
The Law That Wasn't There

Chapter 2: The Political Theology of *Ius Gentium* – The Expansion of Spain 1524–1559

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1 Introduction

Writing a history of the prehistory of international law is a very hard task. First, this is because a large part of the likely readers of that history do not believe that it is just a prehistory, and would not accept that international law is merely the 19th-century historical product of the effort of a selected group of jurists who proclaimed themselves the exclusive interpreters of the conscience of the civilized nations and gave to it a legal form.¹ The second reason which makes it difficult to write this kind of a history is closely connected to the first: as a matter of fact, in the middle of the 19th century, European jurists, inspired by the deep methodological renewal of the German Historical School, started to read the past through the concept of state, system and science, and imagined a teleological history that ended exactly when it started.²

Unfortunately, the past does not flow smoothly before us and we cannot read it so easily. As Raffael Rheinsberg showed in a beautiful installation enigmatically entitled *Die Antike kennt uns nicht*, the ancients do not know us and, perhaps, for this reason they will not answer our questions the way we would like them to.³ What remains is only our illusion of knowing what we cannot know, leaving us prisoners of a mythological representation of a past that we ourselves have built and which we are unable to escape. Francisco de Vitoria and the theologians of the so-called Second Scholastic are part of this representation of the past.⁴ They have been some of the many victims of the mythological history of European international law that, marked by the schism of the Reformation and by the genius of Grotius, had long condemned them to be the characters in apologetic or nostalgic narratives of the Spanish greatness or 'to don

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¹ M. Koskenniemi, *The Gentle Civilizer of Nation. The Rise and Fall of International Law* (2001).

² On the influence of Savigny's Historical School on the international lawyers of the 19th century, see L. Nuzzo, *Lawyers, Space and Subjects: Historical Perspectives on the Western Legal Tradition*, (2020), at 35ff.

³ The artwork was on display at the exhibition entitled *Das XX. Jahrhundert: Ein Jahrhundert Kunst in Deutschland*, National Galerie, Berlin, 1999–2000.

⁴ See C. Galli, 'Introduzione', in F. de Vitoria, *De Iure belli*, trans. C. Galli (2005), at v–lvi.

black ties and serve alongside the French humanists as waiters to their Dutch and German hosts'.⁵

Martti Koskenniemi is fully aware of those risks, to the point that he feels the need to advise his readers that he does not intend to write a history of international law, but just a history of legal imagination. This means, in respect of chapter 2, his account of how, in the historical context of 16th-century Spain, Spanish intellectuals sought to give an answer to new international questions by redefining the vocabulary of the *ius gentium*. But Koskenniemi's approach is not free from risks. Just as his great characters never went to the West Indies, Koskenniemi never lands in America, and leaves us curious to know what happened on the other side of the Atlantic. In fact, in his history of the expansion of Spain there is no room for America, there are no colonial practices, no Indians, no violence of conquest, no *juristas indiano*s. Nor is there room for *ius commune* or *derecho indiano*, or for the Spanish project of construction of indigenous subjectivity.⁶

Koskenniemi operates on a different level. He has adopted a different point of view that seeks to reconstruct the Spanish contribution to what today we call international law, privileging theology and private law. In order to find a way into the chapter and place it within the context of existing historiography, I have identified four key concepts: conscience, law, *dominium* and war. These concepts define what Koskenniemi imagines to be the hidden code of the legal imagination in 16th-century Spain and the Spanish project of expansion. These concepts allow an entire world to take a legal form and, perhaps, find the sense of its own legal existence.

2 Conscience

The discovery of America, before it could be a political or legal issue, was a problem of conscience. 'It is not the province of the lawyers, or not of lawyers alone, to pass sentence on this question', said Francisco de Vitoria in a well-known passage, quoted by Koskenniemi at the beginning of the chapter.⁷ This means that the theological discourse should be taken seriously, rereading the most obvious and most studied texts on the Conquest, namely de Vitoria's two famous *Relectiones* on Indians and war, within a broader intellectual project that aimed to produce a new form of knowledge – a moral theology – through the interpretation and the development of the rationalism of Thomas Aquinas. As a matter of fact, moral theology allowed Spanish theologians to define a Catholic way to modernity against the concentration of power pursued by the states, and to imagine a normative dimension grounded in the atemporal values

⁵ Osler, 'The Myth of European Legal History', 16 *Rechtshistorisches Journal* (1997) 397, at 402.

