
‘Stuck in Salamanca’: A Response

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What a privilege it is to be invited to debate one’s work with colleagues! One is struck by so many things – the generosity of one’s interlocutors, the differences in how we read texts, how we choose between more and less important points in familiar narratives and imagine their principal lessons. Even a work of over a thousand pages can say only something about its subject and remain silent otherwise, thus raising justifiable questions as to ‘why this’, ‘why not that’? As many commentators here and elsewhere have noticed, the thesis that ‘imagination begins at home’ does a lot of work in this book.¹ It is no accident that, as Luigi Nuzzo observes, the Salamanca jurists and theologians of chapter 2 appear never to leave the Iberian Peninsula. Instead, I have wanted to portray them weaving a universal order from legal and religious materials found at home so as to impress and perhaps guide the hand of the king and the inquisitor. Perhaps they are not that different from modern-day experts in global law projecting the texts we have collected from our academic and professional contexts across space and time so as to influence decision-makers and grant institutions.

I want to suggest that we are all ‘stuck in Salamanca’ (as Nuzzo once privately put it to me), constructing the places that we imagine as ‘the past’ or ‘the present’ from the relative comfort of our libraries and the airport lounge. This applies also to the present author, an international lawyer from northern Europe, having practised with and written about international rules many of which have had the bold ambition of addressing humanity as a whole. Silvestrini wonders about the lack of express attention to migration of ideas. But like many occasional travellers, I have felt keenly that never mind where one happens to be at any one moment, one remains ‘stuck’ in the person that one has become, imbibing foreign influences through whatever experiences one has encountered when growing up into the professional life as lawyer. How then, with what authority, can one speak about ‘the world’? This is the predicament of the men in this book. It is also the predicament of many international lawyers today. That this position, and what follows from it for historical writing has recently been articulated with great force liberates me from entering that debate.² I have only wished to follow

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¹ I have discussed the themes of imagination and eurocentrism also in my comments to the symposia on *To the Uttermost Parts of the Earth* to be published in *Rechtsgeschichte/Legal History* and in *Völkerrechtsblog*.

² See A. Orford, *International Law and the Politics of History* (2021).

the rather banal insight that however complex and colourful the world we see, we see it as such because our armchair has been positioned just so.

As most commentators readily noticed, the book's central theme is the legal articulation of European power, especially as it is projected abroad. Because imagination begins at home, that projection invariably took its starting point from the legal vocabularies and idioms that the lawyers were familiar with, in which they had trained and practised in their domestic worlds, idioms that were authoritative with them and with those they aimed to influence. Almost invariably they juxtaposed ideas about public and private power, given legal articulation as sovereignty and property. This gave rise to one of the punchlines of my work that students have become familiar with over the years, namely that *sovereignty and property are the yin and yang of European power*. Wherever sovereignty appears, property relations are never far behind – and wherever the claim of property is heard, sovereign power always awaits around the corner. If the inextricability of sovereignty and property provides the book's unifying theme, its individual chapters demonstrate the many constellations that this relationship can take in different contexts.

The first four chapters are introductory to the development of that theme. First, the experiences of 'feudalism' are remembered and then the religious justification for ruling humans, as well as its obverse, *raison d'état*, are laid down. The first part ends by recording the powerful suggestion by Grotius that it is a quality of human nature to be able to act in accordance with principles, even when they go against one's own immediate interests. In her comment on chapter 1, Julia Costa Lopez suggests, I think rightly, that the description of the late medieval context could have given more attention to what lies between the individual property owner and the kingdom, namely the many corporations – towns, parishes, castles, provinces – that form the context of feudal life. But the subsequent chapters do suggest that these can be understood as part of a centuries-long search for a middle space between individual property rights and the demands of public order. At the end of the epilogue, I describe the effort by a group of German 19th-century lawyers to use the novel vocabulary of 'society' so as to unite autonomous individuals into something that would be distinct from the formal structures of the modern state. That effort failed, but it foreshadowed the recurrent recourse to the idea of an 'international society' as an important part of modern international law's ideological project.

