

Introduction

The Legal Imagination

This is not a history of international law. Instead, it is a history of the legal imagination as it operates in relationship to the use of power in contexts that we would today call international. In an earlier work, I made the point that “modern” international law arose from an effort by a group of European lawyers in the last third of the nineteenth century to spread liberal legislation across Europe and to civilise the colonies. Although many readers reacted with sympathy to that account, they also remained puzzled about how to think about the earlier times – “But what about Vitoria, Grotius and Vattel, theories of the just war and the Peace of Westphalia?” This book is an extended response to that question. It is a history of the ways in which ambitious men, mostly in Europe, used the legal vocabularies available to them in order to react to important events in the surrounding world during the five earlier centuries. The book begins in France at around the year 1300 when a number of well-placed lawyers began to use the idioms of the *Corpus iuris* to consolidate the authority of their king at home and towards foreign rulers. The chapters then move on to Spain, France, Britain and Germany to expound the ways in which subsequent generations of theologians, courtiers, professors, legal and political men employed in addition to Roman law many other legal vocabularies to address the expansion of authority beyond their domestic world. These included variants of natural or customary law, royal prerogative, *lex mercatoria*, individual rights and the just war, among others. Sometimes they legalised forms of speech familiar from religious, philosophical or political texts or had recourse to

Introduction

biology or physics, for example, when they addressed the monarch as the “head” with respect to a “body” of the nation or contemplated the techniques of the balance of power. Often they put these idioms together in larger wholes that they addressed as *ius naturae et gentium*, *Droit public de l’Europe* or *äusseres Staatsrecht*.

This book is a history of the legal imagination as it sought to capture actions or policies with consequences outside the domestic sphere during roughly the period 1300–1870. Owing to their “international” dimension, the events often involved considerations or experiences that were felt in some respects to be new and unfamiliar. Old ways of thinking seemed inadequate, domestic laws and traditional principles inappropriate. These new matters, or their very novelty, often had great political, economic and sometimes even spiritual importance. They challenged earlier preconceptions and attitudes. Who were the inhabitants of the New World whose existence had not previously been known – were they human at all, or humans of a different species? How to think about war between rival Christian princes, each claiming to fight for the right faith? What to do with respect to the spread of the trade in luxuries that accompanied the expansion of long-distance trade and undermined old religious moralities?

To produce answers to such questions, lawyers, theologians and political writers of different description employed old legal vocabularies in new and imaginative ways. I think of this imagining as *bricolage* – a term used by Claude Lévi-Strauss to describe the use of familiar materials scattered around by the indigenous scientist for novel purposes in order to bridge the gap between what is known and tested and what is new or otherwise hard to understand.¹ In a parallel way, well-situated lawyers, political actors and intellectuals employed familiar legal vocabularies lying around to construct responses to new problems in order to justify, stabilise or critique the uses of power. Although intellectual ambition was often involved, this work did not arise predominantly out of an intellectual interest. It was intended to produce an authoritative statement that would have effects with respect to the distribution of material and spiritual values. What and whose action was to be endorsed, and what and whose action rejected as illegal or unjust?

¹ Lévi-Strauss presents *bricolage* as a type of mythical thinking employed in concrete problem-solution where the *bricoleur* is “adept at performing a large number of diverse of tasks”, making do with “whatever is at hand”, *The Savage Mind* (The University of Chicago Press 1966), 16–22.

The Legal Imagination

That I have tried to produce close descriptions of the worlds of legal imagining in half a millennium has made this a long book. A lot of men and much detail traverse these chapters. They do so because I have wanted to give room for the variety of standpoints from which legal vocabularies and idioms emerge to address the world outside the domestic. Not all of my protagonists were lawyers. Some might even have felt insulted had anybody suggested as much. But they were united by their recourse to a legal vocabulary. Some had formal education in Roman law and acted as ministers, ambassadors or counsel to princes. Others were political men with humanist interests, theologians learning new ways to manage the sacrament of penance, colonial administrators worried about intervention from the metropolis or philosophers contemplating the external debt. Some were employed at courts or ministries, others at universities or trading companies. They may have composed their works as intellectuals at home or as merchants living abroad. Their imagination was fed by an almost limitless range of matters, from the justice of slavery to the drafting of diplomatic *acta*, from the rights of neutrality to the permissible interest rates in currency exchange.

