
Historical Imagination: Reason, Revolution, Restoration

Chapter 6: European Public Law 1715–1804

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Martti Koskenniemi's book is a masterpiece of historical imagination, and demonstrates his exceptional ability to rethink the history and theory of the law of nations by bringing together a broad range of methodological perspectives. It is a kind of 'tunnel history'¹ combined with a contextual analysis and biographical portraits that allow the legal imagination to be presented as something tied to the life and behaviour of specific individuals at a certain space and time, whose activities can nevertheless be carried out only within a medium-term intellectual and practical context and in a world that changes over the long term. The most important difference between this and other books on the history of the law of nations is thus the constant interplay between space and time: the chronological account gives way to a series of thrilling narratives that each have a different beginning and provide new perspectives that change the previous picture almost entirely. The reader is invited to move back and forth in a history whose main characteristics are contingency, ambivalence and unpredictability.²

This fascinating method is particularly apparent in part II of the book, whose 'localization' is France: after a chronological presentation of the two 'short centuries' (1625 to 1715 and 1715 to 1804), and of the development of the ideas and practices of sovereignty and internal rule, this past is revisited in the light of its colonial assumptions and implications. The reader must therefore be attentive to the possible 'other face' of theories, which will only be revealed further on. The two main examples of this narrative strategy in the chapter which I will consider here, chapter 6, are those of Mably and of the Revolution itself. At first, we are presented Mably the author of *Le droit public de l'Europe*, while in chapter 7 we encounter him as the theorist of slavery;

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¹ See Pocock, 'The Machiavellian Moment Revisited: A Study in History and Ideology', 53 *Journal of Modern History* (1981) 49, at 53: a 'tunnel history' aims at pursuing 'a single theme', for example 'that of the *vivere civile* and its virtue' in Pocock's main work. In Koskenniemi's work, the 'tunnel' runs through the concepts of property and sovereignty in the law of nations.

² For a critical stance against the paradigm of the great 'epochs' in the history of international law, see Koskenniemi, 'Book Review. *The Epochs of International Law* by Wilhelm Grewe', 51 *International and Comparative Law Quarterly* (2002) 746.

in chapter 6, Koskenniemi presents Revolution 1, that is the Revolution in France and Europe, while chapter 7 shows us Revolution 2, the revolutionary crisis in the French colonies.

The grand design and structure of the book make it impossible to comment on one chapter without considering the broader endeavour underlying the work. The thread running through the overall methodological and narrative strategy adopted in every chapter are the concepts of sovereignty and *dominion*, and the way that these changed as the theory of the law of nations itself evolved. Like several other chapters – such as the one devoted to Grotius – chapter 6 focuses on theories more than on practices, telling the history of the rise and fall of the *ius publicum europeum* as a particular moment in the development of the doctrine of the law of nations.

As the author writes, the chapter ‘explores the 18th-century French idea of law as a science of the government of European politics’ and how ‘legal imagination about international relations had come to be poised between political economy and a mildly reformed system of the public law of Europe’.³ In this book review, I would first like to summarize the intellectual strategy underlying the chapter and to show how this sheds new light on an old set of problems. I will then explore certain difficulties – or grey zones – implicit in Koskenniemi’s methodology and certain questions that in my opinion remain unresolved.

Chapter 6 unfolds along a path which, starting from the first conception of European public law, formulated by Mably, runs through the different interpretations of interstate relations and of war developed in the French Enlightenment, before reaching the revolutionary crisis and concluding with the little studied work of the diplomat Joseph-Mathias Gérard de Rayneval. According to Koskenniemi, Rayneval’s *Institutions du droit de la nature et des gens*, published in 1803, closed the theoretical loop of the *ius publicum europeum* when a new order between the nations, that of the Restoration, was affirming itself. This decline is theoretically connected to the final part of the book, which tells the story of the crisis of natural law in the German states and of the rise of the new sciences of society and of legal positivism that came when international law took the place of the old ‘law of nations’. The chapter is therefore closely connected to the central aim of Koskenniemi’s work, that of demonstrating the differences between the conceptions of the law of nations as they developed in the early modern era, and the international law that asserted itself only during the 19th century.⁴

As the case of Mably demonstrates, ‘the French idea of law’ is characterized by three fundamental elements – nature, reason and interests – which are arranged in various combinations in order to construct a universal science valid for all times and places and capable of governing relations between states and of showing princes and rulers a way out of war, which is considered an absolute evil, albeit not one that can

³ M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021), at 421.

