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Guy Fiti Sinclair

**The Common Law of Mankind:  
C. Wilfred Jenks' Constitutional Vision**

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## THE JEAN MONNET PROGRAM

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Jean Monnet Working Paper 3/16

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# The Common Law of Mankind: C. Wilfred Jenks' Constitutional Vision

Guy Fiti Sinclair\*

## 1 Introduction

Structural changes associated with globalization, privatization, deregulation and the rise of new technologies have transformed the way international law is understood and practiced. International lawyers today are confronted with a bewildering variety of theoretical accounts of the relationship between law and global governance, from 'transnational legal process'<sup>1</sup> to 'governmental networks',<sup>2</sup> from 'global administrative law'<sup>3</sup> and 'global experimentalist governance'<sup>4</sup> to 'international public authority',<sup>5</sup> from 'global constitutionalism'<sup>6</sup> to the 'constitutionalization' of international law and organizations,<sup>7</sup> and more. Each of these accounts entails a project aiming at the renewal and reform of international law as a discipline and practice.<sup>8</sup> The descriptive and normative stakes of these projects are high: to understand how (and by whom) the world is governed and to subject those processes (and people) to legal standards of accountability and control. In many of these projects, moreover, it is clear that the concepts, categories, and vocabularies of domestic public law have become enmeshed with those of international law.<sup>9</sup>

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<sup>1</sup> Koh, 'Transnational Legal Process' 75 *Nebraska Law Review* 181 (1996); and Koh, 'Why Do Nations Obey International Law?' 106 *Yale L.J.* 2599 (1997).

<sup>2</sup> A.-M. Slaughter, *A New World Order* (2004).

<sup>3</sup> See, e.g., Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' 17 *EJIL* 1 (2006).

<sup>4</sup> De Búrca, Keohane and Sabel, 'Global Experimentalist Governance', 44 *British Journal of Political Science* (2014) 477.

<sup>5</sup> See generally A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds.) *The Exercise of Public Authority by International Institutions* (2010).

<sup>6</sup> See, e.g., Wiener et al, 'Global constitutionalism: Human rights, democracy and the rule of law' 1 *Global Constitutionalism* 1 (2012).

<sup>7</sup> See, e.g., J. Klabbers, A. Peters, and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2011); D. Cass, *The Constitutionalization of the World Trade Organization* (2005).

<sup>8</sup> See generally Kennedy, 'When Renewal Repeats: Thinking Against the Box' 32 *N.Y.U. J. Int'l L. & Pol.* 335 (2000).

<sup>9</sup> Cf. Weiler, 'Editorial: I.CON at ten' 10 *International Journal of Constitutional Law* 1, 1 (2012) (describing a broad research and publication agenda that 'challenge[s]... the lines drawn within and among the fields of public law').

This article excavates and analyses an earlier effort to reimagine international law, articulated long before globalization and global governance became buzzwords but at another moment at which the international legal order appeared to be undergoing vast and rapid transformations. By the time of the publication of *The Common Law of Mankind (CLM)* in 1958,<sup>10</sup> C. Wilfred Jenks was already a prolific scholar on topics related to the law of international organizations and international law generally. Largely comprised of edited versions of lectures and papers published elsewhere, *CLM* differed from Jenks' earlier works in the breadth of its theoretical and synthetic ambition. Its thesis, stated in the Preface, was that 'contemporary international law [could] no longer be reasonably presented within the framework of the classical exposition of international law as the law governing the relations between States but must be regarded as the common law of mankind in an early stage of its development'.<sup>11</sup> Elaborating upon that thesis through a sequence of chapters that ranged from the cross-cutting and general<sup>12</sup> to the specific,<sup>13</sup> *CLM* outlined a project for the reform of international law that recalls similar, though differently titled, projects today.

At first blush, *CLM* might not seem particularly worthy of excavation. Remembered today as one of a cohort of international lawyers who sought to rethink their discipline in the wake of the vast changes precipitated by World War II, the onset of the Cold War, and decolonization,<sup>14</sup> Jenks' contemporaries included Philip Jessup,<sup>15</sup> Georg Schwarzenberger,<sup>16</sup> Wolfgang Friedmann,<sup>17</sup> and Josef Kunz.<sup>18</sup> Notwithstanding the important differences among them, these scholars shared a general anxiety about the far-reaching transformations affecting the international

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<sup>10</sup> C. W. Jenks, *The Common Law of Mankind* (1958) [*CLM*].

