LAW OF NATIONS AND THE "CONFLICT OF THE FACULTIES"

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(Final version published in 8 *History of the Present: Law at the Intersection of Theory and History* [Spring 2018], 4-28)

Histories of international law rarely engage with what experts – teachers and practitioners – feel as the existential insecurity of the field. Is there such a thing as "international law"? What sort of thing is it? Engaging with the "deniers" is a traditional textbook *topos* and every international lawyer knows half-dozen ways to defend the existence or relevance of the field, as well as some rejoinders to those responses. But so far no debate has been triggered on what the subject-matter of "history of international law" might be. True, chronological problems are sometimes raised: is it possible to speak of "international law" with respect to the practices of warfare or diplomatic mores of Western Antiquity, for example? Was there "international law" before 1648, or before there were specialists addressing themselves as "international lawyers" in the late 19th century? But questions such as whether the writings of Immanuel Kant on perpetual peace belong to the history of international law owing to their *substance* or the context in which they were written are rarely posed. Basic histories also reference the teachings of the Dominican theologian Francisco Vitoria at the University of Salamanca in the 16th century on the question of the conquest of the Indies – despite the fact that his lectures were part of the training of aspiring clerics on the management of the sacrament of penance and even as that he himself pointed out that "since this is a case of conscience, it is the business of the priests, that is to say the Church, to pass sentence upon it".[1] Why should lawyers care?

A positive response to the question "are texts composed by philosophers and theologians part of international law?" would seem to have a surprising repercussion. If what theologians, for example, have said or written *belongs* to

[1] Vitoria 'On the American Indians', in *Political Writings*, (A Pagden & J Lawrance eds., 1991), 238.

(the history of) international law, does this mean that contemporary teachings of a bishop, an imam or a rabbi, or the massive religious literatures on peace or justice, for example, are in some sense "part of international law"? If not, what is the criterion that includes (some) past but (apparently) no present theologians? And what about utterances by non-*Christian* theologians? While some have no problem in classifying international law as a Christian vocabulary, others might insist that it transcends its particular religious contexts and gives us at least glimpses of universal truth. Other problems of historical interpretation emerge. What is it that makes something "philosophical", "theological" or "legal" in the first place, the ("subjective") view of the speaker or the ("objective") context where an utterance appears? A circle looms: because access to *real* subjective meaning is closed, it is common to derive this from the (objective) context – but when asked how to justify the contextual interpretation, we are tempted to refer back to the understandings of the speaking subjects themselves: Vitoria *intended his words to sound beyond the classroom.*

To avoid this circularity, one might want to present a larger thesis about the supra-contextual significance of some interpretative frame: never mind that Vitoria was a theologian concerned over penance and absolution. His utterances were part of the process of justifying Spanish imperial expansion and "justifying imperial expansion" is something over which international law ought to be concerned. This would be a good response, but also one that would open up dauntingly expansive and politically controversial avenues. The choice of the right frame can only be made on the basis of present-day understandings and preferences. It is *our* world that makes us suggest that "imperial expansion" should (or should not) be used to illuminate international law's past. What about "humanitarianism" or "globalization" as competing frames? No doubt, the choice of the frame depends on one's political inclinations. [2]

[2] For the debate about "contextualism", see Anne Orford, 'The Past as Law of History? In Emmanuelle Jouannet, Hélène Ruiz-Fabri, Mark Toufavuyan, *International Law and New Approaches to the Third World* (2014),

I suppose most historians include in their histories of international law texts that contain such idioms as *ius gentium*, discuss the theme of *Droit public de l'Europe,* or make points about the justice of war or treaty relations between nations. This, I suspect, is how Vitoria and Kant have found their way into the curriculum. But many theologians, philosophers, civil and canon lawyers, politicians and diplomats have addressed those themes. Machiavelli's lawyer-friend Francisco Guicciardini as well the ex-Jesuit Giovanni Botero, for example, wrote extensively and concretely on such matters. Yet they are not usually included. Perhaps the choices emanate from an understanding of the former as more "significant" than the latter. Again, large questions arise about how choices about "significance" operate. Lawyers are likely to believe that Vitoria and Kant were "good" in some sense that Guicciardini and Botero were not – at least "good" for international law. In other words, such choices may have reflected the commitment they share with international lawyers themselves to thinking about the field in strongly normative and teleological terms. International law intervenes and has intervened in the world as a force of the "good" - and the "good" is that which aligns itself with the preferences and priorities that Vitoria and Kant (must) have had, priorities and preferences that appear amazingly close to "ours".

But focusing on what is being said begs the question of what belongs to the field. There is no disagreement about relations between sovereigns – diplomacy, war, treaty-making – as part of international law. But the locution *ius gentium* has also been employed to address just buyings and sellings and other such things … without which men cannot live together".[3] As I have elsewhere argued in more length, relations between sovereigns cannot be usefully separated from the legal conditions and techniques whereby "sovereignty" emerges and operates or that limit to what it can attain.[4] Sovereignty and international relations are underpinned by a network of relations of property and other aspects of private law, contract, succession and (especially) rights over land. In case interest in history is inspired by a wish to know how law has contributed to the way the

[3] Aquinas, 'Summa theologiae' (ST) I-II Q.95 A 4 resp. in *Political Writings* (R.W. Dyson ed. 2002), 135.

[4] "Expanding Histories of International Law", 56 *American Journal of Legal History* (2016), 104-112

world has been ruled, it is impossible to ignore the structures and techniques of private law that both sustain and challenge sovereignty; Vitoria and Kant taught widely on property and contract as well – without those teaching having usually been read into "international law". Western techniques of domination regularly combine public and private law, sovereignty and property, war and commerce. Both have an international "presence". So why are the writings of Emer de Vattel part of international legal history while those by (the lawyers) Charles Davenant or Pierre le Mercier de la Rivière are not? How come has it been forgotten that the work Adam Smith published before his *The Wealth of Nations* (1776) declared in its last paragraph that "in another discourse" he would "give an account of the general principles of law and government", based on the ideas about human nature and derived from a "history of jurisprudence".[5]

Lack of attention to the international nature of regimes of property is all the more surprising owing to the rise of a postcolonial sensitivity that has put to question the progress narrative within which references to Vitoria and Kant used to be made. But even postcolonial scholars have not engaged in much public reflection about what international "is". It may even be that the stronger and the more fundamental the critique, the less it can put to question the relevance or the very existence of its object. The problem is, as Anne Orford has shown, accentuated when the writing is produced in the genre of "disciplinary history" and takes as granted the conventional boundaries of a discipline - such as "international law" – and then focuses on internal developments, trends and infights within an already-defined set of questions and assumptions.[6] What is often of the greatest interest, however, is how those boundaries are formed, and how idioms – and disciplinary power – sometimes transgress them.