⁴ However, it is worth recalling that, as he has shown in his previous book, *The Gentle Civilizer of Nations* (2001), Koskenniemi considers the birth of international law as an academic discipline independent from legal positivism.

be eliminated completely. Koskenniemi's treatment of the French Enlightenment also augments the strictly chronological account with a thematic approach. Thus, after an introductory section he considers, in order, the Abbot of Saint-Pierre and his project for perpetual peace, Melon, Rousseau, Montesquieu, the *Encyclopédie*, then Gournay, Forbonnais and the Physiocrats, the Revolutionary moment and the key authors of the Revolutionary period (particularly Condorcet and the *Idéologues*), before concluding with an examination of the work by Rayneval that, as we have already said, provides a theoretical endpoint.

The text's overall logic asserts itself with great clarity: the focus of the investigation is the development of a new political and social science ultimately based on a new science of man, and the attempts to reform the European order through a reconsideration of the theories of sovereignty and trade. This explains Koskenniemi's decision to begin with Saint-Pierre's project which, in contrast to Mably's later proposal, which will be intent on showing the sovereigns that their true material interests were best served by the 'principles of negotiation', is focused 'realistically' on the need for sovereigns to guarantee not only external but also internal security by negotiating a treaty to establish a union that would export war outside of European territory and guarantee wellbeing and progress through trade. Thus, in the work of Saint-Pierre there emerges an image of a Europe that was not 'a cultural or historical entity', but rather a mechanism, in the Cartesian sense, still firmly anchored to European absolutism, and his project is thus revealed as a form of 'conservative utopianism'.⁵ In contrast to the failure of the social science proposed by Saint-Pierre, Jean-François Melon and Jean-Jacques Rousseau took two radically different approaches. Melon is considered above all as the author who first puts the freedom of trade at the centre of the foreign policy of the states and who, in his *Essai politique sur le commerce* (1734), considers 'the spirit of conquest and the spirit of commerce' within a single nation to be mutually exclusive.⁶ This is a different path to peace from the one taken by Saint-Pierre, but at the same time it is also one that shows clear support for colonial expansion in an anti-Colbertist and anti-absolutist direction. Completely opposed to this view is the critique put forward by Rousseau, who not only sees trade as one of the signs of the deterioration of virtue and of the potential for despotism, but also believes that war is an indelible feature of relations between states and, above all, that European civil society as a historical and cultural construct has led to an exacerbation of the state of war as a natural condition of relations between states: 'In Rousseau's view, the modern law of nations revealed itself unable to confront the political heart of the problem of war.'⁷

While diverging from Rousseau and Melon, Montesquieu too appears to have little to offer to the law of nations, on the one hand due to the theoretical poverty of his doctrine of the federal republic, and, on the other, because of his relativistic approach to social institutions,⁸ which distances him from Locke as well as from republican

⁵ Koskenniemi, *supra* note 3, at 425, 428, 430.

⁶ *Ibid.*, at 430.

⁷ *Ibid.*, at 433.

⁸ *Ibid.*, at 440 ('The book was nothing if not a principled statement of a relativist approach to the study of law (and later condemned as such)').

theories: ‘there were no inalienable rights in his work, and liberty to him meant the freedom left to citizens outside of legislation.’⁹ As a result, a turning point appears to have been reached when, in the second part of the chapter, the theme of natural law as the measure and foundation of social science becomes an essential one running through the works of the *Encyclopédistes*, of the Physiocrats, of Sieyès and of the protagonists of the Revolution. Starting from the *Encyclopédie*, the theme of the ‘terror of natural rights’, which is so central to the well-known book by Dan Edelstein,¹⁰ emerges unequivocally before going on to exert an unmistakable influence on the interpretation of the French Revolution.