None of this is quite as random as the previous remarks may seem to suggest. Any new imagining takes place within the frame of the possibilities offered by the vocabularies “lying around” when it commences. The frame is constituted in part of what the lawyer or political thinker learned during formal education, in part of the accumulated experience that forms the general sensibility of people in those kinds of positions, their consciousness of the world and of their place in it. Legal idioms communicate only part of that experience. Many other vocabularies – religious, scientific, political – complement them to provide the totality of materials from which a sensibility emerges and *bricolage* proceeds. These larger frames are often addressed by words such as “imperialism”, “colonialism”, “capitalism”, “liberalism”, “nationalism” and so on, words like the “universal” that aim to enlighten us about the trajectories through which the past has been turned into the present. Those words form a useful part of the lawyer’s and the historian’s craft. They synthesise elements of the past and make its multiple aspects stand for a limited set of ideas enabling us to orient our political intuitions and projects today. But they also act as epistemological obstacles, as Bachelard might have put it, blocking thinking and simplifying a varied and multiple reality into generalisations with unsustainable causal relations that produce a bad guide for

Introduction

future.² So I have largely (though not wholly) refrained from using such words. The world is a terribly unjust place and its injustices accumulate as parts of large historical trends. But I address those trends by staying as close as possible to the standpoints where people use legal idioms to imagine how to govern and what is just or unjust in the world outside what they think of as their everyday experience.

This is a history of the uses of the legal imagination in the past but also in the present. The ideas and events of the approximately half-millennium treated in this book are connected to the ways in which we think and act today as lawyers, activists and politicians, inhabitants of a world we imagine as ours. That continuity cannot be read as a single tradition. Different ways of imagining a law to be applied abroad or with respect to foreign peoples arose simultaneously at different places; they flourished and withered away in the manner that ways of speaking and thinking do. None of them ever enjoyed universal authority, few possessed much validity even across Europe. The salons of eighteenth-century Paris did not think highly of the thick volumes of natural law produced at German universities. Nor had Germans any sympathy towards the extension of British Admiralty jurisdiction to German property. However, many of the ways of imagining dealt with below left their mark in legal histories and continue to lie around ready for employment by subsequent generations of legal *bricoleurs*. They are part of the historical baggage that limits what it is possible to imagine in a persuasive fashion today.

Legal Imagination in Action

Legal imagination operates in context. Five contextual considerations lay out the frame of the work of legal thinking and acting in the chapters that follow. First, legal work takes place in the context of persuasion. Law is not about the truth of this or that matter but about persuading audiences – usually audiences in authoritative positions – to act in some particular way. Legal persuasion takes place in the context of controversy: out of some number of possible ways of acting law is used to justify one against others. Imagination is needed to find the winning justification, to hit at the right vocabulary. The less routine the subject, the more widely must imagination travel to find a good argument.

² Gaston Bachelard, *The Formation of the Scientific Mind* (Mary McAllester Jones intr. & trans., Manchester, Clinamen Press 2002), 24–32.

Legal Imagination in Action

Persuasion may be directed towards influencing a court, a diplomatic negotiation or a parliamentary debate. But it may equally well operate as *imagined* adversity, a pedagogical lesson or a propaganda tract to consolidate the ranks of those who agree and to demonstrate the mistakes of those who do not. Law's persuasive power differs in different contexts, but it is striking to notice how widely not only lawyers but theologians, political philosophers and government advisors of various sorts have thought it important to have a legal argument available to persuade their audiences. One of the themes that pass through these chapters has to do about the way legal authority migrates between different disciplines. But whoever it is that is speaking must have regard to their audience in order to sound authoritative. What idiom should I use to defend my claim or attack that of my adversary? How does my audience expect me to argue?

