
Time for Federalist Speculation

Chapter 9: Giving Law to the World – England, 1635–1830

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1 Introduction

Sometimes I envy historians. Not that theirs is a simple task, giving shape to the detritus of past epochs, knitting meaning into the mess of everything. But those searching after lost legal time face an even sterner test. The jurist who deploys genealogy needs to fold an ‘external’ analysis of the evolution of the conditions that frame their field into a normative account that explains its conceptual formation, preferably in a way that yields something novel or at least not wholly predictable about it.

They say that productions of *The Ring* are best assessed not in terms of whether they fail, since that is a given, but on how they fail. Perhaps the same is true of history-inflected legal scholarship. Those who know the genre will be familiar with the undertow of disquiet, anatomized by Benjamin, about the extent to which historical inquiry involves celebration of, or at least complicity with, the most successful destructive and oppressive forces of the past.¹ Subduing that thought exposes more specific concerns, the first of which is to avoid the past being deafened by the echo of the future. This can be especially tricky for lawyers who, as Maitland observed, often turn to history for help with present concerns.² More than most, we must suppress the instinct to raid the past for argumentative plunder rather than to read it for its own sake.³ If that is the sort of jibe the professional throws an amateur, a second objection goes the other way. Immersion in the past risks getting lost within it. Failing to find a thread out of the labyrinth, the inquirer becomes unable to make the concerns of an earlier age speak to our own, the path of geeky insularity legal historians too often stumble down.

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¹ Benjamin, ‘Theses on the Philosophy of History’, in W. Benjamin, *Illuminations*, ed. Hannah Arendt, trans. H. Zohn (Houghton Mifflin Harcourt 1968) 253.

² Maitland, ‘Why the History of English Law Is Not Written’, in H.A.L. Fisher (ed.), *Collected Papers of Frederic William Maitland*, vol. 1 (1911) 480.

³ Oakeshott would call this exercise a construction of the ‘mythic past’: see Oakeshott, ‘Present, Future and Past’, in M. Oakeshott, *On History and Other Essays* (1999) 1.

A third difficulty, more germane here, is how to prevent the external or ‘in context’ part of a study from swamping the legal story. It is in the nature of big-picture narratives to dominate. Watching the grinding tectonic plates of social and political time and the flows of philosophical speculation that attend them can be mesmerizing, making it hard for law to emerge as anything other than pure epiphenomenon. But the more the jurisprudential collapses into the general, the less justification for legal scholars as opposed to historians to undertake this sort of work, and the less likely that the work will have value as distinctively juridical inquiry. Perhaps the key is not so much to rescue the legal from, but to identify its special qualities within, the political.

2 Buried Giant

If historical jurisprudence has a ‘shrinking law’ problem, it is surely at its most attenuated where the historical timeline is most extended. Where, then, does that leave Koskenniemi’s new book? A history of close to a thousand years of the law of nations, it is by any measure a staggering achievement. Reading the chapter under consideration was a bit like gazing at a stained-glass window: entranced by what lies before you, while also faintly awestruck in the face of the vastness of the structure of which it forms a part. Even considered singularly, the chapter under consideration is monumental. The narrative begins in pre-Civil War England, a middling power wrestling geopolitically with the Dutch and intellectually with Grotian free seas arguments, moves us through the post-1688 political and fiscal settlements and on to the rise during the ‘long 18th century’ of Britain as a great trading nation, capable of projecting power globally. Though the two cannot be cleanly separated, this chapter concentrates on political economy, while the Empire has the following one to itself.

If the chapter’s bravura sweep impresses, so too does the fastidiously curated detail. Its spine comprises a classic quartet of thinkers (Locke, Hume, Smith, Bentham), read for their insights but also as representative of widely held positions. But there is an intricate, almost mycelial, supporting network, containing names I had never heard of. (In the opening pages alone, I met Gerard Malynes, author of *Consuetudo, Vel Lex mercatoria* [1629], and William Welwood, the Scottish lawyer whose *The Abridgement of All Sea-Lawes* [1613] responded to Grotius at the behest of James I/VI.) Koskenniemi’s established readership will know this already, but if all this sounds heavy going, it is anything but. The writing sparkles, the argument, fresh and buoyant throughout, laced with wisdom and humour, some of it with a nice pungent edge (for instance, when describing Bentham as ‘a third-rate literary performer’ – ouch!).⁴

Even so dextrously handled, it can be hard to thread a clear line of argument through such dense material. And my main criticism of the chapter does in fact concern its general thesis. A sense of disappointment pervades the chapter, which can be read as a story, amidst material success, of juridical and moral failure, or at least of opportunities not taken. But the precise cause of that disappointment is harder to

⁴ M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), at 682.

identify. Is it that *no* law, or no law worth mentioning, emerged during the period; or that the *wrong* sort of law emerged, in that it was commercial, individualistic, ‘interested’, unsystematic, as much ‘private’ in nature as truly or distinctively ‘public’?