If, in fact, the idea of a natural order occupying a supreme and normative position above the political and social order clearly forms the context within which – from the *Encyclopédie* to the Physiocrats, up to Sieyès, Condorcet and Robespierre – it is possible to think about power relations, then the Revolution not only constitutes a break with Montesquieu’s liberalism but also can hardly be traced back to a Rousseau interpreted as a critic of natural law.¹¹ Starting with the *Encyclopédistes*, the ‘French idea of law’ seems to have increasingly involved the abandonment of the idea of sovereignty and of power as a relationship between men and an expression of human will, becoming instead an ambiguous interplay between the sovereignty of nature and the sovereignty of the nation based on an antithesis between good and evil that solidifies around the opposition between society and government: society is good while governments, especially monocratic ones, are evil. From this starting point, history slides inevitably towards the Reign of Terror imposed in the name of natural law, in a reversal that inevitably follows from the scientific vision of society that strove to replace the government of men with universal law. The *Encyclopédie* ushers in a secularized natural law that arises from human nature and constitutes the foundation of the social order: ‘Cultural progress would also bring about a universal morality of natural law that would seek its origins not from God, but from the experience of injustice.’¹² In accordance with Foucault’s reconstruction of the *Encyclopedia* and of Sieyès’s thought,¹³ Koskenniemi affirms that this new science of society puts aside the historical discourse of the war between races, the Franks and the Gauls, and provides a new, universalistic view of politics whose archetype he identifies in the materialism of Baron d’Holbach. This new philosophy involves the eradication of the distinction between the natural and the conventional, and reduces the role of legislation to that of a declaration, to the recognition of what is already inscribed in the natural order in relation not only to domestic politics but also to relationships between the states governed by a law of nations in harmony with the morality of the peoples.¹⁴ From this point of view, within

⁹ *Ibid.*, at 438.

¹⁰ D. Edelstein, *The Terror of Natural Rights: Republicanism, the Cult of Nature, and the French Revolution* (2009).

¹¹ Here Koskenniemi follows the Althusserian interpretation of Montesquieu and Rousseau; for another perspective, see Silvestrini, ‘Natura, società, politica. Montesquieu, Rousseau e Beccaria’, in G. Paganini (ed.), *La filosofia dei moderni* (2020) 275.

¹² Koskenniemi, *supra* note 3, at 441.

¹³ M. Foucault, *Il faut défendre la société: Cours au Collège de France, 1975–1976* (1997), at 186–187.

¹⁴ Koskenniemi, *supra* note 3, at 442–443.

the ambivalent relationship between the pluralism of history and the universalism of natural morality, d'Holbach's position appears to typify a pathway that leads to the Revolution, which it thus inserts within the tradition of the radical Enlightenment.¹⁵

Despite the more realistic and competitive view of international trade of authors like Gournay and Forbonnais, the Physiocrats reduce the role of the state to that of bringing order to the domestic and international spheres, taking the idea of trade as a factor in international peace to its logical extreme: 'in trade, both parties will win because a nation's prosperity will necessarily increase the demands for commodities from others.'¹⁶ This perspective runs from Quesnay to Dupont de Nemours, before finding its ultimate expression in Mercier de la Rivière, who renders absolute the relationship between the laws of nature and the laws of the social order, making possible the growth of domestic wellbeing and the necessary establishment of the universal human society. Beyond the specific events that led from the Declaration of the Rights of Man to the Terror, Koskenniemi underlines how a twin revolution took place in August 1789: one of national sovereignty and another of property that swept away the feudal division of rights.

