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Response – *»Imagination begins at home«*

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Response – »Imagination begins at home«

I am enormously thankful to Thomas Duve and the contributors for having taken on the burden of reading at least part of this mammoth work and providing incisive comments and criticisms even before its formal publication. Understandably, many commentators focus on the apparently paradoxical move that *To the Uttermost Parts of the Earth* makes, at a time of global history and legal transnationalism, towards the European, even the domestic. Instead of showing the reader how ideas crisscross the world and translate from context to context, here they appear reduced to parochial expressions of the ambitions and anxieties of European elites. But the paradox may be only apparent; as Duve notes in his introduction, the choice to begin from »home« arose from giving up the effort to grasp the world as a whole – a dubious ambition characterizing much of past European historiography. Why is there not more on China (Li Chen) or on Islamic or the North African communities (Marglin)? Quite apart from the need to draw limits in an already massive work, the author confesses to his ignorance about the indigenous vocabularies operating in non-European locations during the period covered here. The fact that this is not a social history, as Marglin rightly notes, but an exploration of the languages of *law* directed attention to European elites for which it was often a predominant idiom. It would be worrying if this choice were, as Kessler suggests, to »silence« the »voices« of »many ordinary individuals«. But I suppose it would be an even greater wrong if it stuck in their mouths words they would never have uttered. No assumption is made here about »law« being a universal language.

For non-European actors, too, imagination starts at home. Or as Li Chen puts it, they had »their own discourses and imagination about domestic and international power«. This did not make it impossible for those at the sharp end of European legal power to turn that power against the Europeans, as Nogueira da Silva rightly points out. Although this is mostly a 19th-century phe-

nomenon, more might have been said about it. The question of agency, raised by Leonhard, is important. But if »law« is spoken, who then is the agent? I agree with Herren that there might have been more on colonial and consular law – but rather than meeting the point about Eurocentrism, might that not in fact strengthen it? Are there not traces of Whig history in the new global and transnational approaches? Might they be understood as an effort to relaunch a familiar universalism without its more obviously problematic features? It often seems to me that the more inclusive the effort, the greater the risk of ending up simply supplementing an exotic flourish to a conventional frame. Perspective is unavoidable; there is nowhere else to begin than »home«, a place we carry »to the uttermost parts of the earth«.

Schaub and Herzog enquire about the priority given to Northern and Western Europe at the expense of Southern Europe, Italian city-states or the Gregorian reformation. These locations provide starting-points to the massive works by Pocock and Skinner on the one hand, Berman on the other. Their writings involve powerful, though sometimes only implicit assumptions about the nature and role of law in history. While their discussions of Machiavellian republicanism and the papal revolution have inspired parts of the text, I did not wish to engage in a polemic with them but have chosen to tell a story different from theirs. I am a little surprised that the comments do not invoke what to me was perhaps the most important underlying motivation for the choices I made – namely to explore the legal formation what is commonly called »capitalism«. Histories of international law have not connected their narratives about diplomacy, war and European expansion to the simultaneous emergence of a specific form of political economy whose legal idioms today control the production and distribution material values across the world.¹ My interest was to examine how the specific configurations of »sovereignty« and »property« did precisely that.

1 This may now be changing. See especially NINA TSOUVALA, *Capitalism as Civilisation. A History of International Law*, Cambridge 2020,

and ROSE PARFITT, *The Process of International Legal Reproduction. Inequality, Historiography, Resistance*, Cambridge 2019.

I have been struck by the neglect in earlier histories of international law of the way European expansion was also the spread of commercial practices and attitudes about the economy that have played and continue to play a hugely important role in organization of global power. I am glad that the commentators noticed and two of them even cited the punchline my students have heard over again across the years: »sovereignty and property are the yin and yang of European power«. Legal training is still negatively impacted by the separation of public and private law; bringing them together could, it seems to me, usefully employ Leonhard's point about different temporalities, overlaps and dependencies. Economics and politics have had their particular rhythms, with law responsible for much of their diachronic arrangements. My work is only a pointillist effort to draw attention to a limited number of moments or locations in which the two vocabularies have been entangled; sometimes one leads, sometimes the other, with the dependent party following more or less meekly behind. This dialectic lies at the heart of what Schuppert calls the »justification game« operating with respect to European forms of power. Schaub makes the useful point of reminding us that law's power often operates as a form of conflict-resolution. But it also provides conflicts a legal form and supports engaging in conflict in the first place – an aspect not always visible in systemic studies situating themselves elsewhere than the »home« that is always in need of defense. More work is needed to produce a more systemic account of the way private and public power are co-created and collaborate so as to produce the global world that we recognize as ours. I hope D'Aspremont is right to suggest that *To the Uttermost Parts of the Earth* might assist in opening a space for such work.

