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# ‘Like a Tree in the Garden of State Sciences’: From Staatswissenschaften to External Public Law

## Chapter 12: The End of Natural Law: German Freedom 1734–1821

Nehal Bhuta\*

The final chapter of *To the Uttermost Parts of the Earth* brings the book’s diachronic story of (one of) the idiomatic languages of *ius gentium* and *ius naturale* to a close. The story of the law of nature and of nations in its 18th-century German usages is not exactly one of rise and fall, apogee and nadir. Rather, it is (for international lawyers at least) a salutary revisiting of a connection between natural law and state-making, and between law of nations and the well-ordered *Polizeistaat*, which remains recessed in the historical recollection of 20th- and 21st-century international law’s historical consciousness. While 20th-century international law reinvented its origin stories in the Salamanca Scholastic and the Dutch Golden Age, the important lineage of contemporary vocabularies and genres of international legal and political thought with the German sciences of the state as they developed after 1648 is rarely recognized.<sup>1</sup> These ways of thinking about and, in some sense, enacting and producing public power and state-concepts have become the subject of revived interest and inquiry in histories of economic and political thought,<sup>2</sup> inspired in part by Foucault’s influential

\* Professor of Public International Law, University of Edinburgh, Edinburgh, United Kingdom. Email: [nehal.bhuta@ed.ac.uk](mailto:nehal.bhuta@ed.ac.uk). I thank Professor Miloš Vec of the University of Vienna, Austria, for his helpful comments and his additional references.

<sup>1</sup> But see, for the rich premodern history of public law (including law of nations), M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Band 1: Reichspublizistik und Polizeywissenschaft, 1600–1800* (1988).

<sup>2</sup> See, e.g., K. Tribe, *Governing Economy: The Reformation of German Economic Discourse, 1750–1840* (1988); K. Tribe, *Strategies of Economic Order: Strategies of Economic Order: German Economic Discourse, 1750–1950* (1995); D. F. Lindenfeld, *The Practical Imagination: The German Sciences of the State in the Nineteenth Century* (1997); A. Wakefield, *The Disordered Police State: German Cameralism as Science and Practice* (2009).

resurfacing of this discourse in his lectures at the Collège de France.<sup>3</sup> The figures at the centre of chapter 12's narrative, Achenwall and von Justi, were well known in their time, but rapidly consigned to obscurity even within German texts by the end of the 19th century.<sup>4</sup> Indeed, if Albion Small is to be believed in his monumental account of Cameralist thought from 1909, despite the fact that there was 'no more virile [*sic*] political thinking in Europe in the seventeenth and eighteenth centuries', late 19th-century public lawyers such as Bluntschli 'effectively cancel[ed] the cameralists' from their accounts.<sup>5</sup>

Following from the narrative in chapter 11, Koskenniemi begins essentially where Pufendorf and Wolff left us: *ius gentium* and *ius naturale* are not exclusively legal and political vocabularies (even less, mere rules) for the governing of relations *inter gentes*, but rather are a comprehensive and capacious demesne of principles and political ideas that constitutively theorize sovereign power, but also 'assist the prince to bring about the perfection of the nation that would coincide with the perfection of its subjects'.<sup>6</sup> The law of nature and of nations was the warp and woof on which the fabric of the state was to be woven: public, trans- and inter-public law (such as a notion of a *ius publicum Europaeum*)<sup>7</sup> were manifestations of this *Staatslehre* in its internal and external aspects. In the first part of this chapter, we encounter the internal aspect of these discourses on state and administration, in the form of *Polizeiwissenschaft* ('police science').<sup>8</sup> Achenwall (1719–1772) (and the Göttingen Law Faculty more generally) was an inheritor of the German Enlightenment's emphasis on the reform and rationalization of *the state* as the crucial function of de-theologized academic faculties such as law and philosophy: the work of reason was the work of reformist *gute Policyey*,<sup>9</sup> to the ends of raising revenue, growing the population, enhancing security and promoting the well-being of the population (through, for example, raising agricultural

<sup>3</sup> M. Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, ed. M. Senellart, trans. G. Burchell (Palgrave Macmillan, 2007), chs. 12 and 13. A contemporaneous analysis of the Police State was M. Raeff, *The Well-Ordered Police State: Social and Institutional Change Through Law in the Germanies and Russia, 1600–1800* (1983).

<sup>4</sup> Frambach, 'The Decline of Cameralism in Germany at the End of the Nineteenth Century', in M. Seppel and K. Tribe (eds), *Cameralism in Practice: State Administration and Economy in Early Modern Europe* (2018) 239.

<sup>5</sup> A. Small, *The Cameralists: The Pioneers of German Social Polity* (1909), at xiv–xv.

<sup>6</sup> M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), at 857.