In this paper I want to pursue the kind of history that focuses on the "conflict of the disciplines" (or as Kant would put it, "conflict of the faculties"). This focuses on how authority is vested on certain types of expert speech and migrates

[5] Adam Smith, *The Theory of Moral Sentiments* (P Moloney ed. & Intr. 2004 [1759/1790]), 466.

[6] Anne Orford, 'International Law and the Limits of History', in Wouter Werner, Alexis Galan & Marieke De Hoon, (eds.), *The Law of International Lawyers: Reading Martti Koskenniem* (forthcoming 2017) -

between faculties and disciplines. This kind of history would not be *internal* to a given conception of international law; it would instead examine how the meanings of that locution have varied, the limits of the discipline have changed and power has migrated between disciplines. I believe that disciplinary clashes tell us much about the uses of power when it is being justified, channelled and opposed by a technical idiom. If histories of international law focus on men such as Vitoria and Kant, this means that they recognize that at certain periods experts in theology and philosophy were influential in orienting other people's thinking and action. The disciplinary context, again, might tell us much about the objectives and biases of a field . Here I would just like to illustrate the matter by focusing on two moments – the late-medieval construction of *ius gentium* as part of the struggle for authority in 13th century France and the 18th century transformations of natural law at German universities so as to assist in the government of the state. The struggles between theologians and jurists in the former case, and the internal development of the legal discipline in the latter raise questions about the power of disciplinary boundaries that are not alien to present efforts to understand and control the process commonly referred to as "globalization".

Theology, Law and the Construction of Territorial Power

The demise of the universal pretensions of the church and the empire in face of the rise of territorial kingship in the 13th century was also a moment for intense rivalry between theologians and civil lawyers over competence to capture those transformations in a professional vocabulary. Eventually, a notion of *ius gentium* (law of nations) was invoked on both sides to justify, explain and limit royal power. By the end of the century it would be customary for French civil lawyers to address their king as a "*princeps*" in his realm, even if not *de iure*, nevertheless *de facto*.[7] The curia of Philip the Fair (1268-1314) was famously populated by jurists trained in civil law at the universities of Bologna, Montpellier and Orleans many of whom intensely supported the king's independence from the Pope and

[7] See Albert Rigaudière, *Penser et construire l'Etat dans la France du Moyen Âge (XIIIe-XVe siècle)* (2003), 39-66.

the Emperor. However, even theologians could not have ignored the famous statement by Pope Innocent III (1160-1216), made in the context of a question concerning the legitimation of bastards, according to which nobody was entitled to challenge the way the French king ruled his regnum (*rex superiorem non recognescens in temporalibus*).[8] The first jurist to take up this perhaps carelessly formulated view was the Burgundian lawyer Jean de Blanot (c.1230-c.1280) who later became a clerk with the Archbishop of Lyons. In his commentary on Iustinian's *Institutes* of 1256 [I 4.6,13] Jean wrote that the king "*in temporalibus superiorem non recogniscit*" and ascribed to him "*potestas iuris generalis iurisdictionis*".[9] A few years later he came to the matter anew in the context of commenting on the *Lex Iulia maiestatis* [C.9.8; D. 48.4] where he affirmed that the vassals of a (treasonous) baron engaged in war against their king were freed from their vow to him.[10] This was so because the regnum was the "*patria*" and the king represented the "*bonum publicum.*"[11]

By the time of the famous final clash between Philip and Pope Boniface VIII in 1303 and the Trial of the Templar knights, the struggle between temporal and spiritual power had been the settled in favour of the former. But theology did not at all renounce its status as the principal intellectual frame for understanding and operating the new constellation. In an early work for the instruction of Philip the Augustinian theologian Giles of Rome (Aegidus Romanus, c. 1247-1316) offered *ius gentium* as the proper vocabulary under which to discuss the natural law of kingship and commerce while indicting lawyers as "political idiots" because they lacked an understanding of the (Aristotelian) principles of good

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[8] *Per venerabilem*, 1202. Text e.g. in Jean-Marie Carbasse & Guillaume Leyte, *L'état royal XIIe-XVIIIe siècles. Une anthologie* (2004), 23-29 and Brian Tierney, *The Crisis of Church and State 1050-1300* (1988), 133-134 (extracts). The literature on *Per venerabilem* is enormous. For brief treatments, see Antony Black, *Political Thought in Europe 1250-1450* (1992), 113-115.

[9] Jean de Blanot, *Tractatus super feudis et homagiis* (1256), reproduced in relevant part by Jean Acher, 'Notes sur le droit savant au moyen age', in 30 *Nouv. Rev. Hist. Droit Francais & Etranger* (1906), 161. Cited also in Sophie Petit-Renaud, *'Faire Loy' au royaume de France. De Philippe VI à Charles V (1328-1380)* (2001), 30 and in Francesco Calasso, *I glossatori e la teoria della sovranità* (1957), 114.

[10] Blanot, *Tractatus*, 160-161. [I 4.18, 3].

[11] The king acted "*propter bona tocius patriae sive propter bonum publicum regni gallie cuis administrationem gerit",* Blanot, *Tractatus*, 162.

government.[12] Later, Giles would side directly with the pope in supporting the Church's ultimate jurisdiction even in temporal matters as long as these had some relation to issues of conscience.[13] Others, such as the Dominican theologian Jean Quidort (John of Paris, c. 1250-1306), joined the conversation by his *De potestate regia et papali*, in sharp defence of his king. In 25 dense chapters John discussed the respective powers of priests and kings in ecclesiastical and temporal matters, the universal but limited roles of the pope and the emperor as well as the rights of property enjoyed by individuals. Human diversity prompted legal and political diversity, John claimed "There can be different ways of living, and different kinds of state conforming to differences in climate, language and the conditions of men, with what is suitable for one nation is not so to another."[14] In sum, "development of individual states and kingdoms is natural, although that of an empire or [world] monarchy is not".[15] Like Aristotle, John believed that these separate secular communities were to be self-sufficient and governed "under one man called a king, who rules for the sake of the common good". This kind of rule that takes place by the "specific laws" of each community, John explained, "is derived from the natural law and the law of nations [*ius naturae et gentium*]".[16]

In a sense, it was easier for theologians to adopt the language of *ius gentium* with which to found the independence of territorial rulers than for the civil lawyers, committed as the latter were by the force of their very specialization to the idea that the empire had been established by God and the emperor himself *Dominus mundi*. [D 14. 2, 9].[17] The Orleans jurist, Jacques de Révigny (Jacopo Ravannis], c.