<sup>11</sup> *CLM* xi

<sup>12</sup> See, e.g., 'The Scope of International Law' (Chapter 1), 'The Universality of International Law' (Chapter 2), 'The Impact of International Organisations on International Law' (Chapter 3), and 'Craftsmanship in International law' (Chapter 10).

<sup>13</sup> See, e.g., 'Atoms for Peace in International Law' (Chapter 7), 'An International Régime for Antarctica?' (Chapter 8), and 'International Law and Activities in Space' (Chapter 9).

<sup>14</sup> See generally M. Koskeniemi, *Gentle Civilizer of Nations* (2004) at 474-480.

<sup>15</sup> See generally P. Jessup, *Transnational Law* (1956).

<sup>16</sup> See, e.g., Schwarzenberger, 'The Province of the Doctrine of International Law' 9 *Current Legal Problems* 235 (1956).

<sup>17</sup> See, e.g., Friedmann, 'Some Impacts of Social Organization on International Law' 50 *American Journal of International Law* 475 (1956); Friedmann, 'The Changing Dimensions of International law', 62 *Colum. L. Rev.* 1147 (1962); and W. Friedmann, *The Changing Structure of International Law* (1964).

<sup>18</sup> See, e.g., Kunz, 'The Changing Law of Nations' 51 *American Journal of International Law* 77 (1957).

system and sought to move beyond a state-focussed conception of international law. Friedmann's formulation of an 'International Law of Co-operation' remains emblematic of the post-war moment in international legal thought,<sup>19</sup> while Jessup's concept of 'transnational law' has been taken up and reworked more recently in the work of Harold Koh and others.<sup>20</sup> In contrast, Jenks' conception of a 'common law of mankind' – which he further elaborated over a series of subsequent books,<sup>21</sup> to which some reference will be made here – is now largely overlooked as a framework for thinking about global legal ordering.

The retrieval of Jenks' vision of the common law of mankind is worth pursuing, nonetheless, if only because his personal involvement in the transformations he and others described promises to reveal new insights into the relationship between theory and practice in international law. After completing his legal training at Cambridge, Jenks immediately joined the International Labour Organization (ILO) and remained in its service for over three decades, playing a central role in some of that organization's most significant developments, until his death in 1973.<sup>22</sup> For almost all of the four decades of his employment at the ILO, that organization remained in the vanguard of the rise of functionally-oriented specialised agencies, the engagement of non-state actors in international legal processes, and the infusion of new substantive issues and procedures into the content of international law. It would not be surprising, then, to find that Jenks' outlook on international law was as much shaped by his legal practice at the ILO as it was by his training in the common law.

Indeed, this article argues that Jenks' outlook exemplifies a particular style of international legal thought and practice that might be termed 'common law constitutionalist'. Variants and elements of this style can be discerned in the writings of international law scholars and practitioners, as well as of prominent international

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<sup>19</sup> See, e.g., Burley, 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State' in J. G. Ruggie (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (1993) 125 at 126-129.

<sup>20</sup> See generally Koh, 'Transnational Legal Process'.

<sup>21</sup> See especially *Law, Freedom and Welfare* (1963), *Law in the World Community* (1967), *The World Beyond the Charter* (1968) and *A New World of Law* (1969).

<sup>22</sup> See generally Waldock and Jennings, 'Clarence Wilfred Jenks' 46 *Brit. Y. B. Int'l L.* xi (1972-1973).

civil servants. It draws on an idiom and set of techniques originating in common law jurisdictions and adapted to legal practice within international institutions. Its dominant themes are the rule of law, individual liberties, and legal development through creative experimentation and precedent.<sup>23</sup> It is constitutionalist insofar as it envisages international law or the constituent instruments of one or more international organizations as the evolving constitutional framework of an emerging international community. Located in an intermediate space between the pluralism of ‘global law without a state’<sup>24</sup> and more unitary visions,<sup>25</sup> it is at once pragmatic and idealistic, liberal and internationalist, envisaging an ongoing process of development towards a universal legal order in which legal professionals may assume a preeminent guiding role. Though not identical to any of the various public-law centred framings of contemporary international law, it prefigures their concerns and approaches in several important ways.

