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From the Margins to the Centre: The Law of Nature and of Nations in England and Britain

Chapter 8: The Law and Economics of State-Building: England c.1450–c.1650

Sarah Mortimer*

1 Introduction

In 1453, the English were defeated by the French in the final battle of the Hundred Years War; with the loss of almost all its continental possessions, the English crown became a second-tier player on the European stage. Two hundred years later, with victory for the Commonwealth in the first Anglo-Dutch war, the foundations had been laid for global empire. Despite, or perhaps because of, the rapid growth of this empire from the Stuart period, there was remarkably little British interest in developing a coherent or systematic doctrine of international law. Yet, as Martti Koskenniemi shows in this chapter, from the 15th century there were writers keen to connect law and economics, and to consider ways in which the growth of English or British power abroad might be compatible with – perhaps even essential for – secure property rights at home. In this process, writers and political actors appealed to the 'law of nations', sometimes to critique and sometimes to defend English common law, and often to explore its complex relationship with the royal prerogative. Koskenniemi's analysis brings these themes to the centre of the stage, opening up new perspectives but at times also obscuring important contextual issues crucial to our understanding of the development – both intellectual and rhetorical – of international law.

2 Law and Commerce

To establish connections between common law, the law of nations and the economy, Koskenniemi turns first to Sir John Fortescue, whose *De Laudibus* (*c.*1470) called upon the king to promote – among other things – the material wellbeing of his subjects. For Fortescue, good and virtuous rule would be based upon the universal, natural laws

* Associate Professor of Early Modern History, University of Oxford, Oxford, United Kingdom. Email: sarah.mortimer@chch.ox.ac.uk.

common to all people but it would adapt those laws according to the specific circumstances of time and place. The true king would tailor his policies to the social and economic conditions of the realm; in England this meant incorporating natural law principles into English common law. Similar themes were taken up by Tudor writers, including the celebrated humanist and lawyer Sir Thomas More. In his *Utopia* (1517), More used the mysterious figure of Raphael Hythloday to present a radical programme of social change he had encountered in the faraway island of 'Utopia' and which would, he claimed, alleviate the problems of poverty and greed so obvious in England.

But, Koskenniemi reminds us, early modern writers realized that any such programme had to be placed in a wider, international context. When Hythloday explained the policies of the Utopians he noted their active commitment to colonization and international intervention; in Utopia, he argued, public and private interest was fully aligned and the values of Utopia were exported to less fortunate peoples. A generation later, the Protestant civil lawyer Sir Thomas Smith would take up some of the same themes. He insisted that to ameliorate the crises of the mid-16th century the government must nourish industry, encourage profit and actively colonize Ireland. No English monarch went as far as Hythloday or Smith wanted, but Tudor and Stuart rulers did encourage private enterprise abroad. Through chartered companies, monopolies and privateering, the interests of the crown and of nobles and merchants could be brought together.

Outlining these economic and political synergies is important to Koskenniemi, because they led to new ideas about the law of nations. On the one hand, some people regarded matters of international relations and foreign policy as part of the royal prerogative; on the other, the commercial nature of so much transnational activity encouraged Englishmen to connect the law of nations with (private) property rights and therefore with the common law. In England, therefore, the law of nations was invoked both to expand royal authority and to limit it. This created some serious tensions in the 17th century but they were, Koskenniemi argues, largely resolved by its end. The connection between public and private wellbeing that Hythloday and Smith had advocated came to be widely acknowledged, and – Koskenniemi argues – Englishmen came to see the merits of aligning their private rights with a powerful, but well-defined, royal prerogative. The impact of this alignment is then explored in the subsequent chapters of part III.

Koskenniemi's account offers a distinctive perspective on ideas of law in this period, indicating some of the ways in which common lawyers (especially Sir Edward Coke) came to insist that their courts could decide on matters of commercial practice. Meanwhile, there remained a group of civil lawyers who preferred to emphasize the centrality of royal prerogative in determining international relations. The reign of James I saw some friction arise over customs duties and questions of jurisdiction and property, but it was the decision of Charles I to impose a Ship Money levy (without Parliamentary consent) which brought that friction to a head. When the legality of the levy was challenged in court, the relationship between prerogative, property rights and law was called into question. Though the judges decided in favour of the

King, Charles's victory was short-lived and that decision was reversed by the Long Parliament. But the experience of the English Civil War – and the lessons drawn from it by Thomas Hobbes – helped to transform the debate. The Ship Money case had implied that there was a necessary tension between a powerful prerogative and the property rights of Englishmen, but it soon came to be recognized that royal power, rightly used, could not only guarantee but even help to expand the security and prosperity of the people. In this chapter, Koskenniemi explicitly attributes to Thomas Hobbes a crucial role in changing English attitudes towards this relationship,[1] though much of the rest of part III makes clear that the shift in the balance of power towards Parliament rather than the individual wishes of the king was no less important in ensuring widespread support.

