Introduction

History, Politics, Law

Thinking through the International

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It would be difficult to find a major figure in the history of European political thought who would not have attempted to say something about how authority emerges, or is justified and critiqued, in the world beyond the single polity. Quite frequently, that effort would have involved some idea about a legal order, or at least a set of rules or regularities applicable in that world. Thomas Hobbes was neither the first nor the last major thinker who believed that the 'international' realm was characterised by the independence of states existing 'in the state and posture of gladiators', thus apparently denying that legal rules or practices or legal thinking could have much relevance therein. Yet others believed, as Immanuel Kant did, that without a constitutional vocabulary not much that was meaningful could be said about the human pursuit of freedom, and that silence about the latter would not only constitute a moral failure but an intellectual and perhaps political mistake. For a long time, the idiom of natural law claimed to offer a universally valid frame for thinking about the nature of the political, as well as providing authority for lawyers' speculations about the rules and principles governing the conduct of individuals and corporate bodies wherever they might move. The name of the relevant discipline at German universities from the late seventeenth century onwards – *ius naturae et gentium*, the law of nature and of nations – revealed the full scope of its ambition. That discipline may have died away (although that is a debatable proposition) but any political thinking worth its salt will today (perhaps especially in the twenty-first century) aim to say something about how authority emerges, is maintained or critiqued not only within but also outside the single state. The world of 'nations' or even 'humanity' is established as an important theme of political and legal speculation.

Of course, the image of 'law' among political thinkers and historians has varied as greatly as has the view of 'politics' or the 'political' among lawyers and legal historians. Perhaps typically in an academic context, until recently,

specialists have not been overly keen to speak with each other about such matters. Nevertheless, not only Hobbes and Kant but many other European intellectuals have found their way into textbooks and specialist treatments by both historians of political thought and legal historians, even if the discussion of such figures has varied quite significantly. In more recent times, interest in the *international* dimension of history of political thought has converged with a *historical* turn among international lawyers. Both groups have found themselves perusing the same archive and asking intersecting questions.

But historians of international law and political thought have not met each other only or even predominantly when contemplating the large figures of European political philosophy such as Hobbes or Kant. Indeed, few of them would think that either law or politics derives from their kind of abstract thinking, or can be captured only or even predominantly by examining it. They would also likely agree that their shared efforts to understand and describe a *global* history of international law or political thought would make concentration on such European figures quite problematic. As the methodological chapters in this volume discuss, and the substantive chapters suggest, points of contact exist in moving the gaze from such figures to the development of international rules or institutions; or to the legal and governmental practices of diplomats, merchants and colonial officers; or to the position of women, the family and household. Both lawyers and historians of political thought have been interested in the genealogies of concepts such as 'state', 'empire', 'company', the development and usefulness of divisions between the 'public' and the 'private', as well as the construction of networks of global contacts across cultural divides.

This is not to say that historians of political thought and of international law necessarily see eye to eye on those topics, share similar interests and knowledge – or that their encounters have always been unproblematic. Each has paradigms and topics of especial interest that the other may sometimes find hard to understand. While lawyers may sometimes have difficulty in understanding the subtleties that distinguish the interpretations that historians produce from their materials, historians may often find alien the normative urge frequently driving the writings of international lawyers. One source of these differences lies in the way the theory–practice distinction operates in the two fields: the relationship of history of political thought to present-day 'politics' is not identical to the way international legal historians view their relationship to present-day law. But there are differences within the two fields as well as between them. In particular, Anne Orford and others have contested the terms of the 'turn to history' in international law, arguing that a commitment to contextualist intellectual history necessarily stifles engagement with

the modalities of law itself, and thus the potential of critical histories to intervene effectively in the present. Similar debates over history and the present equally characterise history of political thought and intellectual history more broadly.