Second, legal vocabularies operate in institutional environments. For Vitoria, that was the University of Salamanca where his teaching was part of the Counter-Reformation effort to strengthen the Church's hold on Christian consciences. While Grotius' early writings were about persuading the Amsterdam Admiralty Court, his later work, composed as a refugee in Paris, participated in a Europe-wide debate on just government at a violent time. Rousseau and Kant used the legal idiom to attack the political institutions of the old regime and to undermine its philosophical justifications while J. H. G. von Justi's prolific works were both a critical commentary on the teaching of natural law at German universities and prefaces to job applications with European princes. Many of the men considered below wrote as university professors to academic audiences, while others acted as courtiers, political or legal activists, philosophers or pamphleteers. Some possessed experience in domestic or colonial government, or wrote to influence it. Many had the ambition to assist those in power, but some were critical, though they had to bear in mind the narrow limits within which critique was tolerated and often veiled it in irony or sarcasm. Some were staunch advocates of pre-emptive military action against foreseeable enemies, others favoured a general turn to pacific policies, trade and diplomacy. Some combined work for trade companies with advocacy on commerce and colonialism, others wrote against large monopolies and in favour of expanding free trade, even giving up colonies as a path for prosperity. Many put their opinions in the form of pragmatic compromises and humanist models of virtuous statesmanship. It would be wrong to say that a person's position determines their views. But interest in these chapters is less in what people

Introduction

may have believed than how their imagination was confined within the conventions of authoritative speech and writing.

Third, imagination does not work through deductive inferences or algorithms. When Grotius wrote of law as a moral science or Pufendorf suggested that “moral entities” operate like natural facts, they were tapping into scientific vocabularies at moments when those were deemed especially powerful. Legal imagination may well present itself as having to do with *Wissenschaft* where it addresses an elite trained to appreciate what academics do. In other contexts, such an effort may seem odd or even laughable. It may often be more useful to address the moral or even spiritual worlds of one’s audience. To invoke the rule of law in the colonies or the *Rechtsstaat* to deal with class conflict at home are political projects, not scientific hypotheses. As *bricolage*, they employ materials that are felt likely to help in convincing those to whom one speaks. As will become obvious, the audiences of legal argument are most receptive to language that is familiar from the domestic world even when what is being addressed is an activity taking place abroad. When the settlers in the British American colonies appealed to the ancient rights of Englishmen rather than universal rights of humanity, they knew how to address an audience in Westminster. With an audience of foreigners, this is unlikely to have the same effect. Las Casas reported that he did not know whether to laugh or cry when he learned about the *Requerimiento* that was supposed to inform the native American peoples of their legal position with respect to Spain. The materials “lying around” usually emerge from the domestic context and experience. Only with a truly international elite – for example one formed in Roman law or with experience in trade or diplomacy – may something like a *ius gentium* or “public law of Europe” appear authoritative. It is also often useful to distinguish arguments in routine problems from those that address the very frame within which routine takes place. In routine situations, legal *bricolage* may turn to formal materials such as treaties, customary laws, domestic analogies, judicial precedents. In diplomatic contacts between Europeans or within prize courts, not much imagination is needed to find the arguments that are persuasive, although how to argue still requires interpretative skill. But in non-routine situations such as colonial encounters or domestic upheavals, imagination may have to expand in space and time, inviting a return to basic notions about Christianity, *decorum*, state of nature, or civilisation to give the appropriate frame within which to set up an argumentative hierarchy for future routines.