Leaving aside the analysis of the differences between the supporters of the unity of national sovereignty, like Robespierre, and those, like Sieyès, who called for the powers of the National Assembly to be tempered, and beyond the diverse conceptions of land ownership in the Jacobin and the Thermidor constitutions, what emerges in Koskenniemi's book is a tension between continuity and rupture that brings us back to the issue of the intellectual roots of the Revolution and its relationship with the *Ancien Régime*. This appears particularly clear with regards to war and the *ius publicum europaeum* which Koskenniemi sees as having been broken by the principle of fraternity and the obligation to export the revolution that are supposed to be in contrast with the principle of non-intervention and neutrality. On this point, however, it appears that other possible narratives exist that take into consideration the link between the Revolution and civil war.¹⁷

This connection appears clear in the work of Emer de Vattel, who, following Christian Wolff but also Grotius and Pufendorf, introduced a distinction between the natural law of nations and the law in force between the 'moratiores' nations, which largely coincides with the regulatory order existing among European nations. However, this order, which rejects unlimited war in favour of a 'war in due form', characterized by legality detached from real principles of justice, ultimately works thanks to a dual regulation that weds the possibility of imposing a different set of norms on those who do not respect the rules of the society of nations to the universality of natural law and the law of nations that underpin that society. This gives rise to the possibility of combining war in due form and unlimited war, as well as the principle of non-intervention and neutrality with that of an international solidarity linked to substantive discussion.

¹⁵ J. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity* (2001).

¹⁶ Koskenniemi, *supra* note 3, at 450.

¹⁷ See D. Armitage, *Civil Wars: A History in Ideas* (2017).

The importance of Vattel to French Revolutionary thought is well known, just as the famous decree of the National Convention of the 27 May 1794 not to treat British and Hannoverian soldiers in accordance with the conventions of the law on warfare¹⁸ is entirely coherent with the doctrine of the *droit des gens*. The dictate resonates perfectly with what Vattel had written on the legitimacy of treating the Savoyards captured during the Siege of Geneva as common criminals.¹⁹ It is therefore not surprising that the law of war and the law of nations influenced discussions on the fate of Louis XVI and that the position of Robespierre appears to have been in continuity with 18th-century ideas, in particular those of Beccaria on the death penalty and the right of war.²⁰

From this point of view, then, it seems that here, in interpreting the Revolution and its intellectual matrices, the decision to construct a book on the basis of ‘localization’, on the distinction between the knowledge and the institutions which, in the geographical contexts under discussion, give rise to different disciplines of law and politics and to different ‘communities of languages’ with their own syntax and specific grammar,²¹ ends up overshadowing what is now considered essential elements in the scientific literature, namely mediation, linguistic and cultural transfer and the migration of knowledges, which in different contexts certainly take on different meanings.

In this sense, the space missing from the picture painted by Koskenniemi is, surprisingly, that of the Swiss Confederation and the complex cantonal institutional realities, as well as the contribution that the *école romande* of natural law made to the law of nations. It seems that in the method based on the ‘community of languages’ there is a risk of reproducing national stereotypes which attract and reduce some essential elements and features. Rousseau was a Genevan and not a Frenchman and Vattel was a member of the Neuchâtel bourgeoisie and a subject of the King of Prussia: both came from a land which represented a crossroad of knowledges and cultures. After all, it is in fact the Council Chamber in the League of Nations building, erected in Geneva in the 1930s, that houses the famous fresco painted by José-Maria Sert in 1936, *La leçon de Salamanque*. It was the Swiss Federation that not only made a vital contribution to the development of the law of nations and of international law, but also participated extensively, albeit discreetly, in the colonial exploitation of the New World and the African territories,²² just as Genevans of the second half of the 18th century played various and essential roles in the French Revolution.

¹⁸ W. G. Grewe, *The Epochs of International Law* (2001), at 422–424; Edelstein, *supra* note 10, at 20.

¹⁹ E. de Vattel, *The Law of Nations* (2008), at 508.

²⁰ See M. Walzer, *Regicide and Revolution: Speeches at the Trial of Louis XVI* (1974); Costa, ‘Beccaria e la filosofia della pena’, in R. Davies and P. Tincani (eds), *Un fortunato libriccino: L’attualità di Cesare Beccaria* (2014) 33.

²¹ As also suggested by M. Scattola, *Das Naturrecht vor dem Naturrecht* (1999).

²² See Putschert, Falk and Lüthi, ‘Switzerland and Colonialism without Colonies: Reflections on the Status of Colonial Outsiders’, 18 *Interventions: International Journal of Postcolonial Studies* (2016) 286.