Both claims are suggested, sometimes at once. Consider these two statements, taken from the same page. The first reads: ‘[t]he most powerful type of English jurisprudence . . . was to think of a law as a kind of political economy and to inaugurate international law as a law of a universal commercial society’. And the second: ‘[i]n such an atmosphere, there was little interest among British lawyers or diplomats in anything like a “law of nations”’.⁵ The two claims are not necessarily contradictory. It is possible to read ‘the law of nations’ in the second statement as something distinct from ‘international law’ in the first. The context that follows might indicate that the term ‘the law of nations’ is reserved for more serious attempts to construct a proper system of public rules, or ‘broad-based legal principles’, to ‘govern the international world’, where there are sovereigns but no aspirant hegemons.⁶ Even so, without further elaboration, on a natural reading the first supports the ‘wrong law’, the second the ‘no law’, thesis.

It is odd, or perhaps deliberately ironic, that a chapter called ‘Giving Law to the World’ should leave us unsure of what ‘law’ if any has been ‘given’. It is not even clear whether the nation in question has managed to give law to *itself*, at least not in a cogent or considered manner. ‘In their discussion of the law of nations, British jurists struggled with an alien literary and legal tradition they tried, mostly without much success, to translate into the vernacular’.⁷ Am I wrong to detect a note of condescension here, a sense of British jurists as too hidebound to devise a system of international public law, though the author himself, even with the benefit of hindsight, struggles to articulate what that might have been? Criticism for routing public law through private law channels is particularly unfair. British judges and jurists did in fact talk about ‘public law’ when discussing the law of nations – we see an example of this later. More importantly, they used the same technique to fashion the modern British constitution, often by repurposing old common law – that is, for us, essentially private law – forms of action. The most famous case in the British public law canon, *Entick v. Carrington* (1765), a trespass or property law action used to protect the liberty of the subject against reason of state arguments, exemplifies the approach.⁸ It was precisely this evolution of a public law system out of private law forms that Dicey would later extol, under the rubric the rule of law, as a defining feature of British constitutional law.⁹

Nor do the philosophers entirely escape criticism. Though accorded due respect as shapers of opinion even on the plane of political jurisprudence, their contributions become rounded out over the course of the chapter, almost to the extent that they end up singing from the same hymn sheet. All philosophical paths in this respect lead to

⁵ *Ibid.*, at 687.

⁶ *Ibid.*, at 688.

⁷ *Ibid.*, at 695.

⁸ *Howell’s State Trials* (1765) 1029.

⁹ A.V. Dicey, *The Law of the Constitution*, ed. J.W.F. Allison (2013), ch. 5.

Bentham. Despite his progressive advocacy of international legal codes, Koskenniemi reads him as the culmination of the tendency to sacrifice the jurisprudential at the altar of political economy and its ‘all-encompassing morality of calculation’: ‘the man [Bentham] who coined the neologism “international law” also gave prominence to a form of legal-political thought where nothing of the kind could have an independent existence as against structures of economic thought’.¹⁰

That last sentence is perhaps the clearest statement of the chapter’s general thesis, if it has one, or of that thesis in its stronger form. Law swallowed up by the instrumental; statecraft conceived as purely prudential calculation; and the possibility of international public law, a law of nations worthy of the name, swept up in the pursuit of sovereign interest. This critique lacks bite, not least because it is unclear what the counterfactual might be. It seems unreasonable to chastise our 18th-century ancestors for not producing something better than we ourselves have managed. Perhaps I am insufficiently enlightened, but the most I think we can reasonably expect is for law to correspond to the angels of our ever-so-slightly-better nature. This seems especially pertinent to international law, a jurisprudence poised awkwardly between anarchy and utopia. To operate under a very different criterion when approaching its history feels misplaced, a bit like contemplating a history of public law without the state.