<sup>7</sup> von Bogdandy and Hinghofer-Szalkay, 'Das etwas unheimliche Ius Publicum Europaeum. Begriffsgeschichtliche Analysen im Spannungsfeld von europäischem Rechtsraum, droit public de l'Europe und Carl Schmitt', 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* (2013) 209.

<sup>8</sup> For a very helpful conceptual history of the term *Polizei/ Policyey* in German discourses from the 15th century, see Knemeyer, 'Polizei', 9 *Economy and Society* (1980) 1720. See further N. Matsumoto, *Polizeibegriff im Umbruch. Staatszwecklehre und Gewaltenteilungspraxis in der Reichs- und Rheinbundpublizistik (Studien zu Policyey und Policyeywissenschaft)* (1999).

<sup>9</sup> T. Simon, 'Gute Policyey': *Ordnungsleitbilder und Zielvorstellungen politischen Handelns in der Frühen Neuzeit* (2004).

productivity – and in the 19th century, by promoting private sector activity).<sup>10</sup> Natural law, as fundamentally a command from God to ensure the flourishing of human communities in *this* world, mandated the state to develop the empirical and normative knowledges necessary to achieve its this-worldly purpose (*Staatszweck*). These knowledges included *Staatenkunde* (later known as *Statistik*), compilations of historical knowledge about effective government (sometimes known as universal histories)<sup>11</sup> and *ius publicum* or *Staatsrecht*.<sup>12</sup> The latter mixed positive law and natural law doctrines with history and 'political arithmetic' to develop what Koskenniemi describes as 'a total view of states in their internal and external relations'.<sup>13</sup> This total view, imparted to students at Göttingen and other universities where state sciences were created and taught, was a 'state wisdom' (*Staatsklugheit*) to be applied in the practice of government towards populations, but also in relations with other states.<sup>14</sup> The successful use of state wisdom would result in the realization of natural law's purpose for the state: an increase in its power and in the well-being of its population.

Unlike Britain, France or Holland, 'the Reich and its territories had no direct part' in the commercial revolution that accompanied West Indian or East Indian trade, and attempts to create trading companies and colonial projects in the 16th and 17th centuries largely failed by 1731.<sup>15</sup> Thus, in contrast to Koskenniemi's extended treatments of French and British commerce, slavery and colonialism in chapters 6, 7 and 10, the vocabulary of *ius gentium* and *ius naturale* does not develop in this chapter as an elastic and indispensable register for colonial land appropriation or slave trading in the manner that we observed in earlier chapters. But it does become a frame for a language of commerce and economy, as Koskenniemi shows in his brief treatment of Johann Heinrich Gottlob von Justi (1717–1771). Frambach notes the elective affinities between British political economy, French physiocracy and von Justi's and other cameralists' vision of economic welfare as achieved by the state's guarantee of the preconditions for all private sector activity. The latter was to be left to develop as freely as possible within the framework provided by a wise state, and Frambach notes that with the decline of cameralist science, 'it was then only a small step to an economically orientated liberalism organized through civil law',<sup>16</sup> the general tendency which swept continental Europe (in different national variations) from 1815.

<sup>10</sup> J. Whaley, *Germany and the Holy Roman Empire*. Volume 2: *The Peace of Westphalia to the Dissolution of the Reich 1648–1806* (2012), chs. 54 and 55.

<sup>11</sup> A. de Melo Araújo, *Weltgeschichte in Göttingen: Eine Studie über das spätaufklärerische universalhistorische Denken, 1756–1815* (2012).

<sup>12</sup> Lindenfeld, *supra* note 2, ch. 1.

<sup>13</sup> Koskenniemi, *supra* note 6, at 886–887.

<sup>14</sup> Interestingly, this understanding also extended beyond Germany: when the University of Edinburgh's first chairs in law were created after 1707 to mark the new union of Scotland and England, they were public law chairs, respectively titled the Chair of the Law of Nature and the Law of Nations (1707) and the Chair of Universal History (1719). In the 18th and 19th centuries, Edinburgh law professors maintained close connections with the Göttingen Law faculty.

<sup>15</sup> Whaley, *supra* note 10, ch. 32.

<sup>16</sup> Frambach, *supra* note 4, at 249. See also Whaley, *supra* note 10, at 487.

This thread of the story of the ‘legal imagination’ of *ius gentium* and *ius naturale*, then, spirals inwards towards the making of strong, prosperous states, and in which there are the beginnings of a concern with civil society and economy as somewhat autonomous zones of human action in which free will conduced to the satisfaction of needs and the production of wealth and revenue. External relations are governed by voluntaristic agreements of sovereigns within the principles laid down by natural law and the accumulating factual usages and customs characteristic of state wisdom and political interest; here, we might faintly draw a line of intersection with parallel and surrounding discourses of a universal *ius publicum* shared by European sovereigns, as a concrete realization of natural law.