The approach adopted in this article is broadly interpretive, insofar as it seeks to recover the web of meanings – the background assumptions, beliefs and discourses – that are embodied in, and make sense of, institutional practices. Its purpose is not to revive Jenks’ common law of mankind in order to promote it as yet another competing framework for thinking about present-day international law. To the contrary, my intuition is that by revisiting Jenks’ largely-forgotten vision, we may gain a wider perspective on the possibilities and perils of similarly ambitious projects of reform today. The next three Parts of the article distinguish and analyse three core meanings of Jenks’ titular phrase – the common law of mankind as law beyond the state, as law beyond Europe, and as ‘living law’ – relating each in turn to the larger body of his writings and his experience at the ILO. Part 5 then outlines several senses in which Jenks’ common law vision might be described as ‘constitutionalist’. Part 6 concludes by noting the resonances and lessons of Jenks’ common law

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<sup>23</sup> Cf. J. Laws, *The Common Law Constitution* (2014) at 6-10 (referring to ‘the common law’s insights: reason, fairness and the presumption of liberty’ and describing ‘the common law’s fourfold method: evolution, experiment, history and distillation’). Despite certain terminological and conceptual similarities, it should be clear that this article is not concerned with the scholarly debate opposing ‘common law constitutionalism’ to legislative supremacy in common law jurisdictions: compare, e.g., *Ibid.* with Goldsworthy, ‘The Myth of the Common Law Constitution’ in D. E. Edlin (ed.), *Common Law Theory* (2007) Ch. 8.

<sup>24</sup> G. Teubner (ed), *Global Law Without a State* (1996).

<sup>25</sup> See, e.g., R. Domingo, *The New Global Law* (2010) (discussing Jenks at 39-41).



constitutionalism for public law centred projects of reform in international law today.

## **2. Law beyond the State**

The first and most central meaning of ‘common law of mankind’, announced at the outset and repeated throughout the book, was the extension of public international law beyond inter-state relations to embrace new actors and issues. International law increasingly addressed itself to actors other than states, such as individuals, international organizations, and corporations. Simultaneously, the content of international law had also changed: it was now concerned with elaborating ‘substantive rules on matters of common concern’, including ‘problems of economic and technological interdependence’, the protection of human rights, and other issues ‘vital to the growth of an international community and to the individual well-being of the citizens of its member states’ that may not directly involve states.<sup>26</sup> The book thus aimed to ‘explore, empirically and experimentally, an approach towards... a new synthesis based on the conception that contemporary international law ... must now be regarded as the common law of mankind in an early phase of its development’.<sup>27</sup>

*CLM* was not the first work to herald a sociologically-oriented, anti-formalist regeneration of international law, of course. Lassa Oppenheim’s formal definition of international law as ‘the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other’, though plausible and perhaps even orthodox at the start of the century, had been challenged by a growing body of scholarly opinion during the interwar years.<sup>28</sup> Alejandro Álvarez, in particular, had vigorously promoted a project of renewal in international law for over four decades,<sup>29</sup> latterly from his position as a judge of the

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<sup>26</sup> *CLM*17.

<sup>27</sup> *CLM*8.

<sup>28</sup> *CLM*8-9.

<sup>29</sup> See, e.g., Álvarez, ‘The New International Law’, 15 *Transactions of the Grotius Society* 35 (1929). Also see generally Koskenniemi, *Gentle Civilizer*, at 302-305.

International Court of Justice.<sup>30</sup> In addition, scholars of Jenks' own generation had more recently advanced a range of innovative frameworks for widening the discipline beyond inter-state relations. Most notable among these were Friedmann's suggestion that the term 'co-operative international law' be used to describe 'the growing number of international legal relationships and organizations which are not concerned either with the formalization of diplomatic inter-state relations, or with the adjustment of inter-state conflicts',<sup>31</sup> and Jessup's coinage of 'transnational law' to designate 'all law which regulates actions or events that transcend national frontiers', including both public and private international law, as well as 'other rules which do not wholly fit into such standard categories'.<sup>32</sup>

