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Legal Imagination, the Power of Texts and some Hidden Contexts

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In his book, Martti Koskenniemi provides a remarkable reconstitution of the genesis of legal vocabularies on the relations between domestic communities and their exterior – a set of political entities of diverse nature and size that was at times imagined as an »international community« regulated by a »law of nations« whose foundation was nature. This law acquired different names and meanings (natural law, *ius gentium*) as what was being defined as »natural« changed. In the end, it is the category of »natural law« itself that is questioned by the historical plurality of its meanings (949).

Another concept that gives unity to Koskenniemi's narrative is that of »legal imagination« – a historiographical category. The author's idea is that not everything can be said or thought, because of constraints relating to linguistic contexts and conventions, but that it is nevertheless possible to use old languages imaginatively, create hybrids or use languages »against themselves« (953). The historical agents of this creative work are a group of theologians, political philosophers, professors, politicians, government office-holders, shareholders in trading companies, merchants and lawyers selected by the author. We do not, however, find out why he selected them (because they are the most read, the most quoted or influential in their time? those whose views had the greatest impact? because it is agreed, by historiographical consensus, that they – or some of them – are the authors of the history of international law?). What unites them is the recognition of the potentialities of the legal vocabulary that they mix with other languages, imported from religion, science or political econ-

omy, in a double process, – synchronic and diachronic – of »bricolage«. Koskenniemi's thesis is also that legal ideas emerge from concrete problems and solutions, and that their intelligibility is linked to intellectual contexts, social structures and heterogeneous audiences that are intended to be persuaded, as well as to events that range from a more macro scale (such as the discovery of the New World or the French Revolution) to a more micro level (such as the discussions around the jurisdiction of privileged companies or the Haitian revolution).

By reading this book together with the author's previous reflections,¹ we realise that the book concretises a Skinnerian programme applied to »questions that interested the lawyer«,² as well as an attitude of critical distancing from classical approaches to the history of international law. There is no transhistorical dialogue between the succeeding historical agents, although there are »windows of communication«. Nor, in general, are there any teleological goals inscribed in the complex and discontinuous dialogue allowed by those windows.³ Nevertheless, a teleological dimension of the historical process does appear at times. For example, in the very first chapter, when the process of *state building* is referred to (114–115) in relation to the use that medieval jurists of the 13th–14th centuries made of Roman law idioms to account for the competition between the universal powers (pope, emperors) and smaller political communities (kingdoms, cities, feudal lordships) of that time. In the late middle ages, the dynamics of this debate were strong and their outcomes uncertain, as was the associated balance of plural

1 MARTTI KOSKENNIEMI, Why History of International Law Today, in: *Rechtsgeschichte – Legal History* 4 (2004) 61–65, <http://dx.doi.org/10.12946/rg04/061-066>; IDEM, Histories of International law: Dealing with Eurocentrism, in: *Rechtsgeschichte – Legal History* 19 (2011) 152–176, <http://dx.doi.org/10.12946/rg19/152-176>; IDEM, Vitoria and Us.

Thoughts on Critical Histories of International Law, in: *Rechtsgeschichte – Legal History* 22 (2014) 119–138, <http://dx.doi.org/10.12946/rg22/119-138>.

2 KOSKENNIEMI, Why History of International Law Today (n. 1) 64.

3 KOSKENNIEMI, Histories of International law (n. 1) 153; KOSKENNIEMI, Vitoria and Us (n. 1) 123.

powers, all of which were intrinsically limited.⁴ Roman texts, on the other hand, were not uniform; their structure was versatile, adaptable to the foundation of political forms of diverse nature and breadth.⁵ Finally, the otherness of medieval legal and political thought invites historians to try to imagine the political world as medieval authors saw it and to look for alternative paths to the *state building* process, even if these paths were cancelled out by subsequent historical pathways.

In this book, the production of meaning is seen as occurring on three articulated levels. The first has to do with the construction of internal sovereignty and its impact on the conceptualisation of the relationship between domestic communities of sovereigns and subjects on the one hand, and of the relations with what lies outside, on the other, as well as the impacts generated internally by the idea of a legal order that was beyond the domestic jurisdiction of sovereign powers. The second level concerns the relationship between political communities of the Christian world that were in commercial competition or at war. The third and last level has to do with the relationship between both these and the communities and individuals who were in another »outside« – that of the non-European territories and populations. A relationship in which the most transtemporal of the grammars that emerged from this long history was constituted – that of the hierarchies of the human world. The author's well-known openness to the post-colonial dimension of international law is reflected here, as is his commitment to confront Eurocentrism, and his positions against radical historical relativism: there are no timeless dialogues, but history is also not a succession of closed contexts, without communication among themselves and with the context of the historian.⁶ Because of this perception, Koskenniemi does not hesitate to stress that, while re-reading Thomist doctrines within their own new political and intellectual contexts, the theologians of the »School of Salamanca« legitimized the European

presence in the New World and its role in violence and injustices. The same sensitiveness to the post-colonial dimensions of historical legal discourses is apparent when Koskenniemi concludes that the abolition of slavery in Santo Domingo was not a consequence of the Declaration of the Rights of Man and of the Citizen of 1789, or when he highlights the discriminatory positions of the »international community« towards the young state of Haiti in 1804.