Our motivation for producing this collection has been to enable authors in both law and history to think about what it is that unites and differentiates their respective pursuits. There is no point in seeking to reduce either perspective to the other. But there may be reason to have a clearer view of what the other seeks to accomplish, bearing in mind that neither discipline is a homogeneous totality but each a cluster of varying approaches, policies and points of substantive interest (and that conceptual frames and expectations of good craftsmanship within each discipline are themselves historical categories, subjected to critical analysis within those disciplines). Accordingly, the volume opens with a series of chapters which reflect on how historians and lawyers approach the past. The title of this Part I, 'Methods, Approaches and Encounters', reflects the fact that debates to which these chapters contribute have sometimes been characterised as disputes over the 'method' proper to a particular endeavour – such as writing the history of international law. However, it is not clear that 'method' captures the range and complexity of the issues at stake, nor that participants in these debates are in fact engaged in the same endeavour. What connects these chapters is a register of argument: an explicitness in addressing, if not 'method', then strategy or style, or politics, of scholarship. The chapters offer accounts of what it is we try to do, as historians or lawyers – the subject-position being sometimes itself a mode of argument – and how we go about it.

Brett (Chapter 1) takes up the focus on context which has been central to debates between historians of political thought and international law – both within and beyond this collection – and among historians. However, she positions the methodology of 'meaning in context' within a broader conception of historiography as story-making, and uses that conception to argue against the reduction of history of political thought to the bare principle of contextualism, while at the same time defending its capacity as history to engage the present through the creative deployment of that same principle. Within the conceptual architecture of speech acts, and the distinctive tension between speaker and language that it involves, she illuminates the methodological and simultaneously political choices that historians must make to the extent that they study political as opposed to any other kind of thought. She goes on to sketch two alternative pathways of development within the history of political thought, which might be abbreviated as 'realism' and 'discourse', within which an encounter with historians of international

law might fruitfully take place, expanding the relationship between history and politics into a triadic co-construction of history, politics and law. Finally, pointing to what she calls the 'classic' history of political thought of the later twentieth century, she makes the case for the existing historiographical creativity of the encounter with law, and suggests its promise for future history of political thought in an international and a global frame.

Where Brett looks across from history of political thought to international law, Koskenniemi (Chapter 2) examines the ubiquitous encounter between international law and history from the inside of international law itself. He opens by considering how law has always used history, both in its practical operations and in reflecting on itself, repositioning the question of 'context' within a complex and self-generative back and forth that resists schematic (or indeed polemical) generalisation. His contribution focuses on the variability of law's uses of history and the difficulty of inserting them in any closely crafted set of methodological principles. Sometimes history acts as a conservative force, he suggests, and sometimes, especially in some recent texts, as an instrument of critique. He shows the varying ways in which history is invoked in the practice of international tribunals, and then moves on to discuss some of the ways in which international lawyers have used history to define the contours of the discipline itself, including through narratives of origin. By refining the self-understanding and self-constitution of international law, through different periodisations and by focusing attention on alternatively public and private forms of authority, history of international law may contribute to the role that international law itself plays in the world.

In his contribution, Kennedy (Chapter 3) notes the affinities between critical international lawyers such as Orford, and earlier 'law in society' and 'law in context' scholarship, viewing present debates about the interaction between law and history of political thought as merely one iteration of arguments about the political implications of interdisciplinary approaches to law. However, he focuses almost entirely on the enterprise of history from within a critical international legal tradition, referring to a range of scholars who have mobilised history to critique and in the process critiqued history itself. Working himself within that tradition, Kennedy's use of 'context' dissolves any distinction between the 'context' of a past debate/text and the 'context' of present authorship. As he puts it, 'context-making is performative: it works when it generates a "context effect", changing what is known in ways that alter who can do what'. In a world of 'rule by articulation', Kennedy emphasises authorship as action – the writing or narration or speaking of what we believe to be true, rather than the recovery of something which we may not yet master. This is a task which cannot be guided by discipline-specific

conventions, but only by an explicitness of strategy that allows one to assess whether one has 'hit the target', and to take responsibility for the consequences of one's intellectual interventions.

Simpson's chapter, by contrast, is oriented to a moment 'after method'. In one sense this is an effort to imagine a moment in which insights from explicit methodological debates would be absorbed and perhaps transcended (Chapter 4). In this sense, he assesses the effects of these insights, and what they might still offer. Simpson detects in the new attention to method a disruption of established chronologies, 'centurised' segmentations, and teleological visions of legal change. Like Kennedy, he sees an interrogation of anachronism and context in the writing of international legal history, and relatedly a calling into question of the notion of 'greatness': great men, great powers and their place in the unfolding and writing of history. This scrutiny of greatness needs to be extended, he suggests, beyond the obvious 'realist' targets. Many accounts of international law, of varying political inflections, characterise its history as one of accretion, but such accounts may implicitly entrench a view of international law as merely a *response* to 'the instincts of Great Powers or the pathologies of Great Men'. For all this, however, Simpson also calls into question the adequacy of 'method' to capture the breadth of current debates. There might be, he suggests, other matters at stake, although these are difficult to define – 'writerly ethics', 'style', a 'literary' rather than a 'technical' sensibility which might recover 'history in all its strangeness'.

