translated and underlined by the author).

(36) Höpfner, Ludwig Julius Friedrich: *Naturrecht des einzelnen Menschen der Gesellschaften und der Völker*. 3rd ed. Gießen 1785, § 37, at 32.

(37) Höpfner, Ludwig Julius Friedrich: *Naturrecht des einzelnen Menschen der Gesellschaften und der Völker*. 6th ed. Gießen 1795, § 37, at 47f.: "Ein großer Gewinn für das N. R. wäre es, wenn man eine Realdefinition für das Mein und Dein geben könnte, die uns in den Stand setzte, in jedem vorkommenden Falle zu entscheiden, ob etwas zum Mein gehöre oder nicht. Die wichtigsten Controversen, z.B. über den Büchernachdruck, hängen davon ab. Allein eine solche Definition hat, meines Wissens noch Niemand gegeben, wiewohl sich viele darum bemüht haben". The word of "Realdefinition" can be compared with "Sacherklärung" in Kant's *Doctrine of Right* (MS RL § 5, AA 06: 249.03). Besides Robert, Höpfner referenced four jurists as if they were involved in this problem, namely Heinrich Koehler (details unknown), Johann Justin Schierschmid (1707–1778, German jurist), Joachim Georg Darjes (1714–1791, German jurist) and Ulrich (*supra* note 25). However, these four authors did not use the phrase of "mine or yours". *See* Koehler, Heinrich: *Juris Naturalis Ejusque Cumprimis Cogentis Methodo Systematica Propositi Exercitationes VII*. Frankfurt am Main 1738, § 747, at 146 (He used the terms of "suum" and "alienum").; Schierschmid, Johann Justin: *Elementa Juris Naturalis Socialis et Gentium Methodo Scientifica Conscripta*. Jena 1742, § 244, at 196 ("suum").; Darjes, Joachim Georg: *Institutiones Jurisprudentiae Universalis*. Jena 1745, § 277, at 146 ("nostrum", "alienum", and "suum alterius").; Ulrich, *supra* note 25, § 1, at 3 ("meum").

The reason Robert addressed this theme in his lecture and not in an article is unclear at this moment, but the author presumes that the distinction between mine and yours is important for copyright, as Höpfner mentioned in the above citation, and Robert would have spoken about it, as the title of his lecture includes "*in Memory of the Most Gracious Confirmation of the Local Literature Society*" (in German: *zum Gedächtniß der Gnädigsten Bestätigung der hiesigen Litteratur–Gesellschaft*).

Indeed, Robert did not discuss the idea of an ownership–based private law system but had a good consideration of the distinction between mine and yours; that is, he distinguished something physically mine from something judicially mine as follows: "So, I would like to argue as follows: The expressions 'mine' and 'yours' can be interpreted in two senses and it has actually become a practice to do so, that is, firstly, in a purely physical sense, and secondly, in a moral and juridical sense. For, when we use these words in the first case, we are not thinking about the concepts of legality and illegality, or of obligation, whereas we do so undeniably in the second case" (translated by the author).[(38)] While this explanation is similar to Kant's classification of possession as physical and merely judicial, it should be noted that Robert's definition of something physically mine is not the same as Kant's physical possession, as Robert understood it simply as one's own body, activity, or power: "What is mine is that which cannot be

(38) Robert, *supra* note 32, § 3, at 4f.: "[S]o bemerke ich, daß man die Ausdrücke Mein und Dein in einem doppelten Sinne nehmen könne und auch würklich zu nehmen pflege; nemlich zuerst in einem blos physischen und zweytens in einem moralischen und juristischen Verstande. Im ersten Falle denket man nemlich bey dem Gebrauche dieser Wörter nicht an Begriffe von Recht und Unrecht oder von Verbindlichkeit, so wie man es im letztren Falle ganz unleugbar thut."

regarded as being part of another person, or as his/her activity and power, that is, that which cannot be another person's without contradiction" (translated by the author).[39] Kant did not restrict the meaning of physical possession to one's own body, activity, or power.[40] In addition, Robert's explanation of something judicially mine is closely tied with the concept of "perfection" (in German: Vollkommenheit), which seems to be derived from Christian Wolff's philosophy.[41] This concept is beyond Kant's philosophy, as he refused it in *Critique of Practical Reason* (KpV, AA 05: 41.02–38). Since Kant possessed the fifth edition of Höpfner's *Naturrecht* in his private bookshelf, one would plausibly believe that Kant knew Robert's record being cited there and, while partially following it, mainly criticized it.

Hence, Thomasius's, Höpfner's and Robert's contributions are complementary; specifically, the basic idea that private law is based on the concept of mine or yours originated from Thomasius whereas the concrete issues are proposed by Höpfner and discussed in detail by Robert.

### b. Is Family Law a Part of Social Law?

Thomasius and Kant show similarities in terms of how to classify

(39) *Ibid.*, at 5: "Mein ist das, was ohnmöglich, das ist, ohne Wiederspruch [sic!], als einen Theil oder als eine Würkung und Kraft des andern angesehen werden kann." The term of "contradiction" (in German: Widerspruch) would play an important role when comparing Robert's lecture with Kant's *Doctrine of Right* (MS RL § 6, AA 06: 249.34–250.08).

