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Contexts, Protagonists and Legal Imagination: the Spanish Monarchy as a Reference for a Methodological Discussion

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Contexts, Protagonists and Legal Imagination: the Spanish Monarchy as a Reference for a Methodological Discussion

This book is a titanic effort to analyze how legal language has been used to justify, reinforce and exercise authority in different historical contexts. It is thus a history of the legal imagination and how it shaped legal and power relations in Europe between 1300 and 1870 at different times and in different spaces. *Rechtsgeschichte – Legal History* invites different authors to provide comments on specific aspects of this volume from each of our intellectual perspectives. Allow me, then, to offer a few reflections as a historian of the political economies of Iberian empires and globalization.

To the Uttermost Parts is not specifically about political economies, nor is it about globalization. Koskenniemi even denies his interest in the tension between »universalism and particularism« that would bring his text closer to global history. Hence, his methodology revolves around the contextual and »local« analysis of a great diversity of agents or »protagonists« – theologians, politicians, lawyers, etc. – who resorted to, and reformulated, their »legal vocabularies« to respond to a series of both intra- and extra-European challenges. This is done, and this is part of its merit, without forgetting that this »legal imagination«, and the intellectual *bricolage* to which it gave rise in each context, were inserted in legal traditions – always »European« – that go back to ancient Rome and in particular to natural law and the law of nations, which are both very present in the text.

The proposal to fit the history of law into the contexts of power relations and, therefore, into that of institutions in the broad sense, while not new, undoubtedly proves to be good news. Moreover, Koskenniemi – despite his *excusatio non petita* – makes a contribution to the history of European globalization, insofar as he studies how Europe's globalizing aperture affected the debate on international trade, ideas about property rights, sovereignty and jurisdiction, the European conception of the normative status of non-European societies, and how these new worlds changed Europe.

Like any methodological choice, Koskenniemi's has its pros and cons. It is this aspect that I would like to analyze on the basis of his study of the political theology of *ius gentium* and the expansion of »Spain« [sic] (1524–1559) (Chapter 2) and by also considering its implications for the book as a whole.

The choice of texts of Vitoria, Soto or Azpilcueta as the most important references in the Thomistic tradition is more than justified by the decisive role of the Salamanca School in the history of international law, commerce, debates on slavery, property rights and just war. Although not new, Koskenniemi's vindication of the confession as the communicative field between praxis – economic praxis, above all – and theology serves to demonstrate the social impact of that school. But it is doubtful that this »intellectual space« is sufficient to study the legal imaginary and the dialectic between economic praxis and the legal language that mediates the relationship between these »protagonists« and behaviors in the field of commerce, taxation, and others. A deeper analysis of other theorists of theology, but above all of political economy, such as Tomás de Mercado – to whom two quick references are made, though he had personal contact with the New World and transatlantic trade – would have served to uncover other dimensions of the problem. Above all, it would have clarified the mediations through which the images of the New World reached the Salamanca theologians and the way they conditioned their thinking, which, in turn, would also be a means to better understand America's agency in this process. On the other hand, and to continue considering the example of Mercado, his *Suma de Tratos y Contratos*, expressly addressed to merchants, also evidences another dimension of the problem: the distrust of its author, and probably of other people at the time, of those who, after training for »four years in Salamanca«, believe themselves capable of »penetrating« the complexities of the »practice« of commerce and of Sevillian trade, as well as of providing advice on moral matters. This appreciation is not trivial and refers to an analytical level that is not that of moral theology. Moreover, as far

as Koskenniemi's arguments are concerned, if, according to Mercado, »to confess to someone who is not appropriate for one's status is not to confess fruitfully«, this implied a very strict limit to the »wider frame of maneuver«, attributed to the casuism that stems from this theology. In other words, if Medina's probabilism could have had an influence on the way in which the legal imagination affected society, it remains to be studied how far this influence actually reached in practice.

If this level, closer to daily practice than to pure theology, needs to be analyzed, something similar occurs with respect to the perception of the king's American vassals and their human condition. Here, too, there is another intellectual space to be considered: that of the juridical and political reality of the composite monarchy. Traditional historiography has always related the problem of the enslavement or not of the Indians to the theological-moral debates of the time. But it is also known that, since the 15th century, a concern of the crown and of the cities, which clashed with the crown for this reason, was the preservation of the royal patrimony, systematically plundered by the alienations made to the nobility. The Indians being natural vassals of the monarch and associated with the royal patrimony, the crown's attempt to avoid their enslavement reflected, apart from theological and moral reasoning, its desire to prevent the dispossession of this American patrimony. It is therefore necessary, also in this case, to introduce additional protagonists – the crown, the nobility, the cities and the kingdom represented in Cortes – and another contextual level – that of the preservation of the royal patrimony and of the king's vassals – in order to understand the problem well. There may be a moral theology, but reasoning in terms of political economy accompanied the theological debate. Las Casas' text itself, quoted by Koskenniemi (161), is very revealing in this regard.