Reading these chapters, and the debates they chart, one has the impression that a moment 'after method' is not quite here yet. The chapters acknowledge that there are questions of intellectual procedure which are, at least partially, constitutive of scholarly identity and integrity, and on which disagreements accordingly remain sharp and consequential. The question of 'context' is one such. 'Context', 'contextualism' and its variants have become not only markers of particular positions, but contested ground. Prima facie, it would seem that it is precisely in the most disputed aspects of this encounter that there are the greatest prospects for sustained conversation: 'context' invites exactly the close attention to particular characteristics of legal argument and legal *habitus* that is advocated, albeit in different ways, by both critical international lawyers and historians. But the difficulty is that contextualisation appears to offer a secure basis for critique only at the cost of consigning meaning to the past, in a kind of museum function that domesticates or controls its objects in a way that is challenged by activists the world over (don't just put a contextualising notice by a statue: take it down, change the space itself). In response, Brett argues that history is a form of narrative art that necessarily engages the present, and that history of political thought, specifically, inevitably doubles up past and

present political meaning. In this she shares with the other chapters in Part I, and especially Kennedy, an emphasis on the politics of history – not only in the sense that historical choices involve political commitments, although they do, but also in the sense that authorship itself is a form of political action.

Kennedy goes beyond Brett in the way that he implicates the context of the past in the present. But both see the inevitable reflexivity of historical authorship not as a confusion or impasse that needs to be straightened out by methodology, but as a form of historical intervention or insertion of the author into the action. Context, then, does not cease to be important, but as an issue it becomes less about methodology and more about historiography, about the choices that historians either of political thought or of international law make when they use writing to draw the line between past and present, as Brett puts it. Simpson's chapter calls attention to the poetics of history as a site of 'contestation and reimagination', using the work of Hayden White as a prompt to explore the complex interface between historical and legal poetics. Here, an essentially postmodernist commitment to the liberational possibilities of writing again displaces the question of method, and, as with Kennedy, this is connected to an emphasis on the question of authorial comportment, not merely scholarly discipline. A less definable sensibility of style responds more adequately to the estrangement which is both an ethical and a cognitive self-relation to the past.

Brett, Kennedy and Simpson all address history as a form of writing, a 'writerly' engagement with the past. Yet Koskenniemi, in his opening snippets of remembered conversation, calls attention from the outset to the orality of history in the context of law, and it is again implicit in his subsequent treatment of courts as a primary site of both history and law. There are some commonalities here with Brett's sense of narrative, of the way in which the stories we tell ourselves about the past become the past, and, in Koskenniemi's contribution, become law. And yet orality complicates the emphasis on writing as the medium in which the line between past and present is drawn. Koskenniemi begins *in medias res*, in history as time that is passing, fast, as we speak (no time for novels). In parallel, 'history' as it figures in his account of practice tracks normal spoken usage in shifting between what happened, what we remember, what we self-consciously or formally choose to recall (perhaps in a particular persona, such as a judge), and only finally something that we write. The complicated mutual dynamic that Koskenniemi identifies between history in the making and law in the making both invokes and puts into question all these senses simultaneously.

Nevertheless, his emphasis on practice, defying methodological strictures, aligns his account with the other chapters in Part I. All of them privilege

history as something that we are *in* above something that we write *about*. It is through this lens that they address a theme that will run throughout the volume, that of 'realism' as a paradigm both of politics and of international relations and international law. Realism (in its different forms) offers one very clear way of joining up history, politics and law in the kind of 'triadic co-construction' identified by Brett. The way in which it constructs agency and power supplies an apparently compelling picture both of politics, as political actors seek strategically to increase their power, and of law, as either an instrument in the pursuit of power or the restrainer of it (in the heroic vision of international law that Simpson identifies as perpetuating the realist optic). The historiographical consequence is to position history as a form of critical reportage, as Brett suggests in her treatment of history of political thought. Implicitly, the historian is not herself one of the 'Great Powers' or the 'Great Men', but she *sees* what they are up to on the chessboard of the world, in a photographic rather than writerly encounter with the past. As Koskenniemi notes, twentieth-century histories of international law have often associated it with the emergence, expansion and effects of modern statehood and state policy, taking wars, diplomacy and peace-making as central threads. This approach, reflecting the realist vision of politics, is to take a particular view of what international law is, where it comes from, and how it can be known, which, despite its contentiousness, is rarely made express.