In making his argument, Koskenniemi draws on an impressive range of sources written mostly by lawyers and merchants, drawing our attention to the crossover in language and themes between two groups of men whose activity is rarely connected so fully. Indeed, it is this awareness of the interplay of tropes, arguments and principles which gives the chapter its richness and originality. In his extensive account of the case of *Sandys v. The East India Company* (1684–1685), for example, Koskenniemi shows how Lord Chief Justice Jeffreys combined principles of political economy with legal arguments in finding against the plaintiff. Jeffreys appealed to the practices of all European nations in allowing companies to trade exclusively, noting that the widespread and longstanding use of such privileges indicated that they were part of the law of nations. But he also noted the public benefit of supporting trading companies and protecting their capital outlay, enabling the argument from utility to join hands with the argument from long continuance. In Koskenniemi's summary, the '*Sandys case* read the principles of political economy as part of the law of nations'.[2] Though Jeffreys's ruling was controversial, it drew attention to the tense but crucial relationship between law, commerce and property.

Although Koskenniemi draws our attention to the complex and often technical nature of the legal debates, he links these to some of the most pressing political and commercial questions of the day. English trade was profoundly affected by the major European conflict we know as the Thirty Years War and by the economic disruption it brought; in the second half of the 17th century, English politics was dominated by growing fear of expanding French power. The wider diplomatic and political context is sketched only lightly here, however, and the reader will need to join the dots between the texts discussed in this chapter and the wider political context set out in other chapters, in particular chapters 3 and 9. Judge Jeffrey's ruling, for example, was the work of a staunch monarchist, a man promoted by Charles II and James II, and his ruling was an affirmation of crown authority at a time when the Exclusion Crisis had demonstrated the hostility towards the Stuarts' grander (and apparently Catholic) ambitions.[3]

1 M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), e.g. at 564.

2 *Ibid.*, at 603.

3 See S. Pincus, *1688: The First Modern Revolution* (2009), at 377, 184.

3 British Problems – and Natural Law Solutions

In framing the early modern intellectual debate, Koskenniemi makes some important and distinctive choices. Most noticeably, Koskenniemi sidesteps perhaps the most pressing legal and political problem of these years: the relationship between the crowns of England, Ireland and Scotland. (Although Part III is entitled 'Britain', it is clearly England which is the subject of chapter 8.) In the early modern period, this relationship certainly provided an important 'international' context for debate, complicating any straightforward distinction between the domestic and the international in these years. Even after the accession of James VI of Scotland to the throne of England (and therefore also of Ireland) in 1603, the three kingdoms had their own identities, laws and churches. Contemporaries were well aware of these differences, pointing especially to the contrasts between the Scottish and English legal systems, with the Scottish courts using Roman and civil law rather than the common law favoured by the English. Moreover, James's own views on sovereign power were strident and distinctive; he traced the power of kings in England and Scotland back to an original conquest, insisted on hereditary succession and argued that property rights were dependent upon the king's grant.[4] The impetus for his strong views came not only from the distinctive character of the Scottish legal system but also from the troubled contemporary situation; his concept of 'free monarchy' was, in many ways, a response to the forced abdication of his mother Mary and the republican ideas of his violent tutor George Buchanan. Read south of the border, these ideas were deeply troubling to English writers in the 1590s and 1600s, who wished to show that the crown, at least in England, was subject to rather more stringent limitations. This, it seems to me, is the context in which to read a tract like William Fulbeck's *The Pandectes of the Law of Nations* (1602), in which kingship and property are said both to stem from an original state and which sought to allow scope for royal prerogative with certain limits. Writing as Elizabeth was almost on her deathbed, Fulbeck found in the law of nations a set of principles which could both enable and control the accession of her closest relative.

The tense union of the crowns which followed from James's English coronation may then help to explain some of the other ways in which the laws of nations and of nature were discussed. It is striking that so many of the writers who were keen to invoke these laws did so in explicit or implicit opposition to the English common law, from outside the English legal system in a literal as well as a metaphorical sense. Two clear examples of this in the present chapter are Thomas Hobbes, writing in Paris, and William Petty, largely based in Ireland. Hobbes's 'science of government' emphasized the centrality of sovereign power (not history, custom or merit) not only in distributing office and honour but even in enabling property rights. In this way, Hobbes was able to draw together commerce, property and sovereign power, denying the coherence of any claim to own or deserve anything independently of the sovereign. In its purest form, this theory also did away with local or regional differences; the Stuart

[4] James VI, 'The Trew Law of Free Monarchy', in J. Sommerville (ed.), *James VI & I: Political Writings* (1995) 62, at 73–75.

multiple monarchy could be ruled as one state.[5] Though it generated a great deal of interest and discussion, few were willing to endorse it wholeheartedly, and not least because English writers preferred to anchor their property claims in something more than sovereign will.[6]

Writing in Ireland, William Petty had a strong sense of the need for a more 'scientific' language that could resolve disputes and could offer a new method of analysing the contested place of Ireland within Stuart Britain. By moving away from religion, custom and claims to civility, and turning instead to 'political arithmetic', Petty hoped to level the playing field and promote toleration and prosperity in Ireland. He found an ally and patron in James, Duke of York (the future James VII and II), again suggesting that the early connections between sovereign power and political economy were often forged on the margins, among men keen to challenge the language and power of the English common law. Like Hobbes, Petty saw that a language of natural law could be deployed to undermine the privileged positions of those who appealed to alternative concepts of law and honour – and that it could imply a rhetorically powerful, 'universal' and 'scientific' perspective, to be contrasted with what he saw as the partial and self-interested language of his English, Anglican opponents. The processes of *bricolage* which Koskenniemi outlines in the introduction and conclusion are clearly apparent here.