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[12] Aegidus Romanus (Giles of Rome), *De regimine principum libri III. Ad francorum regem Philip IIII cognomento pulchrum* (Rome 1556), II.II.viii & III.II.xxv (183v and 308r).

[13] *Giles of Rome's On Ecclesiastical Power. A Medieval Theory of World Government* (transl & ed. R.W. Dyson, 2004).

[14] John of Paris, *On Royal and Papal Power (*Arthur P Monahan transl & ed, 1974), Ch 3 (15).

[15] John of Paris, *On Royal and Papal Power,* Ch 3 (15).

[16] John of Paris, *On Royal and Papal Power*, Ch 1 (9).

[17] According to Iustinian's *Novella* No. 73 "*Quia igitur imperium propterea Deus de coelo constituit*" and the law *Cunctos populos* that opens the *Code* was usually read so as to affirm that the emperor was "lord of the world. The text [C 1.1] reads in English "We desire that all peoples [Cunctos populos] subject to Our benign Empire shall live under the same religion." The leading glossator Azo oscillates. In his Summa codicis (3, 13) the emperor is said to possess "plurissima iurisdictio" and the king only "merum imperium". Elsewhere in discussing the French king's

1230-1296), one of the century's most influential French academic lawyers, for example, used the *de iure*/*de facto* distinction so as to find a compromise between the position in the *Corpus iuris* and the political reality around him.[18] According to Révigny, although the French king seemed to think of himself independent of the emperor in fact (*de facto*), he was not so in law (*de iure*).[19] Instead of a "*princeps*" he could be addressed as a kind of territorial official of the emperor ("*magistratus principis*").[20] This did not mean that he would not be "supreme" in his realm, however. Most aspects of imperial rule could be applied to him – including for example taxation and other public law powers.[21]

The effort to find a legal way to defend royal sovereignty against imperial "universality" peaked in the views of the most famous of the 14th century followers of the Orleans jurists Bartolus of Saxoferrato (1313-1357). On the one hand, "whoever would say that the emperor is not lord and monarch of the entire world would be a heretic".[22] On the other hand, it was possible to think not only of the king but also the *civitas* itself as a "*princeps*" (he was thinking of North-Italian city-states) though only *de facto*.[23] This was so because imperial power was ("only") "*ratione protectionis vel administrationis*". It did not cancel out the

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position he notes that "hodie videtur eandem potestatem habere in terra sua quem imperator; ergo potuit facere quod sibi placet". See Bruno Paradisi, *Studi sul medievo giuridico* (1987), 308-9.

[18] Révigny's royalism would be taken on board by the Italian Cinus of Pistoia through whom it would influence the absolutist strands in later Italian commentators. See e.g. Ennio Cortese, *Il rinascimento giuridico medievale* (1996), 85-86. For later absolutist theories see Kenneth Pennington, *The Prince and the Law 1200-1600* (1993), 113-116 and Jane Black, *Absolutism in Renaissance Milan. Plenitude of Power under the Visconti and the Sforza 1329-1535* (2009), 14-29, 35, 94-113.

[19] "quidam dicunt quod Francia exempta est ab imperio; hoc est impossibile de iure"., Jacques de Révigny, Lectura in dig.vet. in premio, cited in E.M. Meijers, *Etudes d'histoire du droit, tome III* (1959), 9n13. On Révigny on kingship, see Kees Bezemer, *What Jacques Saw. Thirteenth Century France thorough the Eyes of Jacques de Révigny, professor of law at Orléans* (1997), 97-102.

[20] "… probatur quia rex princeps est quia non recognoscit superiorem. Dico: hoc est comitere in principem, non, sicunt ipsi dicunt, quod quod rex princeps est, set quia comititur in magistratum principis", quoted in Robert Feenstra, '"Quaestiones de materia feudorum" de Jacques de Révigny', in *Fata iuris romani* (1972) 313.

[21] Kees Bezemer, 'The Law School of Orleans as a School of Public Administration', 66 Tijdschrift voor Rechtsgeschiedenis (1998), 249, 251.

[22] Bartolus on D 49.15,24, English translation in Pennington, *The Prince and the Law*, 197.

[23] See Magnus Ryan, 'Bartolus of Sassofedrrato and Free Cities. The Alexander Prize Lecture', 10 *Transactions of the Royal Historical Society* (1999), 65-89, 66. Ryan points to the many unclarities and contradictions in that concept, however, and argues that it had more to do with the right of the city government to govern (internal sovereignty) than the city's customary independence from the emperor or the pope).

dominion kings had over their regna: to rule universally did not mean to rule every particular as well.[24] It was increasingly obvious that many "Roman" (i.e. Christian) peoples were ruled independently of the emperor. It was here that the civil lawyers' distinction between *de iure/de facto,* and their employment of the *ius gentium* to explain the normative power of the latter, made of civil law – and those practising it – the predominant authorities of an emerging territorial power. Hence Bartolus' most famous student, Baldus of Ubaldi (1327-1400), a future defender of the absolutism of Milanese rulers, could argue that a Christian king will commit a sin if he does not recognise the empire's universal authority *de iure*, adding ingeniously that this did not mean that he also had the highest power in their realm; "*aliud est dicere universale aliud integrum*".[25] Even the Bible recognised the existence of lawful kingship before Rome. If the empire now had lost its power, this could only mean that the old customary *ius gentium* would apply. [26]

In such ways, French and Italian (as well as Spanish and English) jurists, trained in civil law and using the vocabulary of the law of nations (*ius gentium*) would sketch a view of the world where the territorial rulers enjoyed independence vis-à-vis traditional authorities, inaugurating *law* as the authoritative discipline to determine the substance and location of territorial power. Yet, theologians could easily accommodate these changes. This is most strikingly visible in the way the most elaborate system of *ius gentium* that emerged from the pen of the Dominican scholar Thomas Aquinas (1224/5-1274*).* In his *Summa theologiae* (1265-1274) Aquinas wrote that all Christian authority (*dominium*) was derived from God.[27]. "The earth is the Lord's and the fullness thereof, the world and those who dwell therein" (Psalm 24). The world was God's because He had created it. But in creating the world, he had also ordered (or "ordained") it by natural law so that it had become possible for humans to grasp its manner of operation and

[24] Cecil N. Sidney Woolf, *Bartolus of Sassoferrato. His Position in the History of Medieval Political Thought* (1913), 23-25.

[25] Petit-Renaud, *'Faire loy' au royaume de France.*, 29

[26] See in detail Joseph Canning, *The Political Thought of Baldus de Ubaldis* (1987), 104-158.

