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INTERNATIONAL LEGAL THEORY

Less is More: Legal Imagination in Context Introduction

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Why all this interest in the history of international law today? A partial explanation can surely be found from the end of the 20-year period of liberal-internationalist ascendancy (1989–2008) and the perplexity that has followed its demise. Mark Zuckerberg put it succinctly in a manifesto on *Building Global Community* in Facebook in February 2017. When his company started, he noted, it was to 'bring … us closer together and build … a global community'. '[T]his idea', he suggested, 'was not controversial'. But suddenly there has emerged a 'movement for withdrawing from global connection'. Nor have international law scholars rested silent. Eric Posner has termed the present moment – with glee – as the 'backlash' against 'liberal cosmopolitanism'. More soberly, perhaps, Philip Alston has noted the rise of 'challenges [to] the human rights movement' that are 'fundamentally different from much of what has gone before' while James Crawford has warned against 'large-scale retreat into nativism and unilateralism'.[1] What used to be a clear and broadly shared objective – building of a global community – is no longer so clearly visible. So, the temptation might be to look backwards instead and ask, 'how did we get here?'.

In order for this 'turn to history' to be not just an escape from a depressing present, it should be oriented, towards illuminating the roles law and lawyers have played in the effort to build Zuckerberg's, and international lawyers' 'global community'. This would require focusing on the ways legal rules, institutions and practices have been used in the past to support, channel or oppose *power* – how law, in other words, has contributed and is likely to contribute to the way the world has become. To remark that this is what legal history does is true but unenlightening to the extent that it can be done in many different ways. For example, histories that focus on the *internal* developments in fields such as 'private law' or 'environmental law' or 'international law' have their interest but tend to be overly concerned about doctrinal coherence and innovation at the cost of tracing the roles that the respective rules play in the surrounding world. To understand law's role as a carrier of social power, it must somehow be situated in the world of conflict and struggle how does law align itself

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[1] E. Posner, 'Liberal Internationalism and the Populist Backlash', *U Chicago Public Law Working Paper*, No. 606 (2017); P. Alston, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1; J. Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *The Modern Law Review* 1.

with projects of social renewal or retrenchment? Here disciplinary boundaries do not have the final say. Instead, drawing and collapsing boundaries, and with them the jurisdiction and competence of particular institutions, is an important though neglected part of the way law operates in empowering or disempowering social actors. The conventional way of drawing boundaries between public and private law, for example, the rights of sovereignty and property, is one technique through which law does this. By examining how those boundaries had been drawn in the past is to de-naturalize them, and to bring to focus the way they have supported (and continue to support) some interests over others.[2] To examine those struggles, it is often necessary to abstract from any particular legal discipline, field or theory and instead focus on what could be called the *legal imagination* as it is put to work in specific contexts with the linguistic materials that law offers to its users. The aim might be organizing or opposing imperial rule, fighting adversaries, or distributing resources. Here strategic choices are involved: should one take the orthodox position, or perhaps challenge it? Go by the rule or the exception? Choose this institution or that in which to argue one's case – where might one receive the most favourable hearing?

These kinds of choices are the bread and butter of legal practice. Perhaps surprisingly, they are still not a major part of the training of most law schools – an experience that frequently astonishes recent graduates when they take up their first job at a law firm, a company or public administration. International lawyers find it especially hard to think about the law strategically – perhaps because they are taught to believe that the rules and institutions themselves are already pregnant with the ideal society – the 'global community' – so that all that is needed is to apply them. But this is not the case. Law involves choice: not only 'which rule do I apply?' and 'how to apply it?' but today increasingly, 'which rule-system do I choose as my field of competence?' 'Should I become a human rights lawyer or a trade lawyer?' 'Should I be thinking about the law of natural resources or about law and cyber security?' Such questions lead us to the threshold of legal imagination, the complex work to fit a professional language that one has come to master into a conflictual world where most things are shrouded in ambiguity. But if this is not taught at law schools, how then does one learn it? Well, one could do worse than start by examining the choices that past lawyers have made with the rules and institutions, the elements of the legal vocabulary they have found at their disposal.