The figures discussed in this chapter were not only concerned with prerogative and property, but they were also deeply aware of the potential of religious and sectarian conflict to destabilize society – and keen to prevent this. Indeed, their move to discuss political and social relations in terms of shared material interests was often designed to counter the highly charged language of divine favour and the potentially destructive effects of religious division. Sir Thomas Smith, for example, was an ardent Protestant but deeply aware of the fragility of the Edwardian settlement; hence his interest in ensuring that the government created the framework for economic prosperity in a time of scarcity and dearth.[7] For Smith, that prosperity could be achieved not only through increased production in England but also by intensive colonization of Catholic Ireland. Only when Ireland was peopled with Englishmen and ruled by English laws could it achieve the economic success of Smith's native land.[8] Where Petty's use of the language of commerce was intended to enable toleration, including toleration for Catholics, Smith wished to promote the 'civilised', Protestant religion which he believed would surely overcome Romish superstitions. Although Koskenniemi says very little about religion in this chapter, the presence of conflicts which are – at least in part – religious in origin is surely an important element of his story, and an important factor in the shift towards a language of commerce and empire. Despite Petty's efforts,

[5] Mortimer and Scott, 'Leviathan and the Wars of the Three Kingdoms', 76 *Journal of the History of Ideas* (2015) 259.

[6] See J. Parkin, *Taming of the Leviathan* (2010), e.g. at 317–319 (on Edward Hyde, earl of Clarendon).

[7] On Smith, see Mclaren, 'Reading Sir Thomas Smith's *De Republica Anglorum* As Protestant Apologetic', 42 *Historical Journal* (1999) 911; N. Dauber, *State and Commonwealth*: *The Theory of the State in Early Modern England, 1549–1640* (2016), ch. 2.

[8] Koskenniemi, *supra* note 1, at 570–571.

very often that language of commerce was inflected in a Protestant direction, against what were seen as Catholic designs of universal empire. Indeed, as Koskenniemi reminds us throughout this book, it is crucial to recognize the ways languages of law and normativity are deployed to particular ends, and against alternative languages.

The language of law is most persuasive when used with rhetorical sophistication, to engage the imagination as well as reason. This connection is important to Koskenniemi, who presents the work as a whole as a study of the legal imagination, operating in relationship to power in international contexts.[9] At times he notes that those involved in the study of law were also actively involved in explicitly imaginative writing as well, one very good example being Sir Philip Sidney, the poet, diplomat and friend of Alberico Gentili whom we meet in chapter 3. In similar fashion, it is worth reminding ourselves of the ways in which the figures in the present chapter also draw on poetic strategies and fictional devices in order to draw the reader into conversation. In the case of Hobbes, metaphor and simile are carefully employed in order to convince – and entertain – the reader, while Hobbes's heavy use of irony can also serve to encourage readers to come to his conclusions themselves. On the other hand, Thomas More's fictional account of the island of Utopia is deliberately ambiguous, and more ambiguous than Koskenniemi suggests; More exploits the dialogue form to preserve distance between himself as author and the opinions of the strange traveller Hythloday. Through the text of *Utopia*, the reader is presented with alternative opinions about law, society and religion, and must decide for herself how to respond to Hythloday's account of the unique customs of the Utopians. By restoring this imaginative dimension to legal texts, in the spirit of Koskenniemi's wider enterprise, we can see how deeply connected law and literature are, and the extent to which law requires not only physical sanctions but emotional appeal.[10] Furthermore, it reminds us that the process of imaginative bricolage is always incomplete, always in need of interpretation and always susceptible to reworking and adaptation – a process illuminated by so much of this book.

Within the larger story offered here by Koskenniemi, chapter 8 suggests how English writers began to accept the value of coordinating their private rights with a legally well-defined royal prerogative. What helped to cement this position was a series of tracts and treatises which used the language of natural law and the law of nations not only as part of the royal prerogative but also as part of the common law, alongside tracts which offered the law of nature as a solution to the problems of authority and division which haunted England (and Scotland and Ireland) through the early modern period. These ways of invoking and articulating the law of nature and of nations were not determined by any abstract qualities of the legal language itself but rather by the particular circumstances of England and Britain at this time. I have suggested that an important part of that story, as well as England's expanding commercial network, was the context of the Stuart multiple monarchy which encouraged a natural law, 'universalist', defence of prerogative at the expense of local, common

[9] *Ibid.*, at 1.

[10] See, e.g., L. Hutson (ed.), *The Oxford Handbook of English Law and Literature, 1500–1700* (2017).

law and religious difference. But, as chapters 9 and 10 show, it would take the threat of Louis XIV to cement the relationship between property and prerogative, in another demonstration of the importance of context and language to the development of theories of international law.