[27] See Marie-France Renoux-Zagamé, *Origines théologiques du concept moderne de propriété* (1987)*.,* 64-114.

to contribute to the realization of the divine "plan".[28] As far as humans were concerned, that divine plan operated as the law of nature. However:

> "…the general principles of the natural law cannot be applied to all men in the same way because of the great variety of human circumstances; and hence arises the diversity of positive laws among various people". [29]

When God had created human beings he had also donated *dominium* to them. This meant that they had the power to govern other human beings and to own private property (labelled by James of Viterbo, one of Aquinas' followers *dominium iurisdictionum* and *dominiun proprietatis*). The principal instruments of government were civil law and the *ius gentium*. Both were what practical reason derived from natural law in its search of the common good, though differently. "Civil law" was received through a process that Aquinas called "determination", the "specific application of that which is expressed in general terms".[30] It was the *local* specification of a universal natural law. More interesting, however, was the *ius gentium*, that was derived from natural law as "conclusions" that resembled those science abstracted from its principles.[31] This had much broader validity than civil law, responding to conditions of human life everywhere. It was a kind of normative anthropology, a theory about human nature that combined an intrinsic need of sociability with the ability to reason.

> "the *ius gentium* is indeed natural to man in a sense, in so far as he is rational, because it is derived from natural law in the manner of a conclusion not greatly remote from its first principles, which is why men agree to it so readily. Nevertheless, it is distinct from the natural law, and especially so from the natural law which is 'common to all animals'".[32]

Here now was a "law of nations" that depicted world as a system of territorial regimes whose rulers had independence – in secular matters – from external authorities and legislative sovereignty (the power to enact "civil law" with

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[28] ""the eternal law is the plan of government in the Supreme Governor", Aquinas ST I-II Q 93 A 3 resp. (*Political Writings* ,106).

[29] Aquinas ST I-II Q 95 A 2 ad 3 (*Political Writings*, 131).

[30] Aquinas, ST I-II Q.95 A 2 resp. (*Political Writings* ,130).

[31] Aquinas, ST I-II, Q.95 A 2 resp. (*Political Writings* ,130)

[32] Aquinas ST I-II Q 96 A 4 *ad 1* (*Political Writings* ,136).

binding force).[33] The choice of *law* as the applicable vocabulary ensured the effectiveness of the directives in institutional practice while the treatment of the *virtues* by Aquinas linked government with the supernatural ends of human striving. Both originated in God but operated differently: "law" consisted of *external* directives that helped humans reach their good, "virtue" the *internal* conditions to attain it. Also *ius gentium* partook of this dual character: on the one hand, as "law" it consisted of "conclusions" from natural law, promulgated by lawful authority. But it was also an aspect of the virtue of "justice", understood as the commensurateness or appropriateness of something "by reason of some consequence of its being so". Using Gaius' old definition of the *ius gentium*, Aquinas explained that *ius gentium* was something that "natural reason" had established "among all men". It was a set of practical conclusions that humans had made out of existing conditions and it was "observed by all equally" because of its "closeness to equity".[34] As examples Aquinas gave "just buyings and sellings and other such things … without which men cannot live together".[35] These institutions emerged as conclusions produced by practical reasoning, appropriate to human circumstances in general so that they should be respected in the life of every *civitas*.[36]

Now the effect of law of nations being situated within a universe of theological arguments and presuppositions, as one of the instruments through which human beings sought supernatural "blessedness", would greatly strengthen the position of theology as the "queen of the disciplines" and ultimate platform within which questions about legal right ought to be resolved. It is no coincidence that as the Spanish "second scholastic" began in the early 16th century to look for a language through which to address problems that had arisen in the context of the conquest of the "Indies" as well as in the massive expansion of trade that followed the consequent importation of silver into Europe, it was this language

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[33] The tasks of the territorial rulers were laid out by Aquinas in the unifinished tract , 'De regimine principum (De regno)', written for the king of Cyprus. See *Political Writings*,

[34] Aquinas ST II-II Q 57 A 3 ad 1-3 (*Political Writings* 164).

[35] Aquinas, ST I-II Q.95 A 4 Resp. (*Political Writings* 135).

[36] For Aquinas' debt to Roman law in his underdtanding of natural law and *ius gentium*, see Jean-Marie Aubert, *Le droit Romain dans l'oeuvre de Saint Thomas* (1955), 91-97.

of the *ius gentium* that was taken up by its leading representative, the Dominican scholar Francisco de Vitoria.[37] In the introductory part of his famous *relectio* Vitoria took pains to demonstrate the ultimately *religious* character of the question of Spanish power in the Indies, reminding his audience not only that the verdict of religious authority was to be followed "even though they ["wise men", ie. theologians] may judge wrongly", but also that this was "not the province of lawyers, or not of lawyers alone, to pass sentence in the question". The lawyers' province was in any case limited to *leges humanae* that do not deal with the question of the conquest. "Since this is a case of conscience, it is the business of the priests, that is to say on the Church, to pass sentence upon it".[38]

The struggle for authority between the jurists and the theologians was an important theme in the construction of territorial authority in Europe. In the 14th century, the theologian Nicholas Oresme (c. 1320-1382) one of the closest friends of Charles V who prepared at the king's request a French translation of Aristotle's *Politics,* had a very negative view of lawyers' efforts to expand their authority beyond simple legal-technical questions. Instead, Oresme propounded an Aristotelian "science of politics" based on naturalist ideas against what he thought was the civil law inspired absolutism of the lawyers, stressing the necessity to adapt governmental policies to the character of each regime. "One polity is suitable for one people and another for another, as [Aristotle] says…For it is appropriate that the positive laws and government of peoples should differ according to the diversity of their of their regions, complexion, inclinations and habits". [39] Any effort to transcend their natural boundaries by some idea of universal rulership would be unnatural and unjust.[40] Oresme completely rejected the juristic habit of using Roman law as a repository of timeless and universal principles, and the king's exalted position within it. The inclination of jurists to

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[37] I have discussed this in "Empire and International Law: The Real Spanish Contribution", 61 *University of Toronto Law Journal* (2011), 1-36

[38] Francisco de Vitoria, 'On the American Indians', in Vitoria, *Political Writings* (A Pagden & J Lawrance eds. 1991), 238.

[39] Nicole Oresme, Aristotle's 'Politics' (Livre de 'Politiques' d'Aristote), 7.10, cited in Anthony Black, *Political Thought in Europe 1250-1450* (1992), 112.