For Jenks, however, the overriding importance of individual rights and the rule of law were sourced in the deep values of the English common law. In a speech delivered to the Annual Meeting of the American Society of International Law (ASIL) the year after the publication of *CLM*, he argued that '[t]he essentials of the common law tradition lie in the fundamental postulate of the rule of law, ... in the belief that the state was made for man and not man for the state and that civil liberties are the cornerstone of political and personal freedom'.<sup>33</sup> Consistent with these 'essentials of the common law tradition', Jenks identified the principle of 'sovereignty within the law'<sup>34</sup> – expressed elsewhere as 'the principle that the law is above the State'<sup>35</sup> and 'the concept that sovereignty is limited by the law'<sup>36</sup> – as fundamental to the common law of mankind. Stressing the interdependence of 'the rule of law among nations' and 'political freedom and... the rule of law within nations',<sup>37</sup> *CLM* gave particular attention to the growth in international human rights instruments.<sup>38</sup> Jenks thus fell squarely within the 'Grotian tradition' in international law, recently identified by his

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<sup>30</sup> See, e.g., Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 12, at 12, 16 (Mar. 3) (Dissenting Opinion by Judge Álvarez) (urging the Court to interpret the UN Charter according to 'the new international law' which was then emerging in consonance with the 'progressive tendencies of international life').

<sup>31</sup> Friedmann, 'Some Impacts of Social Organization on International Law', at 507-509. Friedmann's first footnote refers to similarities between this article and Jenks' 'The Scope of International Law'.

<sup>32</sup> Jessup, *Transnational Law*, at 2.

<sup>33</sup> Jenks, 'The Challenge of Universality' 53 ASIL Proceedings 85 (1959) 90.

<sup>34</sup> *CLM*123.

<sup>35</sup> *CLM*125.

<sup>36</sup> *CLM*129.

<sup>37</sup> *CLM*171-172.

<sup>38</sup> *CLM*43-46.

friend Hersch Lauterpacht,<sup>39</sup> which placed the individual at the centre of international law and, as Jenks noted, was ‘particularly strong’ in Britain.<sup>40</sup>

Unlike his contemporaries, moreover, Jenks’ conception of a new international law embracing a range of non-state actors had a direct connection to his personal experience of working at one of those actors. Famously, the ILO’s tripartite structure provided for the participation of private actors – delegates of employer and worker organizations – as well as government representatives in both its Conference and Governing Body.<sup>41</sup> The same tripartite principle had earlier required Commissions of Enquiry, which were formed to consider complaints about particular members, to include employer and worker representatives.<sup>42</sup> Furthermore, it restricted the ability of member states to make reservations to, contract out from, interpret, amend or terminate ILO conventions, among other things, without agreement of the other relevant delegates.<sup>43</sup> As early as 1936, Jenks had argued that these features of the ILO could not ‘reasonably be made to square with the theory that international law is “a law between States only and exclusively”’.<sup>44</sup>

More profoundly, perhaps, the ILO had been intimately involved for several decades in what Jenks called ‘an attempt to create a common world law in respect of social questions’.<sup>45</sup> The subject matter of the ILO’s conventions and recommendations, which were primarily concerned with the conditions of employment, demonstrated the convergence of domestic policy and international law; indeed, as Eyal Benvenisti suggests, the ILO was the probably the first international organization in which obligations were placed upon states with respect to their own citizens.<sup>46</sup> Since 1919, the Preamble to the ILO’s constituent instrument had declared that universal peace would only be possible if based upon social justice, and that ‘the peace and the harmony of the world [was] imperilled’ by the ‘injustice, hardship and privation’ of

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<sup>39</sup> Cf. Lauterpacht, ‘The Grotian Tradition in International Law’ 23 *Brit. Y.B. Int’l L.* 1 (1946).

<sup>40</sup> *CLM*12.

<sup>41</sup> ILO Constitution (1946), arts. 3 and 7.

<sup>42</sup> ILO Constitution (pre 1946), art. 26.

<sup>43</sup> Jenks, ‘The Significance for International Law of the Tripartite Character of the International Labour Organisation’, 22 *Transactions of the Grotius Society* 45, 58-69 (1936).

<sup>44</sup> *Ibid.* at 77.

<sup>45</sup> Jenks, ‘The Significance for International Law of the Tripartite Character ...’, 81.

