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Beyond Texts: Institutions and the Historical Pursuit of Non-Elite Forms of Legal Imagination

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To the Uttermost Parts of the Earth is a remarkable work of intellectual history – elegant, creative, and erudite. Koskenniemi’s account weaves together an extraordinary array of texts penned between the 14th and 19th centuries by a broad range of European jurists, theologians, princely advisers, and ambassadors, among others, in order to trace how languages of law were deployed to justify (and more rarely critique) the consolidation and deployment of power and resources, especially in relation to foreign lands. Situated in differing social, political, and geographic contexts, these actors engaged in what Koskenniemi describes as »legal imagination«, creatively assembling legal, political, religious, and scientific discourses to advance their particular interests and agendas. The resulting »bricolage«, he claims, played a profound, even determinative role in establishing the frameworks through which, to this day, we make sense of the world and its problems, »outlin[ing] for us what those ›problems‹ are in the first place« and suggesting possible »recipe[s] for dealing« with these (952). In so arguing, Koskenniemi goes both deep and broad, providing subtle, close readings of individual texts – contextually situated against the particular political, economic, and religious struggles animating authors and readers – but without ever losing the forest for the trees. Thus, despite its massive length, the book never devolves into a series of disjointed essays but is instead artfully held together by several powerful throughlines – including, most importantly, sustained reflection on how languages of public and private power, sovereignty and property, emerged in constitutive relation to one another over the course of centuries.

Koskenniemi presents his book as a work of »critical legal history« (957). By examining how elite, white European men developed the frameworks of law that justified the creation and deployment of power across the globe, he seeks to shine critical light on the structuring legal frameworks of public / private and foreign / domestic that continue to undergird the vastly unequal distribution of resources and geopolitical power. These frameworks, he demonstrates, were not a product of

neutral legal science, but the offshoots of profound political, religious, and economic struggle. Yet, despite the extraordinary erudition and scope of his undertaking, his critique goes only so far. While he appeals to Lévi-Strauss’ metaphor of *bricolage*, Koskenniemi’s *bricoleurs* are largely not people who work with their hands, but are instead decidedly members of the elite. His choice to neglect the legal imagination of the many ordinary individuals caught up in historical struggles over power and resources makes it ultimately impossible for him to move beyond the »hierarchies and exclusions« that he bemoans (13). The end result is not only to silence these voices, but also to limit the forms of imaginable *bricolage*, making the legal frameworks that he critiques appear that much more fixed and inevitable.

Consider, for example, Koskenniemi’s account of the *lex mercatoria*. As he details, appeals to *lex mercatoria* played a key role in the competition between common-law and civil-law jurisdictions in 16th-century England. As the civilian High Court of Admiralty struggled to preserve jurisdiction over commercial and maritime matters, its defenders claimed that such issues were best heard in a civil-law-based court with knowledge of the *ius gentium* – a body of law familiar to merchants abroad. In response, common law jurists argued for the jurisdiction of the common law courts by depicting the *lex mercatoria* as at once deeply rooted in England, dating »from time memorial«, and a component of the law of nations and natural law (579–584). Thereafter, by the late 17th century, such jurists deployed similar claims about the centrality of the *lex mercatoria* to English law in order to promote a vision of the state as dependent on merchants and their property (592–598). As Koskenniemi argues, it was this understanding of the centrality of trade to the empowerment of the state (and merchant interests) that underlay Chief Justice Mansfield’s subsequent, 18th-century efforts further to incorporate core aspects of the *lex mercatoria* into the common law, including not least, negotiability (653–656).

It is beyond cavil that the language of *lex mercatoria* played an important role in facilitating the

rise of the British commercial empire, while also empowering common law jurists and their merchant (and parliamentary) supporters. But the *lex mercatoria* was more than just an elite discourse. It was also a set of practices developed by a broad range of (mostly) merchants, engaged in such vital but mundane activities as keeping accounts, extending credit, and pursuing dispute resolution. Take, for example, negotiable instruments. Describing negotiability as a »contemporary market practice[]« (653), Koskenniemi treats its emergence as a given, such that the question becomes how an elite actor like Mansfield undertook the *bricolage* necessary to justify and facilitate its further development within his own preferred institutional power base (the common law courts). But how precisely did practices of negotiability become a given in the first place? This too can be told as a story of legal imagination – but one involving a different, more expansive set of *bricoleurs*.

Across the Channel, in precisely the period that Mansfield was struggling to ensure that the common law courts gave full recognition to negotiability, the *juridiction consulaire*, or merchant court, of Paris was working through myriad questions relating to the legitimacy and application of negotiability (and associated practices) on an iterative, case-by-case basis. As I have argued elsewhere, over the course of the 18th century, the court eventually embraced negotiability, as well as practices linked to it – such as discounting bills of exchange and endorsing bills without specifying a date or endorsee. But the process by means of which this occurred was long and contested. On a case-by-case basis, parties and their representatives, judges, and court-appointed arbiters took very different positions on these matters. Those involved in these

proceedings were an eclectic group, consisting not only of elite wholesalers, but also of artisans and retailers, lawyers and even an occasional priest. So too, some women participated. In so doing, these actors engaged in their own *bricolage*, appealing to a mix of statutory law, merchant custom, religiously engrained, highly relational notions of commercial morality, and more recent conceptions of the social utility of expansive, risk-taking commercial endeavors (ones that paralleled but never directly referred to the elite discourse associated with the physiocrats). Such non-elite, institutional *bricolage* played its own role in facilitating the emergence of a *lex mercatoria* that – as both language and practice – helped to undergird the rise of the modern commercial state and society. And importantly, the mundane, iterative nature of this non-elite *bricolage* makes more visible the extensive contestation and struggle underlying the ultimate outcomes.

It is, of course, too much to ask that in a book of this already vast scope, Koskenniemi should also have undertaken an extensive analysis of non-elite forms of legal imagination. But to the extent that we heed his insistence on the constitutive power of language, it is vital that we recall that language and the legal imagination that it facilitates are not within the exclusive purview of elites. By studying institutions (and the intersections of language and practice that these enable), rather than just texts, we can uncover how ordinary people – including, the non-Europeans, non-whites, non-Christians, and women, whose marginalization Koskenniemi seeks to critique – also pursued forms of world-shaping *bricolage*. ■