However, there is one aspect that Koskenniemi had identified as important in his previous texts but which is almost absent from this book: colonised peoples' creative use of the legal concepts forged in Europe.⁷ These peoples were not passive subjects of this history. Contact with them reinforced identities that appear in the book as almost self-evident, such as that of the Christian world or of Europeans.⁸ It is also known that they had expectations about the behaviour required of Europeans, although this is a difficult dimension to grasp, and that they constructed their own versions of the unilateral discourses that were produced about them. They claimed rights in agreements (mentioned briefly, 507) and in peace treaties, they resorted to judicial instances – as was the case, already well studied, of the enslaved populations – and they recreated ideas, as has been explored by Christopher Bayly.⁹ But in this book, the only occasion where their capacity to act emerges is during the French revolutionary process, when slaves and former slaves mobilised legal documents, such as the *Code Noire* (536), or revolutionary vocabulary (540) in their favour.

Besides being a reconstitution of concepts and ideas, this book is also a reconstitution of the thought of historical authors. Koskenniemi provides us with information about them which is sometimes very rich and complete, but it would have also been interesting to have a more developed reflection on the constraints which the positions they occupied within the power structures of the time dictated to their imaginations. Kosken-

4 ANTONIO TRUYOL Y SERRA, *Souveraineté*, in: *Archives de Philosophie du Droit* 35 (1990) 313–329, 315; MAURIZIO FIORAVANTI, *Constitución, de la Antigüedad a nuestros días*, Madrid 2001, 33–69.

5 ANTÓNIO MANUEL HESPAHNA, *Cultura Jurídica Europeia. Síntese de*

um Milénio, Lisboa 2017, 39–46, 124–129.

6 KOSKENNIEMI, *Vitoria and Us* (n. 1) 124.

7 KOSKENNIEMI, *Histories of International law* (n. 1) 173.

8 TAMAR HERZOG, *1596 – ¿Qué es ser español en Europa y en América in:*

Xosé M. NÚÑEZ SEIXAS (ed.), *Historia mundial de España / de las Españas*, Barcelona 2018, 305–311.

9 CHRISTOPHER BAYLY, *Recovering Liberties. Indian Thought in the Age of Liberalism and Empire*, Cambridge / New York 2011.

niemi explains that the interest of the book is less in »what people may have believed than how their imagination was confined within the authoritative speech and writing« (6). But what the imagination creates or recreates from these conventions depends on variables that are beyond the academic training of the agents, the universe of their readings or their self-representation as counsellors, teachers, judges, etc. The interests and intentions of those who were writing and of the target audiences they aimed to persuade, even if socially and culturally determined, should be taken into consideration. It is possible to imagine that if Francisco Vitoria had not been an advisor to the Spanish Emperor and a protagonist of the Counterreformation, he might have drawn other conclusions from the universe of conventions that he drew on for the raw materials of his thinking. In the same way we can imagine that Grotius or Locke could have reflected differently had they not been directly involved in the international trade interests of their time. The seriousness of their debates as well as the determination of how far they believed in their own arguments (they probably did) is not at issue here, nor is the thesis that they could have played freely with conventions, functionalising them according to their interests.¹⁰ Rather, it is that power relations, in their various and dynamic dimensions, constitute a variable to be considered in a history of law that is also a history of power. This is even more impor-

tant when we are facing prescriptive discourses that are self-legitimising by reference to the neutrality and universality of their enunciations, either based on theology, on reason or on science. An investigation into the »counter-hegemonic« readings of these statements at the moment of their reception would also enrich this discursive framework.

The wealth and completeness of this book is overwhelming. But its breadth does not always make it easy for the reader to grasp the innovative recreations of tradition or the ruptures that are tearing at the historical fabric. The organisation of the information on the basis of authors and classical space-temporal contexts (medieval, early modern or enlightened Spain, France, England, Germany) can hide other connections, continuities and ruptures that could be highlighted if other spatial contexts had been chosen.¹¹ Thus, for example, one important lesson of this book is that, from the 17th century onwards, the hegemony of scientific discourse produced effects in the legal discourse, giving rise to a radical change in legal vocabulary. Language and metaphors from the natural sciences turned into »linguistic convention«. But the significance of this rupture, whose dynamics were not guided by national frontiers, is diluted in the succession of spaces and authors, losing explanatory autonomy in this long and admirable history.



10 ANTÓNIO MANUEL HESPANHA, *Categorias. Uma reflexão sobre a prática de classificar*, in: *Análise Social* 168 (2003) 823–840, 825.

11 MASSIMO MECCARELLI, *The Assumed Space: Pre-reflective Spaciality and*

Doctrinal Configurations in Juridical Experience, in: *Rechtsgeschichte – Legal History* 23 (2015) 241–252, <http://dx.doi.org/10.12946/rg23/241-252>.