<sup>46</sup> E. Benvenisti, *The Law of Global Governance* (2014) 32.

existing labor conditions.<sup>47</sup> Aiming to redress these conditions, the ILO's widening activities over the following decades led it to become a champion of values associated with the welfare state, in turn making questions of human rights (including social rights) and Keynesian economics central concerns of international law.<sup>48</sup> That work reached an apotheosis in the 'Declaration of Philadelphia', adopted at the International Labour Conference in 1944 and subsequently appended to the ILO's constituent instrument.<sup>49</sup> Co-authored by Jenks, that Declaration presented a welfare-oriented view of universal human rights that was later echoed in the Charter of the United Nations and Universal Declaration of Human Rights. In addressing questions of economic development, the Declaration also embodied the universal scope of Jenks' legal vision.

### **3. Law beyond Europe**

The second meaning of Jenks' 'common law of mankind', then, was of an international law that had transcended its European origins; a universal law that was 'common' and available to all in the international community. Western publicists in the 19<sup>th</sup> century had seen international law as essentially European, 'limited to the civilised and Christian people of Europe or to those of European origin'.<sup>50</sup> Revealing a depth of reading and scholarship remarkable for a full-time practitioner, Jenks compared that parochial worldview to the more universal outlook of the 'Fathers of modern international law', from Vitoria to Vattel.<sup>51</sup> Recent decades had provided evidence of advancement towards universality: the emergence and consolidation of a 'formal universal order' in the wake of two World Wars was demonstrated by the recognition of the International Court of Justice as the principal judicial organ of the United Nations, the formulation of the sources of international law in its Statute, the creation of the International Law Commission with a mandate to assist the General

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<sup>47</sup> ILO Constitution, Preamble.

<sup>48</sup> On these activities of the ILO beginning in the interwar period, see G. F. Sinclair, *To Reform the World: The Legal Powers of International Organizations and the Making of Modern States* (OUP, forthcoming 2017).

<sup>49</sup> Declaration concerning the Aims and Purposes of the International Labour Organisation (26th Session of International Labor Conference, May 10, 1944), cited in full in 50 *International Labour Review* 1, 37 (1944).

<sup>50</sup> Wheaton, *Commentaries Upon International Law*, cited in *CLM* at 70.

<sup>51</sup> *CLM* 66-74

Assembly in the progressive development and codification of international law, and the growth of specialised agencies with law-making powers.<sup>52</sup> Overall, then, this was a confident progress narrative of '[t]he formal transformation of international law from the law of a Western European and North Atlantic family of Christian nations to the universal law of a world community'.<sup>53</sup>

Despite these advances, Jenks was concerned that the international legal system had been weakened by certain 'underlying strains' and now faced a 'crisis of growth'.<sup>54</sup> On the one hand, the ideological divisions of the Cold War were mirrored in a basic disagreement on 'the nature of law itself'; on the other hand, rapid decolonisation carried the 'grave danger' of diluting the content of the law.<sup>55</sup> Jenks was notably sympathetic to non-Western views, particularly in comparison to certain of his contemporaries, for whom the crisis in international law could be traced to the 'decline of Europe' and the rise of an 'anti-colonial rebellion' among non-Western peoples.<sup>56</sup> There was, nevertheless, more than a hint of condescension in his references in *CLM* to nations 'which for historical reasons retain a psychology of newly won independence' and which are 'sometimes inclined to take a high view of the prerogatives of sovereignty';<sup>57</sup> to 'an unlimited view of sovereignty' that 'continues to be expounded all too frequently in current international negotiations and discussions', especially by countries in Latin America, Asia and the Middle East, as well as the Soviet Union;<sup>58</sup> and to the 'deterioration of international standards' consequent upon an influx of new members into the United Nations, which had 'shaken the sense of legal and moral obligation to respect the decisions and findings of international bodies'.<sup>59</sup>

Jenks' solution to these problems borrowed from the methodology of the common law, seeking to distil rule and principle from established custom and practice. The

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<sup>52</sup> *CLM* 62-79.

<sup>53</sup> *CLM* 79.

<sup>54</sup> *CLM* 79.

<sup>55</sup> *CLM* 29.

<sup>56</sup> Kunz, 'The Changing Law of Nations', 51 *Am. J. Int'l L.* 77, 82 (1957).

<sup>57</sup> *CLM* 29.

<sup>58</sup> *CLM* 124.