The symposium on 'imperial locations' was designed to enable scholars to take a close look at very specific, small-scale contexts where law has been used to 'support, channel and oppose power'. It is part of the outcome of a larger research project on '*Histories of International Law: Empire and Religion*', funded by the Finnish Academy and carried out at the University of Helsinki in 2012–2016. I am extremely grateful for the work carried out by Luis Eslava and Liliana Obregón to see these essays to their final publication. The two earlier products that arose from that project were

[2] I have elaborated this point, e.g., in 'What Should International Legal History Become?', in S. Kadelbach, T. Kleinlein and D. Roith-Isigkleit (eds.), *System, Order and International Law. The Early History of International Legal Thought from Machiavelli to Hegel* (2017), 381.

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two collective volumes where groups of colleagues – we termed them 'working groups' – examined the ways in which imperial concerns affected international law (and vice-versa) and what could be said about the close relationship that religious perspectives and arguments have had in the past and present of international law.[3] Of course, they also dealt with the operation of 'legal imagination' but often in an abstract and doctrinal way, as themes in their own right. In the symposium on 'imperial locations', by contrast, the call was to delimit the context radically and to focus on the ways in which law was used so as to enable and challenge imperial rule at specific geographical spots that were somewhat distant from the great imperial centres and that were not very well known so that the 'moves' that legal imagination made would become visible.[4]

The expectation behind this symposium was, in other words, that 'less' might be 'more' to the extent that by having a closely delimited context of legal activity ('case studies', as some of the contributors immediately, and not incorrectly, put it) 'more' could be learned about the operation of the legal imagination than by abstract studies. This, of course, is quite a venerable genre of legal scholarship in which we were happy to join.[5] Examining the way law has operated in particular places subject to imperial rule, it might be possible to develop a sharp view on the agility of the legal imagination as it reacts to and channels the uses of power among human groups. From that project, we now publish five enquiries into specific locations – Haiti, Iraq, Northern Libya, East and Central Africa and Tianjin. The intention is to open a comparative view highlighting the malleability of the legal materials in the hands of the jurists working for colonial powers and indigenous actors and the often ambivalent (sometimes outright disconcerting) role that the law has had in colonial encounters. Empire is an exceedingly bureaucratic thing. But when European bureaucracies meet with non-European populations and cultural practices, imagination is needed to fit the legal patterns in the new circumstances. 'Pluralism' is often a useful theme to think about that encounter.[6] And yet, 'pluralism' is not only about the balanced arrangement of elements by virtue of some principle of contextual coherence but also about a larger frame that lays down the conditions within which local solutions can be forged. Even if law is a supple fabric, it is still not innocent vis-à-vis larger ideological patterns and structures. The five studies go in great detail in showing how that imagination has laboured to organize social hierarchies in particular locations, and under what intellectual and other constraints it has done so. One of the most famous quotes from Karl Marx gives the sense to

[3] See M. Koskenniemi, W. Rech and M. Fonseca (eds.), *International Law and Empire: Historical Explorations* (2016); M. Koskenniemi, M. Garcia-Salmones and P. Amorosa (eds.), *International Law and Religion: Historical and Contemporary Perspectives* (2017).

[4] My use of 'legal imagination' resembles Duncan Kennedy's 'legal consciousness' ('a vocabulary of concepts and typical arguments' or a '*langue*' plus the specific utterances produced in that vocabulary) but is larger because even as legal imagination usually operates within a certain legal consciousness, it also may sometimes transcend its boundaries. See D. Kennedy, 'Three Globalizations of Law and Legal Thought', in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (2006), 23.

[5] A parallel design is visible behind another collective work, namely the volume by F. Johns, R. Joyce and S. Pahuja (eds.), *Events: The Force of International Law* (2011).

[6] Here the works of Lauren Benton have been of great significance. See, e.g., *A Search for Sovereignty. Law and Geography in European Empire 1400-1900* (2010).

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the significance and limits of studying imperialism in its local context: 'Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living'.[7] The point, in other words, is not just to understand the past but to come to grips with that which now weighs on the present.

[7] Karl Marx, 'The Eighteenth of Brumaire of Louis Bonaparte', available at www.marxists.org/archive/marx/works/download/pdf/18th-Brumaire.pdf.

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