[40] Jean Dunbabin, 'Government', in J.H. Burns (ed), *The Cambridge History of Medieval Political Thought c. 350-c. 1450* (Cambridge University Press 1988), 481.

conceive their abstractions as an as autonomous "science" was part of their political naïveté – visible above all in their faith in the universal applicability of the code of Justinian, the ruler of one realm – and their complete ignorance of the kind of political prudence of which governmental wisdom consisted.[41]

These criticisms were continued at the Paris theology faculty where conciliarist masters such as Pierre d'Ailly (1351-1420) and Jean Gerson (1363-1429) stressed theology's superiority over the predominantly "negative" character of law. As Gerson once put it: "God would have needed neither canonists nor legists [civil lawyers] in the pure state of nature, just as He will not need them in the glorified natural state".[42] Gerson's efforts to develop a notion of the mystical community within the Church, including aspects of individual right, would show itself an important alternative in the conception of domestic community to the monarch-centred views of the legists. Also just war theories originating in Augustine and Aquinas were debated by in much more detail by Gerson and d'Ailly than the jurists who generally refrained from seeing any limits to the king's discretion .[43] It is precisely from such debates that the young Vitoria, during his years with the Dominican convent of Saint Jacques in Paris, and later with the university itself, would learn to update the Thomistic vocabulary so as to apply it in the controversies over Spanish imperial expansion.

When the Dutchman Hugo Grotius eventually took over much of what the Spanish theologians had written, and turned it into a robust view on the law of nature and of nations in his *De iure belli ac pacis* (1625/32), the long effort of joining Protestant theology with natural law had commenced. Grotius also wrote massively on theological subjects and points of contact can easily be found between his moderate Arminianism, his effort to seek to unite the Christian churches and his international law. Had matters gone the other way, not only the Spaniards but also Protestant Aristotelians might well have adopted *ius naturae*

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[41] Jacques Krynen, *L'empire du roi. Idées et croyances politiques en France, XIIIe-XVe* (1993), 117-119, 222.

[42] Jean Gerson, *Recommendatio licentiandorum in Decretis*, cited in Jacques *L'empire du roi.* 123.

[43] See e.g. Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (1986), 484-5.

et gentium as a platform for speculations about the European political order. But as the development of the discipline moved to Germany, this took place in the philosophy and law faculties, sometimes against massive protests by more orthodox Protestant theologians.

From (Natural) Law to Economics

From the 17th to the 19th century,. thinking and writing on the law of nations took place largely within the German academic discipline *ius naturae et gentium*. The few tracts produced in 16th century Germany still operated within the narrow boundaries of Christian Aristotelianism; the closed confessional State of post-1555 did not aspire to the neutral space offered by natural law to conflicting beliefs.[44] Things would start moving after 1648 with the slow introduction of Grotius at German universities. But initially, Grotius was known through his religious writings (especially *De veritate religionis Christianae*) that were dealt with critically by orthodox Lutherans and Calvinists.[45] Larger awareness of *De jure belli ac pacis* began to spread only in the latter half of the century, through contacts with Leiden and Dutch intellectual circles. But then it soon overcame its rivals. By 1661 13 Latin editions were circulating in Germany and the first German commentaries were published in the 1660s and 1670s, including annotated student editions and larger analyses, both positive and critical.[46] The first chair in "natural law and the law of nations" that was established in the Heidelberg philosophy faculty in 1661 was designed for teaching "according to Grotius". This was soon followed by Kiel (1665 in the law faculty), Jena (1665), Greifswald (1674), Helmstedt (1675?), Marburg (1676), Giessen (1677), Strasbourg (1694) and other (especially Protestant) universities. [47] The high point of the reception was the publication of the first German translation in 1707 followed by those by Christian Wolff in 1734 and the Cocceji brothers in 1752. In

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[44] See e.g. Horst Denzer, *Moralphilosphie und Naturrecht bei Samuel Pufendorf* (1972), 317-318.

[45] Günter Hoffmann-Loertzer, *Studien zu Hugo Grotius* (1971), 242-244.

[46] For a full discussion, see Hoffmann-Loertzer, *Studien*, 250-260.

[47] See also Frank Grunert, 'The reception of Hugo Grotius' *De jure belli ac pacis* in Early German Enlightenment ', in Tim Hochstrasser & Peter Schröder, *Early Modern Natural law Theories* (2003), 89-105.

his introduction to the 1707 text, Christian Thomasius celebrated the work's usefulness for princes and their advisors; it helped them to decide how to act in accordance with one's conscience and the good of one's community, for the purposes of justice among princes and the protection of one's subjects. [48]

The content of the reception varied. Many objected to Grotius' notoriusly haphazard choice of source-materials, paying attention to the relative scarcity of Christian texts. Jurists who would later label themselves "Grotians" rejected the theologians' view of innate moral and legal norms. The "modern" approach was focus on the instinct and right of self-preservation, something understood as a radical departure from scholasticism. [49] By the end of the century, natural law had become such an important part of the legitimation of political statehood that even orthodox of Christian jurists such as Veit Ludwig von Seckendorff (1626-1692), whose early *Teutsche Fürsten-Staat* (1656) had put forward a divinely ordered state as the total context of the care of souls by a Christian prince, annexed to his later *Christen-Staat* of 1685 a text on natural law. For Christians, however, he insisted that this was contained in the ten commandments whose validity with pagans was based on their practical usefulness.[50]

Natural law first entered the philosophy (and not law) faculty as part of "practical philosophy" where it contributed to the relative rise in importance of "politics" at the cost of "ethics" in the Aristotelian curriculum.[51] It also provided a descriptive frame for understanding the operation of human societies, preparing students for their study in the "higher faculties", including law. As chairs of natural law later came to be established in the law faculty, too, they took on the role of the general theory of law and government, integrating the settlement of the 30-years' war in a theoretical architectonic that consolidated absolutist statehood and developed in the 18th century into an increasingly pragmatic

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[48] Hoffmann-Loertzer, *Studien,* 266-267.

[49] Grunert, 'The Reception of Hugo Grotius', 89-102.

[50] See Frank Grunert, *Normbegründung und politische Legitimation. Zur Rechts- und Staatsphilosphie der deutschen Frühaufklärung* (2000), 29-35.

[51] Hans Maier, 'Die Lehre der Politik an den deutschen Universitäten, vornehmlich vom 16. Bis 18.Jahrhundert', in Dieter Oberdörfer (ed), *Wissenschaftliche Politik. Eine Einführung in Grundfragen ihrer Tradition und Theorie* (1966), 89-90.

discipline of statecraft.[52] It also eased the religious worries emerging with confessional antagonisms in Europe and the discovery of alien cultures outside.