Earlier and contrasting narratives had situated international law in broad trajectories of progress and enlightenment, often with a strong commitment to cosmopolitan progress, and depicted sovereignty as an obstacle to the attainment of international peace and solidarity. Although the visual metaphor of enlightenment may seem the naive counterpart to the critical trope of exposure, these histories did respond to the intuition that law is not just an effect of state power – a position more recently associated with constructivist views about the power of law as discourse, and of language as structuring the international world. In broad terms, this contrast within international law responds to the way in which Brett diagnoses the diverging possibilities inherent in the 'conceptual architecture' of speech act theory deployed as a method for history of political thought. In her handling, the move from the pole of the actor towards the pole of language demands a different historiographical voice and potentially a different historiographical form, one in which the historian is not positioned as an external reporter on language games but is herself, partially but not entirely, within the game. That sense of split-level positioning is paralleled in Simpson's appeal to meta-history, while Kennedy moves to position the historical voice more fully within the game and thus to concentrate on the performative nature of the critical legal historian's speech act.

That negotiation between inside and outside discourse, inside and outside the history that one writes, is paralleled in the history of international law and in international law itself. Studies 'internal' to law have a tendency to collapse into something other than legal history – into normative or jurisprudential analyses, bound up with the particular ways in which law incorporates and narrates history. Studies of law that are 'external' in the sense of pulling to the fore law as an instrument of powerful actors tend likewise to make the specifically legal content of the analysis disappear by emphasising the strategic and political aspects of past recourse to law. It is hard to be both inside and outside at the same time, to take the legal frame as given and to be critical of the frame itself. The chapters in Part I suggest that it is here that the real struggle over 'context' lies. As Koskenniemi suggests, however, the legal historian's stance vis-à-vis the law of the present is further complicated by the sociology of the field. As international law has expanded, the formerly tight relation between academia and the profession has loosened. Lawyers tend to be acutely conscious of law as responding to something outside law, to political, economic or technological change. But precisely because the professor of international law is no longer expected to belong to the same elite from which foreign office professionals are chosen, their simultaneously authorial and legal self-positioning is more of a choice. Necessarily familiar with the 'internal' face of law, they may choose to write from an external position – taking roughly the stance of some other social scientist – or to maintain at least a foothold within, with a claim that their account of the law's past can still sound directly in the law of today. The stakes and potential of each strategy are contingent, to be negotiated.

Behind all the chapters in Part I is a powerful sense of change – changing time and changing space – with which both history and law must grapple, and in the process confront the politics of how they do so. To capture this sense of movement, Part II of this collection is called 'Thinking through the International', with the accent on *through*. The chapters, which offer a cross-section of current work by historians and lawyers (and others who might not position themselves so clearly as either), do not speak directly to the same historical phenomena, nor necessarily to any shared conception of the international. They span diverse areas, from the twenty-first-century legal ordering of the oceans to early-modern understandings of gender in the formation of the state. Authors are not necessarily engaged in the same project or asking the same questions. But the juxtaposition of chapters illustrates the extent to which authors of different disciplinary orientations are grappling with some of the same themes, concepts or boundaries. Engaging with such a rich cross-section of work has the effect of unsettling referents and rendering

disciplinary footings less sure. This disorientation will not drive us all to the *same* ground, or the same view from a given point – but might render our disparate grounds and viewpoints more contingent, and create new possibilities for interdisciplinary conversation. In this spirit, 'the international' of our title is not a fixed reference, but represents a space of conceptual movement, simultaneously in history, politics and law.