Nuzzo rightly notes the central place given to individual consciences in chapter 2 on Spanish scholasticism that followed the legalistic turn taken by the counter-reformation church with respect to the management of the sacrament of penance. This would enable leading Catholic intellectuals to accommodate the inherited moral theology with persistent inter-Christian violence, an expanding commercial ethic as well as the encounter with peoples of which tradition had so far been ignorant. Although the theologians' recourse to 'grace, love and friendship' did mediate the nominalist consequences of their legal theory, such notions remained in a subsidiary position that they have occupied in European law ever since. In her perceptive comments on chapter 3 on the Protestant Alberico Gentili, Francesca Iurlaro draws attention to the open-endedness of the law of nations and the role that *ragion di stato* took to

assist jurists keen to undermine the influence of theologians in matters more properly calling for legal counsel. That, too, was an effort to reconcile and balance – this time with a strong bias in favour of royal power. With Grotius, however, as described in chapter 4, law would receive the position of the stabilizer between the pursuits of merchants and property-holders on the one side and the institutions of an absolutist state on the other, committed to protect everyone's rights by a rigorous system of contract enforcement. Straumann is right to add the rejoinder that despite its foundation on private rights, the Grotian system of natural law was nevertheless tempered by a flexible notion of necessity embodying the need to protect those collective values that make it possible for commerce to flourish and disputes between individual right-holders to be settled efficiently and without threat to the general order. Nevertheless, commutative justice continued to override distributive justice, here and hereafter.

Chapters 5 to 7 discuss the reconciliation of rights and privileges of Frenchmen with 'absolutist' kingship in early modern France up to the revolutionary wars. As Daniel Lee notes, it is not always realized that according to Bodin, a 'royal' (non-despotic) kingship – Bodin's preference – is defined by the way it is not entitled to intervene in the property rights of subjects. Like most other French jurists, Bodin was also critical of the gradual collapse of French sovereignty into a proprietary notion of public office. Up until the revolution, France existed as an oligarchic contract-regime among a limited number of ruling families. But even after the feudal nature of the French polity was terminated, Thermidor would inaugurate what Piketty and others have described as a republic of property owners. As Silvestrini observes, the themes of governance and property are especially important for the debates about commerce. They also underlie the very influential revolutionary theory of Sieyès and his followers as well as, on the opposite side, Robespierre. Is political modernity above all about the protection of private rights and liberties, or the right of participation of everyone in the ruling of the commonwealth? What is the relationship between commercial freedoms and the call for political equality? One way in which the clash of these two pursuits was mediated in Europe was to externalise its detrimental effects elsewhere – colonialism, the focus in the 'French' part of chapter 7. While attention is on France's Atlantic exploits, Gillian Weiss suggests that I could profitably also have examined French activities in the Mediterranean and North Africa, preferably all the way to 1830 and beyond. Including the colonization of Algeria would undoubtedly have influenced the details of the narrative, but perhaps not the main point, the overwhelming predominance of governmental institutions in the organization of French expansion and the very limited and, to be frank, confused use of (mostly French) law that failed to sustain the kind of amalgam of private investment and royal policy that accounted for the much greater efficiency of British expansion.

The sovereignty-property constellation that would title itself 'Britain' in the course of the centuries treated here was no less intensive, though in many ways it was more successful. An economic notion of statecraft united the otherwise contrasting interests and legal idioms represented by common law and civil law. As Sarah Mortimer notes, the protagonists' religious views receive relatively little attention; it is true that concerns about heterodoxy mixed in complex ways with political ambitions and