> "So it was that the discussion of public law which had begun in the universities of the Counter-reformation Catholic Spain, slipped from the hands of catholic science and, in the 17th century, with Althusius, Grotius, and Hobbes, became the domain of Protestant jurists and political philosophers". [53]

Natural law now offered itself to the German princes as a "scientific" technique of the government of the state, depicted as a special type of machine for the production of secular "happiness" ("*Glückseeligkeit*").[54] The most influential early proponent of this program had been the Saxon jurist Samuel Pufendorf (1632-1694), the holder of the first chair in the field at the University of Heidelberg from 1661. Triggered by the devastations of the Thirty-Years' War, of which his family had possessed first-hand experience,[55] Pufendorf wanted to develop an approach to government that would enable humans to understand and control states – which he regarded as "moral entities" analogous to "physical entities" – so as to avoid the reoccurrence of similar disasters. In his principal work *De iure naturae et gentium* (1672), Pufendorf thus produced a simple algorithm for ruling. From what he believed to be the three most basic aspects of human life, he produced a new foundation for the science of government: the egoism of human beings, their pathetic weakness, and their ability to reason. As he put it in the abbreviated version of this work:

> "Man, then, is an animal with an intense concern for his own preservation, needy by himself, incapable of protection without the help of his fellows, and very well fitted for the mutual provision of benefits".[56]

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[52] See Denzer, *Moralphilosphie*, 312-322.

[53] Wilhelm Schmidt-Biggemann, 'New Structures of Knowledge', in Hilde de Ridder-Symons, *A History of the University in Europe*, Vol VII (1996), 121.

[54] See Barbara Sollberg-Rilinger, *Der Staat als Machine. Zur politischen Metaphorik des absolutischen Fürstenstaats* (1986),

[55] Detlef Döring, 'Biographisches über Samuel von Pufendorf', in Bodo Geger & Helmut Goerlich (eds), *Samuel Pufendorf und seine Wirkungen auf die heutige Zeit* (1996), 24-25.

[56] Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (James Tully ed., Michael Silverthorne transl,., Cambridgre University Press, 1991), 35. See further 'On the Law of

Humans did not live in states out of love to each other but from the recognition that they could not realise their egoism (self-love and self-protection) alone; remaining in the natural state of civil society, all kinds of harm would befall them. "State" would be the name for that system of cooperation – that "machine" – that civil society, anterior to statehood, would create to protect itself and to enable it to attain its objectives. Once they had established such a State, they would fully subordinate themselves to it. It was purely instrumental; its single objective was the *salus publica*.[57] Its technicians would be neither theologians nor philosophers but natural lawyers.[58]

Theologians and orthodox jurists were initially suspicious of the whole venture. God, or indeed Christian moral principles, were no part of it. Pufendorf had also attacked some of the most hallowed principles of German constitutionalism, demonstrating in polemical tones that the Aristotelian tradition had no credible understanding of Germany's complex political reality but had contributed to its having become an ungovernable "*monstrum*".[59] By the end of the 17th century most German Protestant universities had set up chairs for *ius naturae et gentium* and natural lawyers had begun to attain lucrative careers in the courts of their respective princes. Some of them, like the "universal genius" Gottfried Wilhelm Leibniz (1646-1716) even sought to create a metaphysical system of "universal benevolence" under which a realist ambition to "say clearly how things really are" was combined with elaborate statements on justice, benevolence and even piety to guide rulers to cooperate among themselevs.[60]

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nature and of Nations, in Craig L. Carr & Michael J. Seidler, *The Political Writings of Samuel Pufendorf* (), II.3. 14 (151).

[57] Older theories, too, had justified monarchical power by allocation from the "people". Roman *lex regia* provided one such theory, and medieval Germany knew many theories of elective kingship by a "pactum" between subjects. See e.g. Dieter Wyduckel, *Princeps legibus solutus. Eine Untersuchung zur frühmodernen rechts- und Staatslehre* (1979), 163-166.

[58] Pufendorf, *On the Duty*, Author's Preface, 6-13.

[59] Samuel Pufendorf, "Severinus de Monzambano Veronese de Statu Imperii germanici ad Laelium Fratrem, Dominum Trezolani," *Liber unum - Über die Verfassung des Deutschen Reiches*, tr. H. Bresslau, (1922), Ch VI, § 9. For the English text, see now Samuel Pufendorf, *The Present State of Germany* (ed. & intr. By M.J. Seidl, 2007), 176-177.

[60] Leibniz, 'Codex juris gentium' (Praefatio), in *Political Writings* (Patrick Riley ed. 1988), 167, 170-174.

By mid-18th century, however, a malaise had crept within the community of natural lawyers. Once the rational-empirical justification of statehood had been laid out, the need had emerged to produce practical instructions about how to govern it so as to attain the hallowed objective of "happiness". But now natural lawyers found themselves as divided on policy as royal counsel always had been. Neither of the two directions from which they had looked for scientific rules had shown itself fully authoritative.[61] Those more rationalistically inclined followed the Halle-based philosopher Christian Wolff (1679-1754) who had tried to deduce detailed instructions for government and policy from higher-level principles about everything in the world pursuing its "perfection". With the "Wolffians", true philosophy would produce a society of perfect security and happiness where *summa potestas* and *summa sapientia* would coalesce to mould the ruler into "an agent of a social reason".[62] Yet even as the search for "perfection" and the obsession about "reason" would become defining features of the German bureaucratic ethos, it was still hard to derive specific policy-proposals from the thick volumes produced by Wolff or his followers. At Göttingen, natural lawyers such as Johann Jakob Schmauss (1690-1757) and Gottfied Achenwall (1719-1772) were engaged in historical and comparative studies that hoped to canvas a realistic theory of government as *Staatsklugheit* ("State-wisdom").[63] This was accompanied by special disciplines such as universal and particular civil and public law and the law of nations on the one

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[61] The section below abbreviates my 'Variations of Natural Law. Germany 1648-1815', *The Oxford Handbook of International Legal Theory* (A Orford & F Hoffmann eds. 2016), 59-81. For an extensive discussion of the contrast between the "Thomasian" civil philosophy and the metaphysical rationalism of the Wolffians in German 18th century, see Ian Hunter, *Rival Enlightenments. Civil and Metaphysical Philosophy in early Modern Germany* (2001).

[62] Werner Schneiders, 'Die Philosophie der aufgeklärten Absolutismus. Zum Verhältnis von Philosophie und Politik, Nicht nur im 18. Jahrhundert', in Hans Erich Bödeker, *Aufklärung als Politisierung – Politiserung als Aufklärung* (1987), 33.