What happens to this state-centred discourse of *ius publicum*? The balance of chapter 12 describes a style of thought which germinates within the Universities which drove forward the statist *Aufklärung*, but dramatically transforms this inheritance even as its presuppositions rest upon ‘enlightened absolutism’s’ very achievements<sup>17</sup> – territorial unification, intensive production of individualized disciplined subjects in the interests of good order and welfare and increasing juridification of economic and social relationships. Whereas the natural law and public law of Pufendorf, Wolff and Achenwall rested on the premise that the order and human prosperity mandated by God required earthly commanders to ensure that weak-willed and passionate humans could understand and follow the dictates of natural law, Kant (and predecessors such as Rousseau) reject this as a morality of servility and heteronomy. The revolt against voluntaristic accounts of law’s authority and validity as resulting from the command of a superior (first God, then the state)<sup>18</sup> drives Kant’s rejection of both Epicurean epistemologies (Hume) and voluntarist theories of political authority (Hobbes and Pufendorf, among others).<sup>19</sup> To the extent that Pufendorf’s, Wolff’s and Vattel’s natural law and law of nations condition the work of reason and enlightenment on external commands of sovereigns, they are rejected as miserable comforters. Kant’s ‘Copernican Revolution’ rejected the idea that reason consists of universal norms which subsist in themselves but require a steady and knowing superior will to realize; instead, reason ‘must be seen as a set of [objective] principles... dependent on its subjective side, i.e. upon the spontaneous activity of the rational ego, who explicates his own structure in these principles and recognizes them as his own’.<sup>20</sup> No set of universal norms is rational ‘except as it is constituted by the subject and can be recognized by him as such. And correspondingly we become rational not by complying with a system of preestablished norms but by setting up the norms with which we comply’.<sup>21</sup> Reason is found within and contains within it the possibilities of rationalization; freedom rationalizes, not state wisdom – unless it is the wisdom of states built

<sup>17</sup> See J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1991), parts 1 and 2.

<sup>18</sup> See J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (1998), ch. 23.

<sup>19</sup> On the relationship between Epicureanism and voluntarism, see especially R. Tuck, *Philosophy and Government, 1572–1651* (1989).

<sup>20</sup> Y. Yovel, *Kant and the Philosophy of History* (1980), at 13.

<sup>21</sup> *Ibid.*

on the principle of practical freedom: the republican state being the only one which meets this demanding criterion.

The Kantian Copernican revolution thus turns rationality (understood as the autonomy of the subject) into the final foundation of the validity of law; Hegel does not reject this fundamental premise, but famously challenges Kant's understanding of how such a rational subject comes to be *in* history, reconciling historically concrete forms of reason (such as natural law) as partial expressions of a more complete rationality that unfolds through human subjects formed and acting within concrete societies and economies: subject becomes substance. Either way, natural law is a merely empirical matter, an instance of reason *in* history but not reason itself nor its culmination. The validity of natural law, on this logic, can be assessed only from the perspective of practical reason alone, and not by its external consequences or effects. This transformation provides a foundation for the moral validity of all law – its status as an expression of self-legislating reason – but it comes at a price: the redundancy of natural law as supremely valid principles of statecraft, internally or externally. Kant's Copernican revolution of reason, and his accompanying *Rechtslehre* (doctrine of right), sharpened the division between public (constitutional) law, rationally grounded in freedom and self-determination, and the mere usages of states engaged in competition and contestation. For a quasi-constitutional order to arise beyond the state, on this principle, only a historically realized homogeneity of republican state forms would be adequate;<sup>22</sup> until such time, an incomplete cosmopolitan semi-federal order of republican states would coexist with non-republican ones that only incompletely realize the principle of freedom.

In between Kant and Hegel is the figure of Georg Friedrich von Martens, one of the few other names that will be readily recognizable within the 'history of international law' as it is traditionally understood. Long associated with the emergence of a 'positivist' concept of international law identified with the careful compilation of usages and treaties,<sup>23</sup> in this telling Martens is more of a transitional figure. There is no sharp divide between naturalism and positivism, in as much as the collection of states' policy and practice and study of their histories is a form of knowledge which extends our possibilities of realizing the aims of natural law through *Staatskunst* and *Staatklugheit*: the security and welfare of the population and the productivity of the territory. This is *ius publicum* in its external facing aspect, not radically distinct from the logics and arts of *ius publicum* in its internal aspect. Martens's approach to this law followed the template of the sciences of the state, attempting to induce 'the entire European legal landscape' as a *Europäisches Völkerrecht*. The validity of the whole order so discerned rested on the validity of the state 'as a moral person established by individuals escaping the precariousness of the state of nature'.<sup>24</sup> This position was compatible with both the older

<sup>22</sup> See S. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (2010), chs 7–9.