Legal Imagination in Action

Fourth, and relatedly, legal imagining takes place in a normatively indeterminate terrain where out of binary choices it seeks to construct a hierarchy most convincing to its intended audience. The available mass of materials needs to be interpreted in a way that avoids the most obvious pitfalls while pointing to what appears as a reasonable and realistic way to act. The success of Emer de Vattel's *Droit des gens* depended greatly on the author's ability to combine older mirror-of-princes standpoint with vocabularies from more recent natural law in a compromise he called "voluntary law", situated between law that was fully rational and abstract on the one hand and law that was merely contingent and voluntary on the other.³ The result avoided ascending to the high heaven of humankind united by reason while not automatically subordinated to state policy either. In this way, he was following what those who had employed the idiom of *ius gentium* had always been doing. As we shall see, what unites the bewildering variety of meanings projected to that expression is that it denoted something "in between", not quite as morally rigorous as the divinely originated provisions of natural law, nor quite as dependent on the shifting priorities of princely policy as contract or treaty. While theologians might imagine it in a descending way as pragmatic modifications of the law handed to humans at creation in order to fit life among sinners, jurists might develop it into in an ascending way as a kind of proto-sociology indicating what was natural for historically developed human communities. Despite their different starting-points, Vitoria and Adam Smith might find themselves at the same terminus.

Fifth, my use of the term "legal imagination" combines elements of what have sometimes been discussed as legal culture, legal ideology or legal consciousness. But as in my previous work, I have refrained from associating it definitely with such technical terms. Contexts of legal speech are not always, perhaps only rarely, such that it would be appropriate to regard them as "legal". Theologians and merchants, poets and philosophers, medical doctors and economists may exercise legal imagination, and have often done so. From whom authoritative institutions take their legal advice reflects variations in the cultures, ideologies and forms of consciousness that legal argument enters only as a more or less welcome guest. It may then need to adapt itself so that the resulting hybrids (e.g. law in theology, law in *raison d'état*) may not at

³ Emer de Vattel, *The Law of Nations* (Indianapolis, Liberty Fund 2008 [1758]), Preface, 15–17.

Introduction

all support the priorities that lawyers in that environment typically have. Legalism is often felt inappropriate when authority is exercised abroad. One of the narrative strands woven into these chapters has to do precisely with the struggle for authority among different types of knowledge in Western societies. What Kant called the contest of the faculties was never merely about intellectual predominance but involved prioritising between values and distributive choices. As the idiom of natural law transforms in the course of the half millennium below, it will lend its support to cultures, ideologies and forms of consciousness where it is alternatively theology, history, diplomacy, philosophy, *raison d'état* or economic analysis that will frame the moment's persuasive speech. What is of interest here is the way biases emerge during such transformations, with some interests upheld, others pushed aside.

Legal imagination is a form of institutional action that takes place in the context of controversy through the authoritative use of language. Real stakes are involved to those employing such language but even more to people who are expected to yield to the authority of the one who speaks. This book is inspired by the effort, not to say an obsession, to think about law in the context of power, namely the power of law as language. Throughout this work, I will survey the twists and turns of legal language as it traverses the lives and practices of European men involved in the government of matters situated outside the purely domestic world. In fact one of the themes addressed by legal language in its search for authority is that of drawing the line between the domestic and the foreign. On which side a matter falls will then be decisive for how it is treated. Another theme has to do with boundary-drawing inside the law itself. There is no more important convention in legal speech than the separation between public and private. That conventional analysis deals almost exclusively with what it imagines as “public” power, the authority of the sovereign, while liberating that which it labels “private” to take its natural course somewhere else is one of the most consequential choices made in the course of this history. The relationship of sovereignty and property is a recurring theme in these chapters.