Similar reasoning can be applied to the debate about the king's power to levy taxes for war. The issue is well studied by Koskenniemi when he refers to the theory of the »king has to live off his own« in medieval France (Chapter 1) or in pre-revolutionary England (Chapter 8). But when in the Spanish case he contextualises the formation of a new legal imagination only – or preferably – in Salamancan theology, he blurs the fact that this debate has one of its most important roots in the demands of the Cortes that taxes should not be paid for the benefit of the Habsburg dynasty – »foreign«, by the way – unless such a benefit coincided with the interests of the kingdom or the defense of Christianity; an idea that had been already very present since the 15th century. Ultimately, this additional level, the political economy of taxation, and those other protagonists – the cities and the kingdom – are key to understanding the legal imagination. It is not that Koskenniemi is wrong. But the equation of theology / legal language / power and authority (»the main theme« of the book) is insufficient to comprehend what happened in its full dimensions. Furthermore, this choice, which gives priority to Dominican thought, leaves out »protagonists« who form a whole tradition of thought with origins in St. Augustine – barely present in this section of the book – and which passes over the Franciscans, who preached an egalitarianism even more radical than that of the Dominicans, as well as a theory of labor value such as that of Martínez de Mata. This egalitarianism, which Norman Cohn referred to years ago in other contexts, would be very present in the Spanish picaresque and would also be one of the keys to the development of »Paulist« theories of labor, trade, usury and value, without which it is impossible to understand the transformations in the Hispanic and perhaps European legal imaginary.

In short, this type of analysis and its reductionism to the School of Salamanca contrasts markedly with other chapters (those dedicated to France or England, for example), where the plurality of actors and protagonists is much more present. This imbalance even prevents possible comparisons that would have been useful for the book as a whole and for the history of the Spanish Monarchy and Spain – always a victim of exceptionalism – in general. A development of the subject at the same analytical level as that of these other countries would also have served to place America and its influence on European thought – starting with Hobbes himself – on a more visible level.

Generally, here would now come the ritual and stupid accusation of Eurocentrism. In this case the criticism would be doubly stupid, since this is a book about the history of Europe. But a title that evokes »the uttermost parts of the earth« makes one wonder about what happened outside Europe, about the way in which other societies responded to the challenge of globalization. Obviously, Koskenniemi is under no obligation to answer this question, which would force him to write a differ-

ent book. But a critical reader has the right to wonder to what extent this story about legal imagination and international power did not draw on contacts at the borders between Europeans and other parts of the earth. Especially if we know that there were adaptations and changes in the »legal vocabulary« in those »peripheries« and even among the Creole elites, who manipulated, accommodated and rejected the discourses analyzed by the author. A study of the writings of the Andean author Felipe Guamán Poma de Ayala (1534–1615) would have pleasantly surprised – I believe – both the author and his readers. On the other hand, there are many studies, starting with those referring to legal pluralism in the early modern period, which oblige us to consider the problem from this point of view. Just as it is legitimate to doubt that many of the problems raised in this book can be studied by taking an identification of Europe *only* with the Roman-Christian tradition that shaped the natural law and the law of nations as a starting point. Of course, the external contaminations are missing. And the result of a study that considered them would have been a more decentralised image of the problems studied.

There are many other topics to discuss, and the questions that this book raises are very rich and varied. The value of the book lies precisely in that. This is an exceptional study, despite some weakness of local knowledge – including bibliographic knowledge – that those of us who read it from our own specialization might find. Its methodological proposal is groundbreaking and has argumentative strength; the intellectual effort of erudition and use of primary and secondary sources is admirable. The first – the methodological proposal – may be limited and insufficient in some cases. Most probably, to each choice of discursive levels and protagonists that is made, other protagonists and other intellectual and global spaces that had as much importance as those chosen by the author for each case can be opposed or added to. Perhaps some would see this outcome as a weakness. But it is also a great virtue: *To the Uttermost Parts of the Earth* encourages us to ask ourselves about other explanatory levels, complementary or discordant, in future works. It is undoubtedly a seminal book that I predict will have and wish a great influence on the development of its discipline. ■