(40) For example, Kant regarded the having an apple in hand as physical possession (MS RL § 4, AA 06: 247.24–248.07). An apple is not one's own body, activity, or power itself, but an external thing. Thus, Robert's definition of what is physically mine does not match Kant's one of physical possession.

(41) Robert, *supra* note 32, § 5, at 8 and § 8, at 10.

laws. They are convinced of the correctness of the fundamental distinction between "private law" (in Latin: jus privatum, in German: Privatrecht) and "public law" (in Latin: jus publicum, in German: öffentliches Recht), whereas some famous jurists divide laws into "natural law" (in Latin: jus naturae, in German: Naturrecht) and "social law" (in Latin: jus sociale, in German: Gesellschaftsrecht).(42) In addition, Thomasius classified family law into private law as in the case of Kant; in other words, family law is also based on the concept of mine or yours.(43)

At first glance, the concept of social law would be introduced for good reason; that is, public society (i.e., state) would presume private community (i.e., family), and both societies could be regulated uniformly. The continuity from a private to a public society apparently assumes that a state has been developed in stages; simply put, several families form a small state, as Achenwall argued: "A STATE (a republic in the *broad* sense of the word) is an unequal society of several families for the pursuit of external happiness" (translated by Vermeulen).(44) Achenwall, Höpfner, Ulrich, Jakob, and Hufeland adopted this classification of family law into social law.(45) Moreover, its origin is found in earlier

(42) Achenwall, Gottfried: *Jus Naturae*. 5th ed. Pars 2. Göttingen 1763, II1ff., at 1ff.; Höpfner, *supra* note 25, § 137ff., at 133ff.; Ulrich, *supra* note 25, § 361ff., at 257ff.; Jakob, *supra* note 25, § 481ff., at 291ff.; Hufeland, *supra* note 25, § 284ff., at 132ff.; Schmalz, *supra* note 25, § 121ff., at 76ff.

(43) Thomasius et al., *supra* note 11, § 10 of prooemium, at 5.

(44) Achenwall, *supra* note 1, II86, at 135.

(45) Cf. the systematic position of the following texts. Achenwall, *supra* note 42, II78, at 61.; Höpfner, *supra* note 25, § 152ff., at 143ff.; Ulrich, *supra* note 25, § 425ff., at 303ff.; Jakob, *supra* note 25, § 539ff., at 322ff.; Hufeland, *supra* note 25, § 300ff., at 142ff. Schmalz used the term of social law (*see supra* note 42), but it is unclear whether he regarded family to be regulated by it or not, since he explained only national institution. *See* Schmalz, *supra* note 25, § 121ff., at 76ff.

periods; for example, Pufendorf discussed property law and contract law from the third to the fifth volume of *On the Law of Nature and of Nations* (in Latin: *De Jure Naturae et Gentium*, 1672) and began discussing the concept of family in the sixth volume with the following introduction: "It follows that we must try to find out, on the one hand, the origin and nature of human overlordship, and, on the other hand, which rules of natural law and of international law are based on this overlordship" (translated by the author).[46] Wolff explained family law under the concept of "overlordship" (in Latin: imperium) as well; that is, family law relates to "private overlordship" (in Latin: imperium privatum).[47]

However, Kant criticized the other jurists, writing, "The highest division of natural right cannot be the division (sometimes made) into *natural* and *social* right; it must instead be the division into natural and *civil* right, the former of which is called *private right* and the latter *public right*. For a *state of nature* is not opposed to a social but to a civil condition, since there can certainly be society in a state of nature, but not *civil* society (which secures what is mine or yours by public laws). This is why right in a state of nature is called private right" (translated by Gregor, MS RL Einleitung, AA 06: 242.12–19).[48] Kant did not mention the case in which the distinction between natural and social law becomes inappropriate, but the community of family must be one such case, as this small social unit has existed even before the founding of a state, that is, in natural state. Therefore, the distinction between

(46) Pufendorf, *supra* note 4, Lib. 6, Cap. 1, § 1, at 749: "Sequitur, ut investigemus tum originem et naturam imperii humani, tum quae praecepta juris naturalis et gentium illud praesupponunt."

(47) Wolff explained family law under the section of private imperium. *See* Wolff, *supra* note 33, the title of Pars 3, Sect. 1, at 509 and § 854ff., at 522ff.

(48) Kant, *supra* note 20, at 37.

natural law and social law is confused, as not only civil but also natural state is also social state to some degree.