⁶ S. V. Tau Anzoátegui, *Casuismo y Sistema. Indagación histórica sobre el espíritu del derecho indiano* (1992). On the relationship between *ius commune* and *derecho indiano*, see Nuzzo, *Between America and Europe. The Strange Case of Derecho Indiano*, in T. Duve and H. Pihlajamäki (eds), *New Horizons in Colonial Spanish Law. Contributions to Transnational Early Modern Legal History* (2015) 161, at 161–192.

⁷ M. Koskenniemi, *To the Uttermost Part of the Earth: Legal Imagination and International Power 1300–1870* (2021), at 117.

of theology and reason. A new autonomous order was born. Separated from state law as well as from canon law, it took conscience as its object and was concerned about its juridification.⁸ Every act in every man's life could be scrutinized by a confessor who, acting as the judge of conscience, was called to define pragmatically the behavioural norms of kings and their subjects. This reoriented theological writings towards casuistry, a new literary genre which aimed to provide the confessor with a set of instructions, helping him to decide what is honest and what is dishonest and to impose the right penance.⁹

Through an examination of Azpilcueta's successful manual for confessors, the Covarruvias's *relectio* on *Regula Peccatum* and Vitoria's *Confesionario*, Koskenniemi brings his readers to look at the internal forum, that is at the heart of the process of the juridification of morality and of the moralization of law. Koskenniemi then invites the readers to reconsider the answers given by Spanish theologians to the doubts of conscience arising from the economic, legal and political issues of their time.¹⁰

3 Law

As is well known, and as Koskenniemi appropriately reminds us, the School of Salamanca was not a homogeneous group, and deep differences marked the aims, strategies and cultural context of the theologians and lawyers who, inspired by Francisco de Vitoria, went back to comment on the *Summa Theologiae* of Thomas Aquinas. Nevertheless, behind their texts and the arguments they used to analyse the notion of conscience, there is a common epistemology. These commentaries shared a description of a common political and legal frame in which the state, as a form of organization of political power, coexists with the universal dimension of the Church. The state's positive laws are part of a broader moral dimension depending directly on natural law.¹¹ At the same time, School of Salamanca writers share an anthropocentric perspective through which they define the discourse of property rights, the foundation of powers, the relationships between different peoples and the management of new economic issues. The *ius gentium* was the law 'needed for such situations'.¹² According to Soto's famous definition, *ius gentium* is not simply an act of will, nor does it consist of self-evident natural law principles reflecting our inclinations. On

⁸ Legendre, *L'inscription du droit canon dans la théologie: remarques sur la Seconde Scolastique*, in S. Kuttner and K. Pennington (eds), *Proceedings of the Fifth International Congress of Medieval Canon Law* (1980) 443, at 443–454; M. Turrini, *La coscienza e la legge. Morale e diritto nei testi sulla confessione della prima età moderna* (1991).

⁹ V. Lavenia, *L'infamia e il perdono. Tributi, pene e confessione nella teologia morale della prima età moderna* (2004).

¹⁰ A deep analysis of the influence of the discovery of America on the debate on conscience and its control is offered by the seminal work of A. Prosperi, *Tribunali della coscienza: Inquisitori, confessori, missionari* (1996), at 551ff. On the role played by conscience in the Spanish Indies, see Owensby, *The Theater of Conscience in the Living Law of the Indies*, in Duve and Pihlajamäki (eds.), *supra* note 6, at 125, 125–149.

¹¹ P. Prodi, *Una storia della giustizia. Dal pluralismo dei fori al moderno dualismo tra coscienza e diritto* (2000), at 325ff.

¹² Koskenniemi, *supra* note 7, at 139.

the contrary, *ius gentium* recognized the human inclination towards the realization of God's plans, and was formed from the self-evidence of first principles. In this way, it was possible to recognize the role of practical reason in the determination of law, historicizing the higher, eternal moral principles and reducing the obligatory nature of law to its rationality.¹³

Rationality, as well as the idea of justice as a social virtue able to shape the law by readdressing it towards right purposes, represented for the Spanish theologians an objective dimension able to temper the voluntaristic drives of the kings and, at the same time, a secure basis for imagining solutions for completely new problems.

Analysing de Vitoria's reading of the *Questio 57* of *Secunda Secundae*, Koskenniemi shows in a very clear way the ambiguity of an intermediate normative circuit, worked out by a selected group of intellectuals who claimed exclusive responsibility for connecting the necessity of timeless law with the contingency of political practices, thus defining a new law for an organicist and natural community.