<sup>23</sup> Indeed, Koskenniemi himself seems to endorse this view more directly in an earlier treatment of Martens: Koskenniemi, 'Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law', 15 *Constellations: An International Journal of Critical and Democratic Theory* (2008) 207.

<sup>24</sup> Koskenniemi, *supra* note 6, at 936.

natural law and the new account of the state as an Idea of Reason advanced in Kant's *Rechtslehre*: the validity of 'external public law' could in principle, it seems, be distinguished from either theory about the foundation of the state, because European states themselves had common *moeurs*, practices, forms and legal orders that could ground legal relations between them. As Koskenniemi notes, this conclusion was taken up expressly by Hegel, for whom External Public Law (as he called law between states) could have its validity *only and exclusively* in the *thin* ethical life created between states sharing a common civilization: 'The European nations form a family with respect to the universal principle of their legislation, customs, and culture, so that their conduct in terms of international law is modified accordingly in a situation that is otherwise dominated by the mutual infliction of evils.'<sup>25</sup> *Civilization*, rather than natural law-derived *Staatsklugheit*, becomes the true foundation of international law.

Koskenniemi's narrative in chapter 12 leaves international law between a utopia of reason and an apologetics of state wisdom, political interest and state culture, a dilemmatic from which it has arguably never recovered. Consistent with what I have noted about his methods in my Introduction to this symposium, Koskenniemi never presents us with a compact statement of the lines he draws – he simply goes ahead and draws them, placing these figures and their works into a mostly latent and gesturally articulated dialogue. Mundane matters of why certain figures are chosen for exposition and not others, or a more pedestrian accounting of social, economic and intellectual contexts, are introduced to the extent necessary to follow the sweep of the chapter. The reader instead is invited to immerse themselves in the stream of ideas and construct her or his own interpretation of what is shown. It is perhaps a testament to the success of this method that *this reader's* own preoccupations with state theory and the language of *ius naturale* and *ius gentium* as vectors of state science have become the focus of the story. There are no doubt other threads which can be pulled on in this chapter, as well as the risk that readers emerge from their immersion thoroughly waterlogged but unable to make sense of what has been shown. But Koskenniemi refuses a *certain kind* of didacticism, that of the punctual argument and the compact insight. Instead, he concludes with some rather ponderous questions which seem to be aimed at drawing us into the present:

The legacy of the contest of the faculties is heard to this day. Should we be governed in the way we have always been governed, or might some new knowledge help us govern ourselves better... The space of human nature... may be filled with whatever qualities we are inclined to feel as normal and decent. Whatever the legal imagination moves in the sphere of the universal, it will be accompanied by the now-familiar eighteenth century languages, means of measurement, standards and criteria that we associate with science and enlightenment and for which the human appears as the ambivalent figure of that which is both free to live by the laws it has chosen and thoroughly immersed within the technical languages that it has convinced itself are nothing but the instruments of self-expression.<sup>26</sup>

<sup>25</sup> G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. A. Wood, trans. H. Nisbet (Cambridge University Press, 1991), at 371, para. 339.

<sup>26</sup> Koskenniemi, *supra* note 6, at 951.

Of course, Koskenniemi would not maintain that this is the only insight to be drawn from the trajectory he sketches in chapter 12, but it is not clear to me that it is the most useful one either. Rather than concluding with a fairly general (and formal) critique of reification which leaves us hanging between norm or value and technique,<sup>27</sup> it seems to me the chapter holds out other critical lessons: of the powerful determining weight cast by the experience of European state-building on its normative vocabularies, and of the ways in which those normative vocabularies contributed to a powerful generative matrix of concepts about the nature and boundaries of stateness, civilization, the relationship between rational authority and order-creating facticity as the ground of the state and of the nature of inter-state society; of the seemingly persistent and enduring affinity between 'technologies of stateness',<sup>28</sup> reformist visions of state-making<sup>29</sup> and the powerful authorizing force of ideas of 'universal public law' and 'universal histories' which circulate *via* the international and its laws.

<sup>27</sup> Koskenniemi, 'The Fate of International Law: Between Technique and Politics', 70 *Modern Law Review* (2007) 1.

<sup>28</sup> See *Technologies of Stateness*, 11 *Humanity: An Interdisciplinary Journal of Human Rights, Humanitarianism and Development* (Special Issue) (2020) 1.

<sup>29</sup> See, e.g., Bhuta, 'Against State-Building', 15 *Constellations: An International Journal of Critical and Democratic Theory* (2008) 517; Fiti Sinclair, 'State Formation, Liberal Reform and the Growth of International Organizations', 26 *European Journal of International Law* (2015) 445.