In addition, to verify the uniqueness of Thomasius's and Kant's opinions as required in section (2) of this chapter, it is significant to note that Kant could not simply follow the popular Roman jurisprudence despite its adoption of the distinction between private and public law. Ulpian, a famous jurist in ancient Rome, wrote, "There are two branches of legal study: public and private law. Public law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest" (excerpted from D 1.1.1.2, translated by Watson et al.).[49] In this text, Ulpian regarded private law as being concerned with "individuals' interests" (in Latin: singulorum utilitas); in other words, his definition was based on a utilitarian aspect. Contrarily, Kant sharply criticized the reference to utilities for grounding legal concepts (MS Einleitung II, AA 06: 215.24–216.27). Therefore, even if Kant adhered to the distinction between public and private law for being more traditional than the one between natural and social law, he could not use the Roman term "private law" because of its incompatibility with his philosophy. This term became usable for Kant only when it was separated from its utilitarian character, and this separation was founded first by Thomasius in that dissertation.

### (4) Independency against Jurisprudence

Contrary to the above two examples, Kant's independence against jurisprudence can be revealed through a comparison with Thomasius in the question of how to understand the concepts "in general" (in Latin: in

(49) *The Digest of Justinian*. Vol. 1. Translated by Watson, Alan et al. Philadelphia 1998, 1.

genere, in German: in Gattung) and "in kind" (in Latin: in specie, in German: der Spezies nach). Kant defined "loan for consumption" (in Latin: mutuum, in German: Darlehen) as "[l]ending a thing on the condition of its being returned only in kind (e.g., grain for grain, or money for money)" (translated by Gregor, MS RL §31, AA 06: 285.20–22).(50) On this definition, the academic version notes that the phrase "in kind" should have been replaced with "in general" (in German: dem Genus nach, Sachliche Erläuterungen zu $285_{21}$, AA 06: 523). Indeed, Achenwall explained, "[a] contract by which a thing is promised in order to be restituted in general sometime is a CONSUMPTION-LOAN CONTRACT, and once the thing is handed over it becomes a CONSUMPTION LOAN" (translated by Vermeulen).(51)

However, this doubt can be alleviated by referring to the following passage in Thomasius's dissertation *On the Differences of Things*: "Furthermore, things are *the same* [with each other] or *different* [from each other]. In both the cases, they are so *in general* or *in kind*. However, it is to be noted here that 'in kind' means in laws something which philosophers usually call 'individual', but 'in general' means something which they usually call 'in kind'" (translated by the author, italics by Thomasius).(52) According to Thomasius, the judicial term "in general" can be paraphrased using "in kind" in view of philosophers; thus, Kant did not write incorrectly when adopting this terminology. Kant was allowed to use the phrase "in kind" instead of "in general" so

(50) Kant, *supra* note 20, at 74.

(51) Achenwall, *supra* note 1, I219, at 75f. About the original text, *see* Achenwall, *supra* note 6, at 189.

(52) Thomasius et al., *supra* note 11, §33, at 12: "Sunt etiam res vel *eaedem* vel *diversae*. Utraeque sunt vel *genere* tales vel *specie*. Id vero hic notandum, quod species in jure denotet id, quod individuum appellare solent Philosophi, genus autem, quod hi speciem."

far as his *Doctrine of Right* was part of his philosophical book *The Metaphysics of Morals*, although the jurists whose books Kant owned in his private study used "in general."(53) This switching of terms shows that Kant did not follow jurists unrestrainedly but rather kept his own discipline even when discussing jurisprudence.

## 4. Conclusion

Kant read Thomasius's work *On Ownership* through Achenwall's citation and adopted the idea of a "mine or yours"–based private–law system in his *Doctrine of Right*. This conception of Thomasius was not familiar to other jurists, such as Achenwall, especially in the aim to explain private law through possession and ownership. Furthermore, Kant seems to be involved in the real definition of "mine or yours" that is based not on his own original idea but on the collaboration between Höpfner and Robert. Robert argued, by mentioning Höpfner's term "one's own", that something physically mine means my body, my activity, and my power while something judicially mine is concerned with achieving my own perfection, which seems derived from Wolff's philosophy. Kant could not adopt Robert's definition because of his moral philosophy; that is, he could not accept the concept of perfection for controlling the private law system. Hence, from these, it is plausible to assume that

(53) Ulrich and Jakob also used not "in kind" but "in general" in the definition of *mutuum*. *See* Ulrich, *supra* note 25, § 266, at 187.; Jakob, *supra* note 25, § 376, at 225 (von derselben Gattung). Höpfner used neither "Gattung" nor "Spezies" but "Art" as follows: "Fungibele Sachen sind die, bey welchen es mir gleichgültig ist, ob ich sie selbst oder andere von gleicher Art habe." Höpfner, *supra* note 25, § 96(1), at 89. Hufeland believed that the classification of contracts is not necessary for natural law, and hence he did not define consumption loan. *See* Hufeland, *supra* note 25, § 277, at 128.

Kant's "mine or yours"–based private law system was inspired by Thomasius, Höpfner, and Robert, with philosophical modifications. The fact that Kant kept the independence of his moral philosophy against jurisprudence can also be substantiated by the definition of loan for consumption; that is, he rejected the judicial terminology of "in general" and replaced it with the philosophical term "in kind." This concludes, first, that Kant critically read many legal books regardless of their popularity, at least more than previously assumed, and, second, that Kant's legal knowledge may have been underestimated. Interdisciplinary collaboration is expected to discover jurists and legal texts untouched by previous research.