The law of nations was not a necessary law, but a human one. Strengthened by a normative power coming from the justice it had within itself and legitimized by the consensus of the majority of nations, it appeared as an absolutely useful law. '[The law of nations] was neither pure reason nor pure will but a single process of normative elaboration',¹⁴ it combined ethics with a new way of organizing power and guaranteeing the good of the commonwealth. At the same time, the *ius gentium* was considered the right instrument to give legitimacy to the acts of princes and to justify their *dominia*.

4 *Dominium*

The concept of *dominium* brings us to heart of the discursive strategies developed by Koskenniemi. This concept could be a good interpretative key to analyse the construction of American space and to comprehend the appropriative will of the Spanish Crown.

But it is not that easy. We must wait a little longer to move to America. Deconstructing the semantics of the concept of *dominium* means, first of all, going back again to Thomas Aquinas and his *Secunda Secundae* and recalling the debates on nominalism and voluntarism followed by Vitoria and Soto in their Parisian years. Jean Gerson and, most of all, Conrad Summenhart offer the best legal systematization of a new way to construct the relationship between man and nature and to imagine the legal order as a beam of relationships of *dominium*.¹⁵ Starting from Summenhart, Vitoria discusses the *questio de restitutione*, finding Thomas Aquinas' definition of *ius* insufficient, to

¹³ Scattola, *Naturrecht als Rechtstheorie: Die Systematisierung der 'res scholastica' in der Naturrechtslehre des Domingo de Soto*, in F. Grunert and K. Seelmann (eds), *Die Ordnung der Praxis: Neue Studien zur spanischen Spätscholastik* (2001) 21, at 21–48.

¹⁴ Koskenniemi, *supra* note 7, at 148.

¹⁵ The influence of Jean Gerson and Conrad Summenhart on Vitoria is stressed by Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150–1625* (1997), at 255ff.

the extent that it did not provide the restitution of a *ius*. But if every *dominium* was grounded on an *ius*, the latter could be defined as 'a power or faculty to use a thing in accordance with the law'.¹⁶ The consequences of this little, but significant, betrayal of Thomas Aquinas' thinking are extremely important. Analysing the concept of *dominium* and (re)discovering its subjective dimension made this concept suitable for the management of the new economic needs and for the launch of a new anthropology founded on the interchangeability of liberty and property. The *dominium sui* became the necessary premise for the exercise of a *dominium rerum externarum*, and brought the theologians of Salamanca to look to American possessions and to take Indian property rights and the Spanish rights of jurisdiction as their object of study.¹⁷

At this point, Koskenniemi allows us to verify the role played by the discovery and conquest of America in the legal imagination of what, one day, international lawyers would define as international law. But this is also the moment when we realize that there is not a single legal imaginary or a single official history of international law. Koskenniemi seems conscious of this when, following the discussion of the rights of *dominium*, he analyses the power of the kings of Spain over their dominions and subjects, and recognizes that the 'Salamanca scholars were greatly inspired by concerns of conscience relating to the Spanish penetration in the New World'.¹⁸

Sailors, popes, kings, laws, governors and jurists are finally included in the story and with them also the ambiguous institution of the *encomienda* and the strange text of the *Requerimiento*. But the *encomienda* and *Requerimiento* are not just, respectively, the instrument of brutal exploitation of the indigenous populations entrusted to the 'protection' of an *encomendero* (a settler), and the official act that had to be read to natives before undertaking any act of violence in order to inform them about the existence of the pope, the kings of Spain and the possibility of inclusion in the *Respublica Christiana*.¹⁹ Both, in fact, are also open doors to other forms of legal imaginary. It is a disturbing imaginary in which human relations, as well as the relationships between political institutions, are not regulated simply by laws, but obey a deeper moral and feudal code. Moral, ethical and religious concepts, such as grace, love and friendship, appear to be categories that structure and order reality, even in exotic locations such as the West Indies. These categories governed spaces and bodies, bringing them back into the textual tradition of feudal law and *ius commune*. They represented the channels through which flowed the textual tradition of the *Respublica Christiana* and allowed, by enveloping things and people, the management of the dangers and anxieties inevitably ushered in by the new. These categories further defined the logic that conditioned

¹⁶ S. Conrad Summenhart, *De contractibus liciti, atque illicitis* (1580), I, 1, at 1; Francisco de Vitoria, *Comentarios a la Secunda Secundae de Santo Tomas* (1934), III, 62, 1, 5 at 64; Koskenniemi, *supra* note 7, at 149

¹⁷ P. Grossi, *La proprietà nel sistema privatistico della Seconda Scolastica*, in P. Grossi, *Il dominio e le cose. Percezioni medievali e moderne dei diritti reali* (1992), at 284ff.