<sup>59</sup> *CLM* 174.

task of ‘international lawyers bred in the common law’, as he later argued at the ASIL Annual Meeting, was ‘to achieve a wider synthesis in which our own legal tradition fuses with legal traditions which have arisen from entirely different histories and circumstances to produce a generally acceptable common law of mankind’.<sup>60</sup> Surveying an extraordinarily wide secondary literature on both Western and non-Western legal systems, Jenks thus sought to identify a common stock of custom and general principles with which to fortify international law.<sup>61</sup> In a typically optimistic summing up, Jenks concluded that there was nothing intrinsic to these traditions that made the idea of ‘a universal law of civil liberties’ unattainable in theory – the only practical obstacle being the restriction of ‘organised public opposition to the doctrine and policies of the dominant party’, as was the case in the Soviet Union.<sup>62</sup>

Jenks’s confidence that such a synthesis of legal traditions might be possible drew on his experience at the ILO. A sense of universal mission had pervaded that organization from the outset – ‘a faith in which the whole of mankind can believe’, in the words of first Director of the International Labour Office, Albert Thomas.<sup>63</sup> Immediately after its establishment, the Office began to set up a network of overseas branch offices and national correspondents to maintain regular relations with national governments, workers’ and employers’ organizations in important capitals.<sup>64</sup> From the early 1920s onwards, Thomas and other members of his staff undertook frequent ‘missions’ to member countries. Already by the 1930s, those missions had extended as far afield as Egypt, China, Japan, the Dutch East Indies, Indochina, and Latin America, supplying the occasion for transmitting European ideas and practices of welfare-oriented liberal government and increasingly involving the provision of technical assistance, particularly in the establishment of systems of factory inspection, schemes of social insurance, and the like. There was thus a very

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<sup>60</sup> Jenks, ‘Challenge of Universality’, 90.

<sup>61</sup> See especially *CLM* 84-166. Jenks acknowledged the assistance of a large number of experts on non-Western legal systems, including Muhammad Zafrullah Khan (then serving on the International Court of Justice) on Islamic law, Shabtai Rosenne on Jewish law, and T.O. Elias on ‘African law’. *CLM* at xiii.

<sup>62</sup> *CLM* 166-167.

<sup>63</sup> Albert Thomas, *International Social Policy* 73 (1948).

<sup>64</sup> See generally International Labour Office, *The International Labour Organisation: The First Decade* (1931).

real sense in the ILO of the possibilities of developing a set of shared and coordinated norms through the 'mutual interaction of different legal systems'.<sup>65</sup>

Moreover, Jenks' experience in the ILO had taught him that international lawyers could play a direct role in facilitating that process. In drafting ILO conventions and recommendations, of course, the 'international legislative draftsman' performed the crucial function of ensuring that 'law-making treaties' expressed the shared intentions of the parties while reinforcing each other 'so as to constitute a coherent international Statute-book'.<sup>66</sup> But a more pro-active shaping of domestic law was also possible. Accordingly, as the Second World War drew to a close, the International Labour Office seized the opportunity to influence the reconstruction of national constitutions, not only in Europe but also in independent states and dependent territories around the world. As Jenks wrote in the introduction to a volume that compiled the 'world's law regarding social and economic questions', '[t]he task of rebuilding the constitutional arrangements of so large a number of countries' presented 'an opportunity unlikely to recur for generations'.<sup>67</sup> As the next Part of this article argues, the legitimacy of that task depended on a conception of the common law of mankind as mutable and organic.

#### **4. Law as a Living Growth**

To Jenks, the common law of mankind was an emergent phenomenon, evolving in response to social, economic and political change. A universal legal order had not yet been realised, though there had been 'progress toward universality'.<sup>68</sup> International law was 'the law of the transition' from anarchy 'towards an organised world community': 'As such it must show the capacity for adaptation, change and growth implied in the idea of a transition.'<sup>69</sup> The law was 'constantly in motion' and 'the law

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<sup>65</sup> *CLM*109.

<sup>66</sup> *CLM*433, 435.

<sup>67</sup> ILO, *Constitutional Provisions concerning Social and Economic Policy* x (1944) at xiii.

<sup>68</sup> *CLM*63.

