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Security

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The law of security engages the jurist with three central challenges of the contemporary legal endeavour: are law's institutions best organized and grouped by reference to stipulated conceptual features (their essences) or by reference to their social and economic purposes (their functions)? Is justice according to law foundationally about corrective justice upon which second order distributive regimes may be imposed, or is a regime of corrective justice a particular instantiation of a distributive regime? And, is law best conceived as a mechanism of social control or as a facilitation of human interaction?

Unsurprisingly, specific legal systems answer the eight permutations arising from these questions differently. Surprisingly, even within the field of security in a given legal system, there is no coherence of approach; both sides of each dichotomy are reflected in the design and operation of the regime of security. What distinguishes legal orders, be they official orders of political states or orders arising from social systems, are the analytical starting points, the default reflexes, and the relative predominance of one or the other approach.

To the layperson, the idea of security is not difficult to grasp. Whatever institutions and techniques make a creditor more secure in its belief that it will not suffer in the event of non-performance of an obligation by a debtor are security. The law has historically taken a narrower view. Not all inducements to performance or guarantees are security. To understand the variety of legal responses to the problem of definition, one needs to begin with the social situation from which the impulse to security originated, namely the fact that, at bottom, a creditor (from *credere*—to believe, to trust) has little option but to trust a debtor.

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Human relations involving credit have long been an ubiquitous feature of most Western societies. In everyday affairs we routinely find ourselves owing the performance of an obligation to another for a service rendered, an asset delivered, or a payment made. Conversely, we are regularly creditors of a promised future performance or payment by others. Normally we expect our debtors to faithfully fulfill their obligations, just as we anticipate faithfully fulfilling our own. It matters not that these obligations may have been voluntarily assumed (as in a contract), or arisen by operation of law (as in delictual, restitutionary, or fiduciary situations), or been imposed through a judicial order (as in alimentary claims), or find their origin in a public law statutory obligation (as in the liability to pay workers compensation and employment insurance levies, to collect employee tax deductions, or to directly pay property and income taxes).

Sometimes, however, performance will not be forthcoming, or will be defective or inadequate. In these cases, the law provides that creditors may either compel performance of the prestation due or the payment of compensation in lieu of performance. With few exceptions, the exercise of any creditor remedy presupposes a judicial action, which if successful will lead to the compulsory execution of the judgment rendered. Where the obligation is to pay money or where monetary compensation is ordered in lieu, the sheriff will seize and sell the debtor's assets and remit the proceeds of the sale to the creditor in payment of the debt owing. Should several creditors have obtained a judgment against a debtor and the sale of the assets not generate enough money to pay all their claims in full, the proceeds will be held in a common pool either by the sheriff or by an insolvency administrator and all claims will eventually be paid *pro rata* from the available money.

Despite its apparent simplicity, this regime does not always work to best advantage debtors, creditors, or third parties. For debtors, the *pro rata* scheme of distribution means that those who are high credit risks will often be unable to purchase property on credit, or to borrow money at reasonable rates of interest. For creditors, the risk is that over time their debtor may have dissipated the asset pool upon which their confidence in its solvency was initially based. For third parties like dependants of the debtor, the seizure and sale of family assets can be devastating. In addition, because sheriff's sales are rarely an efficient mechanism for realizing the full value of a debtor's assets, it will normally be necessary to sell more property than really necessary in order to pay outstanding claims.

These limitations of the regime for ensuring payment by debtors unable or unwilling to perform them have vexed civil law and common law systems for centuries. Since the industrial revolution they have been exacerbated by a significant growth in the number and scope of credit transactions, be these in respect of home ownership, the acquisition of consumer goods, or the financing of commercial enterprises, or be these the result of non-contractual interactions.

To palliate the inconveniences of the enforcement regime, Western legal systems typically envision a vast array of institutions and techniques by which creditors may enhance their chances of obtaining full payment of obligations they are owed. So, for example, in some cases, creditors are permitted to enforce obligations without having to obtain a judicial order. Again, in some cases, creditors are able to require debtors to perform obligations or to appropriate their property rather than to be content with the payment of their monetary equivalent as damages. By far the most common mechanism to enhance the likelihood of full recovery, whatever the legal system in question, is security.