Imagining Starts at Home

Persuasive legal *bricolage* is about finding a powerful justification for acting or taking decision in some particular way. The conceptual world that opens up when the need arises for addressing the world outside the

Imagining Starts at Home

domestic includes notions such as war, sovereignty, monarch, diplomat, jurisdiction, prerogative, treaty and so on, words that carry their international meaning on their sleeve. But it also includes words such as property, contract, company, slave, family, territory, succession, to which it is common that although we are familiar with them in the domestic legal order they are equally applicable and constantly applied in order to understand and operate beyond it. This book makes a lot of reference to such notions. It is assumed here that an important part of the way power is exercised internationally depends on notions whose primary reference is at home. This includes also the notion of *ius gentium* and cognate civil law or natural law expressions that are almost always understood from the perspective of the domestic legal system and domestic legal training. The frame within which a Spaniard or a Frenchman thinks of the law abroad comes from that person's training in Spain or France. What they imagine as "law of nations" is what Spaniards or Frenchmen imagine as such. The chapters in this book have therefore been organised with the assumption that *bricolage* begins at home. This is also why I will nowhere in this book engage in the interminable discussions about universalism and particularism. The two cannot be separated: we imagine the universal from our particular standpoint – but we do it by concepts and categories that define to us what we think of as "our standpoint" and are in that sense exterior to it. *Bricolage* begins at European locations and then extends to "the uttermost parts of the earth".

Here is how this book has been organised. Chapter 1 focuses on men educated in the thirteenth century in law faculties in Bologna, Montpellier or Orleans where they learned civil law expressions like *dominium* and *ius gentium* that opened the door to high positions in Paris where they supported their king against his domestic and foreign rivals. At other locations in the French capital, Thomas Aquinas employed those very same idioms to address the question of justified authority in human society generally. His texts were taken up two centuries later, as discussed in Chapter 2, by Spanish Dominican theologians who would employ them to discuss Spanish authority in the New World and to address the concerns of conscience opened up by the global expansion of the commercial ethic following the exploitation of New World resources. Chapters 3 and 4 discuss, respectively, the writings of the two Protestant lawyers, Alberico Gentili and Hugo Grotius, as they tried to detach legal speech from the hands of the theologians while opposing the expansion of a countervailing idiom of

Introduction

advice to rulers addressed as *raison d'état*. Explaining obedience to rules as a specifically human quality as against following one's interests would long remain a key theme for defending law as against other idioms for justifying authority.

Chapters 5–7 trace the ups and downs of legal authority in France and the French colonial world up to the Haitian Revolution in 1793–1804. Here law first integrated techniques of the reason of state in what came to be called the *Droit public de l'Europe* and then, in the run-up to the Revolution, imagined itself as a science of the natural and essential order of all political communities. There was a world of difference, however, between what was imagined by the intellectuals and how the administration of an absolutist ruler viewed the roles of the law and lawyers. From the influence law had in ending the religious wars it descended into quite a secondary aspect of royal rule in the seventeenth century. It was then reinvented in the eighteenth century as part of the call for abolishing feudal privileges and creating a world of equality and rights among Frenchmen. Through most of this time, the legal status of Caribbean slavery was untouched by developments in metropolitan France.

Chapters 8–10 begin by tracing the rivalry between the idioms of the common law and the royal prerogative during British commercial and colonial expansion. The narrative about the rise of a British Empire is a story of the cooption of royal sovereignty by the property rights of landed elites and owners of trading companies and the paradoxical creation of sovereignty out of the property claims of settlers in the Atlantic colonies. On the intellectual side, the French and the British narratives involve a partial conversion in the late eighteenth century of the language of natural law into that of political economy. That development was inspired by the crown's reliance on private wealth and private actors who expected commercial privileges and a relatively free hand in the colonial world, but also sometimes demanded extended opportunities to trade across the world. Britain's free trade empire was based on the combination of ideas about protection and the rule of law that were less argued in terms of the law of nations than as rules of a kind of civilisational propriety the contents of which were imagined by British politicians and colonial officers themselves.

A parallel development unfolds in Chapters 11 and 12, which visit the transformations of German academic vocabulary of *ius naturae et gentium* from a Protestant technique of advice to princes to a rationalist philosophy of statehood on the one hand and an empirical science of