Bearing in mind the complex dynamics of that three-way relationship, and the way in which boundaries on all levels are called into question in the process, the chapters are arranged under themes of potential dialogue ('Law and Constructions of the Political'; 'Empires, States and Nations'; 'Institutions and Persons'; 'Economics and Innovation'; and 'Gender') rather than formal areas of study. Both the thematic arrangement and the distribution of 'historians' and 'lawyers' in relation to the themes have shifted since the genesis of this volume. The chapters might equally have been arranged otherwise, to privilege different interactions and affinities, and we anticipate that readers will in turn see possible new interconnections of their own. In an attempt to provoke this – but not prescribe any particular reading – we offer below a brief outline of each chapter.

The first pair of chapters tackles a central concern of the whole volume, 'Law and Constructions of the Political' (Chapters 5 and 6), through the work of Carl Schmitt. Schmitt has been the subject of extensive commentary in part because of his idiosyncrasy, so he does not here appear as a representative figure. However, his work has a canonical importance for the law–politics relation, and for the tradition of 'realist' political thought. This means that it is revealing not only as a resource in its own right, but as a foil against which others articulate disciplinary or political positions: a dual significance probed in these chapters. Von Bogdandy and Hussain (Chapter 5) note the importance of Schmitt's legal training in sharpening his systematic rigour and polemic; and in attracting his attention to the (legal) decision, and by extension the exception (concepts which would be crucial to much of his thought). They trace the grand lines of Schmitt's theorisation of the political, the state and the international, and its contribution to law. Smeltzer and Kelly in Chapter 6 probe one manifestation of Schmitt's broader commitments, namely his theorisation of the Rhineland occupation, and thus offer a fine-grained sense of the tenor of debates between Schmitt and his contemporaries. Both chapters deal with Schmitt's own treatment of law and the political, but also the stakes for Schmitt, and us, of positioning him as jurist or politician.

Rivalrous claims to genuinely juridical thought were an important part of the confrontation between Schmitt and interwar liberals, as each struggled for authority and their own vision of the law in it. Schmitt engaged in a

disingenuous (re)positioning of his own after the Second World War, casting his own work as mere academic adventurism, hijacked by the practitioners of *real* politics, and thus insusceptible to criminal prosecution. The implications of the law–politics divide still resonate today, in the reception of Schmitt's thought. For von Bogdandy and Hussain, it is the particular intellectual context of the German legal academy which helped produce Schmitt as a thinker. Law and the legal academy proved highly generative of a strand of political thought which was, in turn, corrosive to law as a container for, or bulwark against, the political. For Smeltzer and Kelly (Chapter 6), too, it matters that we understand Schmitt as a jurist – but for different reasons. We must, they suggest, see him as a 'jurist [who] wanted to win his cases, and . . . curated the law and its interpretation in political contexts'. This, coupled with Schmitt's own argument for the contingency of the historical situation, ought to inoculate us against reading Schmitt in the wrong way, transposing his work to timeless models of agonistic pluralism or spatial politics.

The next thematic pairing, 'Empires, States and Nations', expands reflection on the importance of the state as a conceptual frame, in and through the law of nations, for our understanding of past, present and future political order. Pitts (Chapter 7) works within the 'law of nations' as a broad language of political and moral reflection, particularly prior to the professionalisation of international law in the late nineteenth century. She highlights the role of canonical authors, particularly Vattel, in popularising a conception of nations, or states (he used the terms interchangeably) as moral communities of equal status. Although some revisionist historians of international law have understood this as accommodating pluralism, Pitts asks whether Vattel's contribution – understood not as aspiration but description – actually concealed from view the persistence of empire. Hunter, too (Chapter 8), is concerned with the historical and political implications of our (mis)understanding of the state form, particularly as it manifests itself in Africa. Like Pitts, she objects to the way in which a focus on states, and the road to their creation, 'obscures a much messier historical reality in which the jurisdiction of states has always coexisted with other sorts of authority'. She takes aim in particular at dominant popular and scholarly narratives in which the state form was imposed on a decolonising African continent from outside. Characterisations of this kind are, she notes, made in the service of a critical project, namely a search for alternative visions which failed to flourish at independence. But they reify a particular normative model of statehood, and occlude the range and intensity of local debates about future political ordering.

Hunter emphasises that the post-colonial construction of the state unfolded in relation to other sites of politics. The prospect of regional federation and