In preparing this work, I found histories of economic thought quite disappointing. Many of them either began only with Adam Smith or treated the earlier periods as an extended anticipation of his descent to the world. Moreover, they usually did not show much interest in or understanding of the role of law in the construction of the »economy« as a special type of imagining

human relations. Conspicuously, they did not dwell at any length on slave trade – arguably the most significant practice of long-distance commerce in the early modern period – probably because that might have undermined the progress narrative that always undergirded them. Van Hulle notes that I omitted to mention the debates on abolition. This, I admit, was part of my contrarian reaction to the practice of always citing abolition in legal histories and rarely the fact that the slave trade and slavery itself were legal systems of great sophistication. I wanted to eliminate the ideological supposition that the introduction of legal or economic thinking in something was in itself a good thing as well as to show how the two languages operated, as they still do, inside each other so that one cannot be really understood in its complexities without a good grasp of the other. »Economics« is young as a specialist vocabulary and understandably anxious to show its independence from its parents, law, philosophy and theology. There is reason to hope that once that infantile disorder will pass, it will be possible to engage in more extensive research on the co-constitution of these vocabularies and their attendant practices.

As the comments show, this is not a »full« history of legal imagining in Europe, even less across other continents and periods. Halpérin rightly notes the relative absence of private international law themes and Kessler's remark about the sparse attention to legal imagining by merchants is to the point. I also agree with Nogueira da Silva that the self-representations and role constraints of these men might have been described at greater length. But I did not engage in this work simply to write a history, even less a total history. I am interested in these stories because of what they tell us about what David Kennedy calls »rule by articulation«, the way in which the structures of today's power have been constituted by their articulation in legal forms.² In the period treated here, Europe rose to world dominance. This was in part a result of its military superiority but to a great extent also of its economic power – all of such power articulated as legal claims about sovereignty and property. Some years ago, Antony Anghie demonstrated how the ostensibly generous projection of natural

2 DAVID KENNEDY, *A World of Struggle. How Power, Law and Expertise Shape Global Political Economy*, Princeton 2016, 135–138.

law to govern the indigenous population in the Americas by the Spanish 16th century theologians meant subordinating them to a specialist vocabulary whose authoritative speakers were those very same Spaniards.³ To be able to say, with authority, what notions that govern human relationships mean in some contexts, is an enormously important aspect of exercising power over those relationships. I was interested how that authority was constituted in the half-millennium that governed the consolidation and global expansion of European statehood. How did sovereignty and property attain the content they did and came to organize the way people imagined their relationships? How was it that these European discourses, as Van Hulle puts it, »suppressed and obliterated all else«? While chapter 2 presented theology as the master vocabulary of power, chapters 3 and 4 saw it being set aside by more influential articulations from Roman civil law and natural law. The three geographical sections then proceeded to give a more detailed account of the way the relationships addressed by the languages of sovereignty and property configured themselves in, respectively, France, Britain and Germany.

A final point was also to say something about this imagining as a »prehistory« of international law, a theme addressed in the briefest of terms in

the second section of the epilogue. Much of the conceptual baggage from the period treated in *To the Uttermost Parts* is available for today's legal bricoleurs. But the spirit of international professionalism characterizing what began at the meetings of the *Institut de droit international* in 1873 is not the same as that which went before, though fragments of earlier imagining continue to influence academic efforts (weak as they are) to provide coherence to present law. I am struck by the way the powerful publishing houses especially in the Anglophone world keep feeding the market with literature suggesting that international law's ambitions could be met by recourse to philosophy, economics, »international relations« or moral reasoning. The resulting conflict of the faculties reminds us of the 18th century, when European intellectuals believed they were just a hair's breadth away from the truth about human society that would finally make them free. As this prehistory lands in that same market, I hope it might persuade experts in those vocabularies that they, too, examine the world from a »home« that has a history within which choices were made that now determine the limits of what it is possible to imagine within them.



3 ANTONY ANGHIE, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2004, 13–31.