In the widest sense of the term, all institutions and techniques to reduce the risk of debtor non-performance can be considered as security. But this is hardly a satisfactory criterion of identification. Not all guarantees are security. Over the years, driven by both the inventiveness of lawyers, and the attempt by governments to use bankruptcy regulation to limit the extent to which more powerful creditors may appropriate an insolvent debtor's assets, scholars have come to despair about the possibility of defining the notion of a security. Indeed, it is now common simply to assert that security is not a concept, but merely a convenient label applied to disparate legal institutions. Were one to take a conceptual approach to characterization, the central features of security would be that it constitutes a right in a debtor's property, which is vested with a right to follow, a non-defeasible priority right, and a power of private realization and that permits the creditor to appropriate the economic value of the whole or a part of a debtor's estate. Yet others find a unifying thread in functionalism: a security is a prerogative given by contract, by law, or by a judgment to certain determined creditors—over and above the prerogatives vested in ordinary creditors—that has for its fundamental purpose to protect a creditor against a debtor's possible insolvency through the affectation of property to the payment of the claim.

Neither approach is sufficient on its own to delimit the scope of the notion. For example, the essentialist approach cannot account for personal rights or title security. Nor does it embrace personal security (paradigmatically, suretyship, and guarantees). Similarly, under the functionalist approach, security rights are seen to attach to property, but the notion captures all rights in property that secure the performance of an obligation, including conditional creditor ownership of assets being acquired by, or once owned by, a debtor. Moreover, the common law exclusion of suretyship seems odd since its analytical framework—the affectation of a universality of property (the surety's own exigible estate)—is no different from the affectation of a universality of the debtor's own property. Finally, it is curious that the civil law conception has difficulty with consignments, conditional assignments, negative pledge agreements, direct actions, and default insurance as security instruments.

Historically, some legal traditions conceived security rights as a bilateral bargain between a debtor and a creditor. The alienation of a property right to secure performance of an obligation was not different than the alienation of a real right of enjoyment. Both were instances where non-performance would be enforced under a regime of corrective justice. Only later were the distributive consequences of disrupting the equality of creditors perceived as requiring a deliberate lexical ordering of creditor prerogatives. Other traditions imagined a debtor's estate as the representation of the debtor's social interaction. Allocating rights to one creditor immediately implied a diminishing of rights of another. Hence the state was entitled to identify a panoply of creditors that it might favour affording them priority rights that would not normally be bargained for. In this scheme, consensual security is the distributive allocation of a prerogative to private parties to negotiate a regime of corrective justice.

A last consideration is whether security regimes are best conceived as a mechanism of social control, or as a facilitation of human interaction. In one perspective, the regulation of security is meant to structure the nexus of debtors, creditors, assets, and obligations in such a way as to prevent exploitation. A *numerus clausus* of security rights, limitations on what may be given in security (for example, people may not be held hostage as security assets), and the strict elaboration of prerogatives that could be appropriated by creditors framed the regime. An imperative normative regime was required to limit the types of assets, if any, that should be made available to permit certain creditors a claim a superior status over others, and thereby crystallize belief through a privileged entitlement to performance. And such a regime would evaluate the relative intensity of any given congeries of relationships, deciding how to control the impact of economic power on forging relationships of preferential entitlement even as against creditors of other commitments that may be more intense or more long-standing. Alternatively, security may be seen as an opportunity for people to reach beyond close relationships and communities and to generate social solidarity in an uncertain world of promising. Given the large number of relations mediated through property, we rely on institutions and intendments that allow us to create and recognize obligations to others by deploying what we own to caution what we owe.

Choosing the configuration of a regime of security assumes decisions on each of these dimensions of legal belief systems. Institutionalized orders play an uneasy mediation of form (or *ex ante* analytical category) and intention (or *ex post* purposive attribution) in the design and operation of these systems. Moreover, deciding whether the criterion of distribution of creditor entitlement should be equality or opportunity calls forth decisions about the conditions under which distributional choice should be allocated to subsets of those otherwise claiming a remedy in corrective justice. Finally, determining if the benefit of enlarging the community of belief and trust to enhance social solidarity outweighs the risk of self-interested rent-seeking requires states to decide whether the material form of objects or the human form of interaction is controlling.