influenced the formation of empire. But these could often be veiled by the rich argumentative resources provided by prerogative and the common law. Poole notes the ambivalence with which the text treats the role of law and lawyers in British expansion. It may be a cliché to treat modernity as a juggernaut, but it is hard to see the succession of short-term imperial successes with long-term disasters as anything but. Nowhere was legal thinking as utterly instrumentalized, whatever the intentions, to consolidate the fruit of victories at home and abroad. If the perspective of the colonized is absent, as noted by Satia, that is because it was enclosed within the myopic pragmatism with which settlement of foreign spaces was treated by the men and discourses that are the subject of this book.³ Do I then accept the ‘Victorian myth’ that British colonization took place only with reluctance, in response to circumstances, downplaying the physical violence that accompanied it? No, I don’t. But violence is costly – not a minor concern for the capitalists – and my objective was to suggest that there is an even more insidious form of oppression than physical violence, namely breaking the target so utterly that nothing else is left than to assent, and to pretend one does this out of one’s free will. If the legal idiom – the very vocabularies of sovereignty and property – are the culprit, then no meaningful post-colonial corrective is provided by recording that non-Europeans, too, learned to speak it.⁴

The last two chapters as well as the second part of the epilogue turn to German academic lawyers and philosophers. Nowhere does legal imagining form more complex patterns and operate more self-consciously than at the German university. As I have elsewhere suggested, the bits and pieces of abstract reasoning from which contemporary legal *bricoleurs* form their idioms of international law owe a huge debt to the natural lawyers who tried to square the circle of fitting the imperial law of the Holy Roman Empire of the German Nation to the *Landeshoheit* of individual princes and the 19th-century jurists and philosophers following in their footsteps.⁵ The state machine metaphor, too, has had a long shelf life, and even though there is some respectable German writing on that theme, I suggest, with Nokkala, that it merits further analysis both as a piece of historical imagining and as an analytical category. I am thankful to Nehal Bhuta not only for organizing this symposium but for his perceptive conclusion that ‘civilization, rather than natural law-derived *Staatsklugheit*, becomes the true foundation of international law’. This is, indeed, what the epilogue suggests. But I hope the teleological drive does not overshadow the point that alternative foundations were available and that it was quite an accidental outcome of central European political struggles that 20th-century international law received the (always contested) ideological orientation it had.

³ Brenna Bhandar explains that British settlers ‘required legal narratives that equated English common law concepts of property with civilized life and were coupled with a belief in the inherent superiority of people whose cultural and economic practices bore resemblance to the agrarian capitalism in England’. B. Bhandar, *Colonial Lives of Property. Law, Land and Racial Regimes of Ownership* (2018), at 7.

⁴ As Antony Anghie has shown, the offer of natural law to the American indigenous by the Spanish scholastic theologians was a poisoned chalice, confirming the authority of Spanish elites over the ways of life of alien populations. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

⁵ Koskenniemi, ‘Between Coordination and Constitution: International Law as German Discipline’, 14 *Redescriptions: Yearbook of Political Thought and Conceptual History* (2011) 47.

Some of the comments raise the question of causal relations, and express a surprise, perhaps disappointment, about absence of their treatment here. Satia expressly suggests that law was mostly reactive and, in this sense, of secondary importance for the process of British expansion. I disagree. How to assess the force of legal imagining in the 'real world'? Instead of addressing this basic topic of international jurisprudence in the classical mode, I have employed the perspective that David Kennedy calls the power of articulation for which the competence to say, with authority, what 'sovereignty' or 'property' mean, and who has them, is the heart of law's social power, extending way beyond its internal doctrinal or institutional frames.⁶ If we think sovereignty and property matter, then we have put our finger on the extraordinary force of legal imagining. The book does shun a *certain kind* of didacticism, as Nehal Bhuta observes. But I hope the introduction, epilogue and occasional passages along the way offer sufficient impulse for those drawn to inquire about methodological choices to imagine what *other kind* of abstract conceptualizations might be at play within this book.

⁶ D. Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (2016), at 135–138. 'Articulation' as an analytical device to examine hegemonic structures embedded in 'common sense' is usually associated with the work of the radical cultural theorist Stuart Hall.