3 Artist of a Floating World

There are implications for the jurisprudential story the chapter tells. A wealth of legal material is assembled. But it seems to emerge as floating scraps. This is not only a function of the material being presented as sporadic and peripheral to the main game of prudential action. It is also and more deeply that the fragments appear inchoate, lacking even the prospect of becoming composite elements of a more developed jurisprudential structure. This is so even though the chapter affords space to two defining juridical features of the age: the prevalence of legal externalities – i.e. laws with effects outside national territory (e.g. the Navigation Acts regulating overseas trade) – and what we might call legal internalities – i.e. non-national laws with effects within the national legal order (e.g. Lord Mansfield and the common law’s subsumption of the *lex mercatoria*, handled more convincingly than the Blackstonian principle that the law of nations was the law of the land).

I think the juridical pack can be reshuffled to reveal a more compelling legal story. True, you don’t end up with all that much of a system; but that doesn’t mean there is nothing systematic. ‘British lawyers had no time for federalist speculation’, Koskenniemi writes,¹¹ though they unquestionably enabled a lot of federalist activity. But he misses a trick at a related point earlier on. In discussing Locke, rightly seen as the originator of this tradition of law and morals, Koskenniemi castigates Armitage

¹⁰ Koskenniemi, *supra* note 4, at 682.

¹¹ *Ibid.*, at 694.

for suggesting that Locke's identification of a foreign relations or 'federative' power was one of his 'least successful' innovations with 'no immediate afterlife'.¹² He argues to the contrary that Locke's 'was a realistic and accurate description of much of foreign affairs decision-making at the time and thereafter'.¹³ That may be so. But unfortunately the criticism is marred by the adoption of a common misreading of Locke on the federative (and one that Armitage shares).¹⁴ 'For Locke', Koskenniemi claims, 'foreign policy was a matter of governmental prudence' whose 'normative basis' lies 'in the king's prerogative' and whose discretionary exercise by the Prince (executive) is suited to the 'struggle for wealth and power among nations' figured as a 'zero sum game'.¹⁵ He also suggests that its central expression is the exercise by sovereigns of the natural right to punish, paradigmatically through war, those who violate natural rights.¹⁶

Notice that this reading of the federative as the external analogue of prerogative, operating as a zone of pure prudential calculation, is juridically inert. It denies the existence even of the conditions under which a law of nations worth the name could arise and so the possibility of a meaningful escape from conditions of natural enmity. It would be strange if Locke subscribed to this view, given the prominence in his thought of a thickly textured natural law capable of supporting binding obligations outside established political communities,¹⁷ and the significance he attached to the generative and civilizing properties of law. It is pretty clear to me that he did not.¹⁸ A clue lies in the name: the federative, that is the capacity of the state the central property of which is to form agreements or treaties – in Latin *foedera* (sing. *foedus*) – with other polities. While it is true that the prudential is foregrounded in the definition in chapter XII of the *Second Treatise*, what the text actually says is that the federative 'is much less capable' of being legally patterned than domestic affairs,¹⁹ a formulation that leaves room for the juridical. And far from eliding federative with prerogative, Locke is in fact careful to separate them. An often-overlooked passage in chapter XIII clarifies that the relevant pairing is ordinary (legal) executive power and the federative on one side, and prerogative on the other. Prerogative is an exceptional extra-legal and sovereign power, whereas the other two are 'Ministerial and subordinate to the Legislative'²⁰ and, as such, subject to similar constitutional constraints.

¹² Armitage, 'John Locke's International Thought', in D. Armitage, *Foundations of Modern International Thought* (2013) 75, at 84.

¹³ Koskenniemi, *supra* note 4, at 636 n.80.

¹⁴ See, e.g., Pasquino, 'Locke on King's Prerogative', 26 *Political Theory* (1998) 198.

¹⁵ Koskenniemi, *supra* note 4, at 636.

¹⁶ *Ibid.*, at 637–638.

¹⁷ Locke's international state of nature can be patterned through the application of the natural capacity to effect binding promises. There are, he writes, aside from the special agreement that creates the commonwealth, 'other promises and compacts, men may make one with another, and yet still be in the state of nature . . . For truth and keeping of faith belongs to men as men, and not as members of society'. Locke, 'Second Treatise', in J. Locke, *Two Treatises of Government*, ed. P. Laslett (1988) 265, at s.14.