[63] The 'Georgia Augusta' was established in 1734 as an institution to teach imperial history, constitutional and international law from the "empirical" perspective. Göttingen scholars would connect a historical notion of civil society with an instrumental-technical concept of statehood, one a matter of regulating passions, the other of rational rules, that would lay the basis for the subsequent development of the knowledges that had up to this point been collected under the law of nature and of nations. See Notker Hammerstein, *Ius und Historie. Ein Beitrag zur Geschichte des historischen Denkens an deutschen Universitäten im späten 17. und im 18. Jahrhundert* (1972) and Michael Stolleis, *Geschichte des öffentlichen Rechs in Deutschland. Erster Band 1600-1800*, (1988), 309-317.

hand, and an empirically oriented *Staatenkunde* (*Statistik*), policy-science and cameralism on the other.[64] The curriculum of the law school was geared in increasingly pragmatic direction. Schmauss insisted on separating natural law from divine law and every aspect of theological morality and wanted to provide an anthropological basis for the field.[65] As Achenwall and his colleague Johann Stephan Pütter (1725-1807) wanted to change the emphasis between the three terms in Aristotelian triad "ethics, politics, oeconomy". The first was relegated to the production of "internal happiness", a task beyond State institutions.[66] The latter two became techniques for the production of security and welfare. In order to sort out the relations between politics and "oeconomy", Achenwall began to pursue a comparative history of European States. In a work from 1761 he distinguished between State-wisdom and *Staatskunst* (State-technique) as the techniques for its implementation. He further explained economic and financial matters were crucially important for the latter; it was essential that the modern "Politicus" knew them well so as to optimise the operation of the state – that "great machine".[67]

In due course, however, ideas of economic governance separated themselves from the state-machine. In a pamphlet from 1759 on "The Chimera of the Balance of Power in Trade and Shipping" (*Die Chimäre des Gleichgewichts der Handlung und Schiffart*), the prolific and obscure but influential natural lawyer and cameralist Johann Heinrich Gottlob (von) Justi (1717-1771) attacked with force the suggestion that the balance of power under European public law could possibly be extended to trade and commerce. The proposal had been made during the seven-years' war (1756-1763) by, among others, the French minister Maubert de Gouvest (1721-1767), with the ostensible aim to prevent England's effort at "universal monarchy" through its mastery of the seas. During the war,

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[64] See Hans Erich Bödeker, 'Das staatswissenschaftliche Fächersystem im 18. Jahrhundert', , in Vierhaus *Wissenschaften*, 153-155.

[65] See e.g. Johann Jakob Schmauss, *Vorstellung des wahren Begriffs von einem Recht der Natur* (1748). 25-27. and *id*., 'Neues Systema der Rechts der Natur', the third part of his *Neues Systema der Rechts der Natur* (1754), 503-506, 526-529.

[66] Gottfried Achenwall & Johann Stephan Pütter, *Anfangsgründe des Naturrechts* (Jan Schröder ed. Frankfurt, Insel 1995)., Bk III Ch 2 Title I § 719-720 (234/235).

[67] *Gottfried Achenwall, Die Staatsklugheit nach ihren ersten Grundsätzen* (1761), Vorrede § 11-12.

England had successfully obstructed French access to and from the Caribbean by sinking and capturing French ships and other vessels operating on France's behalf. Through the unrivalled efficiency of its naval warfare, and by simultaneously being able to pursue its own commercial relations virtually unhindered, England had gained a decisive advantage. According to Maubert, English economic warfare was in breach of the well-established principle of European public law of the "balance of power". The rest of Europe was therefore to be enlisted on the French side against English aspirations.

Justi's pamphlet contained a vigorous and at times *in personam* attack on Maubert, his arguments and motivations. But mostly it tried to explain why the idea of an internationally enforced "balance of trade and shipping" was outright ridiculous, unjust, unreasonable and above all impossible to realise. A few years earlier Justi had produced another work where he had attacked the basic idea of balance of power as a part of European public law. Even as the arguments made in that earlier work applied also in respect of trade and shipping, Justi now wanted to make the case that the very idea of prohibiting belligerent powers from gaining advantage through trade was "a thousand times more unreasonable than the system of balance of power between European nations".[68] This was so, he explained, because while it was theoretically possible (though again, impracticable and unreasonable) to agree on a apolitical and military "balance", such suggestion went directly against the very nature of commercial relations. Politics and commerce were related but different, indeed in some respect wholly opposite notions. Of course, Justi wrote, both had the objective to enhance the happiness and the strength of the state. Both were crucially dependent on the economic resources. But they were wholly different in that while the direction of political government dependent on the will of the ruler, commerce and economic prosperity had its own laws that the government needed to know and respect and with which it could interfere only in a limited way.

[68] "Noch tausendmal ungereimter ist, als das System des Gleichgewichts unter […] europäischen Machten", JHG Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart*, (1759) 17.

Justi made four arguments to demonstrate the utter impossibility of the diplomatic establishment of a "balance of trade and shipping". All commerce depended on the natural resources a state possessed and the skill and industriousness of its people. It would be ridiculous to demand that a state leave its resources unused or demand that its citizens engage in commerce or production no more than its neighbours do: to demand this would be unreasonable, ridiculous and chimerical ("*ungereimt, lächerlich und chimärisch*").[69] Even if a country were willing to do this, the effects of such a (foolish) decision would not be limited to itself; they would cause direct harm to its trading partners. For commerce brings reciprocal benefits in that it enables each nation to concentrate on selling what it can produce cheapest and thus be most beneficial for its neighbours to purchase. To decree on "balance" would not only strike at the ambitions of an economically active country but at *all* nations seeking to purchase the cheapest goods available.[70] This led Justi to speculate on the nature of commerce as free; in pursuing the happiness of their populations all governments sought to establish the kinds of commercial relations that would be most profitable. Their merchants were constantly looking for the best bargains while hoping to satisfy their clients with the smallest possible cost. To compel nations to deal with partners with whom benefit would be less or where shipping would be hard or dangerous would violate everyone's freedom.[71] All nations traded on the basis of their natural situation: countries like England, France or the Netherlands possessed long coastlines and much experience in navigation. To limit the number of their commercial vessels, for example, or directions where they could sail, would create an irrational advantage for nations without advanced long-distance trading contacts. Moreover, trade was not just a function of the number of ships but also of the skill, energy and experience of the merchants and sailors so that even if the numbers of ships were limited, this would not lead to equality; nations with skilful merchants and sailors will always enjoy an advantage.[72]

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[69] Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart,* 42.

[70] Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart,* 42-43.

[71] Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart,* 43.

[72] Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffart,*

Justi was aiming to persuade his readers that a view of statecraft that focused only on the powers of the government mistaken; it ignored the presence within the domestic realm of laws of human behaviour that were relatively independent from state legislation and which the sovereign would neglect to his peril. In itself the idea of other - "superior" – laws was not new. Justi did not have in mind laws deriving from a constraining morality, however, but from social factuality that had survived the establishment of states and continued to be operative within the sphere that some would call "civil society". To govern the state efficiently necessitated taking full account of these laws, eventually to be labelled the laws of "political economy".