¹⁸ Koskenniemi, *supra* note 7, at 155.

¹⁹ Nuzzo, 'Law, Religion and Power: Text and Discourse of Conquest', in I. de la Rasilla and A. Shahid (eds), *International Law and Islam* (2019), at 199–227.

all relations of public and political life in premodern systems and that manifested itself both inside and outside the borders of the Spanish empire. It was a ‘love relation’ that bound the King of Spain to the pope and to the natives, that opposed France and England and other powers wishing to subvert the Spanish spatial order; or even the one that the monarchy tried to use for bridling the fluid and anarchic powers in the New World within a centralizing and bureaucratic pattern.²⁰

But none of this seems to belong to the legal imaginary of the international lawyer. Probably grace, love and friendship continue to be an element of disorder in the harmony of the imagined archeological garden of the Western legal tradition. Koskenniemi, in fact, prefers to turn back quickly to his theologians and deal with their ‘reaction’ to the old claims of a universal *dominium*. Neither the pope nor the emperor is the lord of the world any longer, and the legitimacy of the king’s power of command comes from the people, thanks to a *translatio auctoritatis*. At the same time, as Koskenniemi well stresses, the efficient cause of civil power is always God and the material cause identifies itself with the commonwealth that directs all its activities to the common good.²¹

5 War

Vitoria and friends rejected the hierocratic thesis advanced by medieval canon lawyers, and recognized that natives, and more generally non-Christian populations, could have private and public *dominia*, but not one of them came to deny the legitimacy of the Spanish presence in the West Indies. Vitoria and his circle presupposed the existence of a *communitas orbis* that was no longer subjected to the ordering authorities of the pope and the emperor, but formed by free and independent political subjects attached to the law of nations. The global world imagined by the Spanish theologians in the university halls of Salamanca was therefore governed by a fundamental right of peoples to freely relate to one another and from which further rights descended: rights of transit, migration, free trade, enjoyment of shared goods, occupation of uncultivated lands and collection of *res derelictae*. But rights corresponded to heavy obligations, the violation of which led to war, that is, to violence justified by law. The world of Vitoria and the other Salamancan scholars was always a Christian world, in which the Spaniards, as ambassadors of the true faith, had the right to preach the Gospel, protect native converts, dismiss legitimate governors and replace them with Christian ones, overthrow tyrannical regimes and – in defiance of the laws of nature – intervene militarily in defence of allies and friends, or to accept the possible request of the natives themselves to be governed by the King of Spain.

This debate takes us back to Thomas Aquinas and to his view of the prince acting as a judge when his war is brought about by a just cause. However, there are significant

²⁰ See, e.g., B. Clavero, *Antidora: Antropología católica de la economía moderna* (1991); A. M. Hespanha, *La gracia del derecho. Economía de la cultura en la época moderna* (1993); L. Nuzzo, *Il linguaggio giuridico della Conquista. Strategie di controllo nelle Indie spagnole* (2004) (directly referencing the American experience).

²¹ Koskenniemi, *supra* note 7, at 117.

new features. Vitoria moved away from the Thomistic tradition towards a legal dimension. War was a reparation of an offence, and not only a sin against charity. As a method for the implementation of justice, war had become lawful and necessary, assuming the dimension of legal sanction within an international legal order.

War remained the last resort and peace was to be the desired outcome of every conflict; however, perpetual peace was just a dream which jurists (and theologians) did not believe in. The legal imagination of Western civilization could not be thought of without war, because war was its fundamental component.

International law, which is represented as one of the brightest products of this legal imagination, is built on the dichotomy of peace and war, without ever banning warfare. War is a cruel instrument, but cannot be excluded from the horizon of law, and it is unrealistic to try to eliminate it. Jurists knew this so well that the entire history of modern international law can be retold by taking war as a narrative paradigm. The rationalization, humanization, formalization and finally codification of war mark the different phases in a path that started in 16th-century Salamanca.

Three hundred years later, the great lawyers who transformed international law into a legal science and positive law, fixing the canons of the modern legal imaginary, confined Vitoria to the dusty ranks of precursors. Koskenniemi has the great merit of having cleared away much of that dust. Not only does he definitively situate Vitoria and the Spanish theologians of the second scholastic within the tradition of the Western legal imagination, but he also successfully shows their contribution to the formulation of a modern vocabulary of international law, reconnecting the issues stemming from the discovery of America to a broader reflection undergirding political economic and private law questions.