¹⁸ For extended argument see Poole, 'The Script of Alliance: Locke on the Federative', 42 *History of Political Thought* (forthcoming 2021).

¹⁹ Locke, *supra* note 17, at s.147.

²⁰ *Ibid.*, at s.153;

This reading of the federative as marked by an interplay of the legal and the prudential, rather than the prudential alone, is not just the more charitable interpretation of Locke. It can also orientate us through legal material that might otherwise seem diffuse. It offers a kind of conceptual hub through which the inward and outward movements characteristic of the operation of the law of nations can be seen to flow. The federative, properly conceived, becomes the feature of the domestic constitution through which the state's external agency is exercised and through which the state's duties in respect of its external law-making activities are actualized. It also indicates something about how the interaction between states in the exercise of their external capacities can have system-building effects. Allying law to statecraft, the federative provides a jurisgenerative property capable of bridging the distance between the legal sanctity of one commonwealth and that of another, drawing on the legal and moral resources of states to create the conditions of peace that ought to subsist between nations.

One consequence of this perspective is how it can complicate the relationship between interest and law. Though dealt with elsewhere in the book, the slave trade appears only parenthetically in chapter 9. Yet it was the hottest political topic in Britain in the last half-century of the period it covers. Outlawed domestically in 1807 when it was still the biggest slave-trading nation, Britain's subsequent efforts to suppress the slave trade became 'the issue with global implications' during the 19th century.²¹ The Congress of Vienna 1815 agreed on a ban in principle, but failure to reach consensus on modalities either there or at the Congress of Verona 1822 meant waiting until the Berlin Conference of 1885 for multilateral agreement. But that did not exhaust Britain's efforts. Towards the end of the Napoleonic Wars, the Navy began to seize foreign ships suspected of trading in slaves. Though it initially met with judicial approval,²² that plan was scuppered in *The Le Louis*, the High Court of Admiralty finding itself unable to identify a right in 'public law' – that is, the general principles of the law of nations – to visit ships of non-belligerent foreign states.²³ The British turned instead to securing bilateral agreements with slave-trading nations. Brazil, Portugal and Sweden were in fairly short order bullied into compliance, with treaties establishing 'mixed commissions' (international courts) to adjudicate claims arising from the capture of suspected slave-trading vessels. Ultimately, rivals France and the United States

When the Legislative hath put the Execution of the Laws, they make, into other hands, they have a power still to resume it out of those hands, when they find cause, and to punish for any mal-administration against the Laws. The same holds also in regard of the Federative Power, that and the Executive being both Ministerial and subordinate to the Legislative, which as has been shew'd in a Constituted Commonwealth, is the Supream.

²¹ Allain, 'The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade', 78 *British Yearbook of International Law* (2007) 342, at 342.

²² See, e.g., *The Fortuna*, 1 *Dodson's Admiralty Reports* (1811) 81, at 84 (per Lord Stowell): 'any trade contrary to the general law of nations, although not tending to or accompanied with any infraction of the belligerent rights of that country, whose tribunals are called upon to consider it, may subject the vessel employed in that [the slave] trade to confiscation.' See also *The Amedie*, 1 *Acton's Admiralty Reports* (1810) 240.

²³ *The Le Louis*, 2 *Dodson's Admiralty Reports* (1817) 210, at 244–245.

came on board, despite suspicion of British motives, on condition that Britain agreed a watered-down right to visit merchant ships.

It is hard to interpret this episode as a straightforward exercise in furthering commercial interest,²⁴ which is not to say it was an exercise in pure-spirited humanitarianism either. Likely there was a mix of considerations, economic, strategic, political and philanthropic. But it does indicate that international public law was, or at least could be, taken seriously as an integrated if dispersed juridical system. Evidently, British courts saw it as imposing legal duties, and the government took the determination of those duties seriously enough to alter its policy choices. But even more, the episode tells us something about how the law could be extended through the mutual exercise by states of their federative capacities, spinning a web of alliances and in so doing reinforcing the systematic character of that juridical field. I don't mind hearing about international law's systematic failings; but it would be nice to read a little more about its systemic success.

²⁴ J.S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2012), at 13:

[T]he best historical evidence suggests that slavery did not die an accidental death of abandonment in the face of competition from industrial capitalism. Slavery was eradicated, intentionally, by people who came to believe it was morally wrong. It was eradicated in part by military force, but also by coordinated legal action – including, surprisingly, international courts.