In his 'political metaphysic', Justi had followed many of his colleagues in putting forward the view of state power as above all economic wealth.[73] But he differed from them in stressing that this was predominantly created by private industriousness. He even claimed that one of the objectives of statehood was to create a space of economic liberty for the subjects.[74] In few years thereafter, translations of the French Physiocrats and Adam Smith began to circulate in Germany. By this time, Justi had already concluded that it was no longer possible to rule the state only by lawyers—one needed 'universal cameralists', men who would be knowledgeable about the operation of the private economy and the resources of the state as a whole.[75] Justi would now define the political power of a state as a combination of the wealth of private families and efficient statecraft, taking seriously the existence of a realm of private commercial exchanges that operated best without excessive interference by public power.[76] Unlike older generation of naturalists, Justi regarded commerce in luxury as welcome because

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[73] JHG Justi *Natur und Wesen der Staaten als die Quelle aller Regierungswisseschaften und Gesezze* (1771 [1760]) ch 3 §§ 30–44 (61–95). See also EP Nokkala 'The Machine of State in Germany—The Case of Johann Heinrich Gottlob von Justi (1717–1771)' (2009) 5 *Contributions to the History of Concepts* 71–93.

[74] See eg JHG Justi *Der Grundriss einer guten Regierung* (1759) Einleitung §§ 32, 34 (20–22); *Staatswissenschaften* (n **Error! Bookmark not defined.**) 233.

[75] Keith Tribe, *Governing Economy. The Reformation of German Economic Discourse 1750-1840* (1988) ,67.

[76] Ulrich Adam, *The Political Economy of JHG Justi* (2006) 194–9.

it would contribute to the emergence of a wealthy merchant class that would then be emulated by the rest of the population. Indeed it was one of the objectives of the state 'to have rich and powerful merchants'. He advocated the removal of monopolies, guilds and other restrictive provisions in all other cases apart from protecting the initial operations of large investments.[77]

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The internal debates among natural lawyers turned the field first into empirical statecraft, *cameralism* and *Policey* but ultimately into *Oeconomia.* As long as natural law was taught at the philosophy faculty, its expansion into such other areas would be encouraged by re-thinking the relations between Aristotelian ethics, politics and *oeconomia*. To the extent that they were taught at the law faculty, however, *cameralism* and *Policey* remained cantoned in the theory of statehood until the idioms of "competition" and "market" gradually began to be heard even within the political debates under enlightened absolutism. [78] The reception of Adam Smith in Germany drew attention to a whole field of economic activity outside public finances. Justi had still supported the *Ständestaat*, but many others were ready to describe society on an more individualistic basis. Attention was directed to the objective of need-fulfilment in policy, accompanied by the sense that a "rationality" also existed outside the state-machine. A new generation of natural lawyers writing under the influence of Smith and the French physiocrats began to stress inalienable individual rights as the core of natural law, the basis of a well-functioning economy and of a cosmopolitan world order.[79] When the emphasis on the *autonomy* of the subject in Kant was associated with the kind of vision of the economy put forward by Smith, the basic ingredients were in place for the shift of attention from *Staatswirtschaft* to *Nationalökonomie*. When Wilhelm von Humboldt in the 1790s suggested limiting

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[77] Adam, *The Political Economy of JHG Justi*, 199 & 208.

[78] Eckart Hellmuth, *Naturrechtsphilosophie und bürgerliches Welthorizont. Studien zur preussischen Geistes- und Sozialgeschichte des 18. Jahrhunderts* (1985), 122-140.

[79] See Diethelm Klippel, ' 'Naturrecht als politische Theorie. Zur politischen Bedeutung des deutschen Naturrechts im. 18 und 19. Jahrhundert' in H.E. Bödeker & U Herrmann (eds), *Aufklärung als Politisierung – Politisierung der Aufklärung* , (1987), 273-277.

the state's role to that of guardian of "security", this undermined dramatically the role of the legal class that had since Pufendorf committed itself to expanding the operations of the State-machine .[80] In a sense, natural law had itself created the conditions of its demise as "law"; to fulfil the promise it had made those in governing positions, and to follow up its empirical turn, there was no way it could avoid turning into political economy.

Conclusion: The Struggle Continues

Kant's plea for the independence of the philosophical faculty against the "higher" faculties of theology, medicine and law was founded on the idea that whereas the latter were teaching what those in power had decreed as useful for the soul, the body and society, philosophy's only concern was "truth", and truth could not be "decreed" by anybody. [81] In particular, Kant argued that "law" had no business to debate the truth or justice of positive laws – the decrees of the government *are* the juristic right "and the jurist must straightaway dismiss as nonsense the question of whether the decrees themselves are right".[82] This was the exclusive preserve of the philosophical faculty. Today, faculties are no longer limited to the four and each of them has come to claim authority over its own truths. Even in law, including international law, the fragmentation of legal knowledge had led to the proliferation of legal truths, associated with particular institutions, experts and embedded biases for policy. None of the disciplines is in the position of claiming a monopoly for truth or reason in the manner Kant once claimed for philosophy. As Leo Strauss would have predicted, the absence of a universal standpoint has led to historicization: if we cannot determine the truth of any particular knowledge, at least we can ask the question of where the regimes of knowledge we are left with come from, how have the organised themselves, and what influence have they had on the world.[83] What, in particular, Foucault has taught us to query, has been their relationship to power?

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[80] Wilhelm von Humboldt, Über die Sorgfalt der Staaten für die Sicherheit gegen auswärtige Feinde', 20 *Berlinische Monatsschrift* (1797), 346-354.

[81] Immanuel Kant, *The Conflict of the Faculties*, (Mary J. Gredor transl. & ed.1979), 42-47.

[82] Immanuel Kant, *The Conflict of the Faculties*, (Mary J. Gredor transl. & ed.1979), 36-39

[83] Leo Strauss, Natural Right and History (1953).

This essay has been an attempt to examine how the relations between theology, law and economics have structured themselves during five centuries of thinking about *ius gentium*, the law of nature and of nations, and empirical policy-science. Some of the developments have been triggered by causes related to the formation and reformation of universities, some to expectations or pressures from the outside. The disciplines have often been critical of each other and resistant to change. But they have also sought change to fortify their positions or expand their influence. Without aiming at anything close to exhaustiveness the essay has tried to make the point that history of the formation of knowledge about "law of nations" has not yet been told in any great depth: how is it that authority about universal norms has migrated between different disciplines and public and private institutions? What factors have situated such authority either in this or that "faculty" or specialization? Far from questions of merely historiographic interest, making them might alert us to the subtle ways in which authority claims about universal norms are being made and challenged today.[84]

[84]See Devid Kennedy, A World of Struggle. *How Power, Law and Expertise shape Global Political Economy* (2016).