<sup>69</sup> Jenks, *Law in the World Community*, 7.

of yesterday [would] not necessarily be the law of tomorrow'.<sup>70</sup> As Jenks repeatedly emphasized throughout *CLM*, the 'imperfect development' of the world community was 'reflected in the early stage of development of the law', but did 'not invalidate the basic conception'.<sup>71</sup>

This, then, was a characteristically 'social' view of law, deeply influenced by the sociological jurisprudence of the interwar years, as organic, vital and responsive to the progressive needs of society.<sup>72</sup> In Jenks' estimation, the view of law as a 'living growth' was shared by both of the major legal traditions of the West.<sup>73</sup> Though perhaps less compatible with Hindu, Chinese, Japanese and especially Islamic law – all of which 'were in phases of imperviousness to changes from within when they first became subject to western influence' – such a 'dynamic' view of law was indispensable to an 'effective universal system'.<sup>74</sup> The common law, in particular, was a pragmatic tradition the essence of which involved '[g]rowth by adaptation from precedent to precedent to meet practical needs as they emerge'.<sup>75</sup> Its strength was 'an essentially experimental approach' that drew upon 'the experience of the past' while being 'equally concerned with the needs of the future'.<sup>76</sup> The common law thus offered a methodology for 'the metabolism of legal development, the process by which the law takes in, assimilates and uses matter from without and by so doing gathers the energy for its own growth'.<sup>77</sup>

Furthermore, the idea of international law and institutions as 'living' things was deeply embedded in the discourse and practice of the ILO. Already in 1920, during the earliest months of that organization's existence, Albert Thomas declared the intention of his staff 'to make of this institution... an adaptable and living

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<sup>70</sup> Jenks, *Law, Freedom and Welfare*, 92.

<sup>71</sup> *CLM* 8, 58.

<sup>72</sup> See generally Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (2006) 19 (ch 2), 37-42; and Astorino, 'The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience', 34 *Duq. L. Rev.* 277 (1995-1996).

<sup>73</sup> *CLM* 167.

<sup>74</sup> *CLM* 167, 168.

<sup>75</sup> *CLM* 167.

<sup>76</sup> *CLM* 167.

<sup>77</sup> *CLM* 167.



organisation'.<sup>78</sup> Two years later, in his first appearance before the Permanent Court of International Justice in 1922, Thomas was able to ground his legal arguments in the emergent 'daily practice' of the organization: 'A whole series of practices are in fact growing up; customs are being adopted which do not conflict with [the ILO's constituent instrument] but supplement it.'<sup>79</sup> In the same year, the International Labour Office started to curate and systematize that practice by publishing its advice to member states on questions of legal interpretation in regular issues of its *Official Bulletin*.<sup>80</sup> Prepared with meticulous attention to the preparatory work of conventions and recommendations, the earliest of these 'interpretations' nonetheless dutifully noted that the Office was 'not empowered by the Treaty of Peace to deliver interpretations of terms in Conventions'.<sup>81</sup> Within two decades, however, the Office had established a higher interpretive authority. That authority applied where the Office gave an opinion on a particular provision, and that opinion had been submitted to the ILO's Governing Body, published in the Bulletin, and met with no adverse comment. If the International Labour Conference subsequently included an identical or equivalent provision in another Convention, it was presumed to have intended that provision to be understood in the manner in which the Office had previously interpreted it.

The possibility of a dynamic evolution of international law thus drew directly on the ILO's experience of the development of custom and practice through the common law technique of accumulating precedent. By 1938, Jenks was able to state with confidence that '[t]he practice of requesting the Office for its opinion has... developed to the point at which there is a considerable "*jurisprudence*" of Office opinions upon disputed points of interpretation'.<sup>82</sup> In a move that anticipated later developments in the jurisprudence of the International Court of Justice,<sup>83</sup> Jenks considered the

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<sup>78</sup> A. Thomas, *International Social Policy* 9 (1948).

<sup>79</sup> Speech by M. Albert Thomas at the Public Sitting on June 30<sup>th</sup>, 1922 (*Translation*), in *Speeches Made and Documents Read before the Court*, Series C, No. 1, Annex 21, p. 123 (1922), at 142.

<sup>80</sup> See generally Jenks, 'The Interpretation of International Labour Conventions by the International Labour Office', 20 *Brit. Y.B. Int'l L.* 132 (1939).

<sup>81</sup> (no author), 'Interpretation of the Decisions of the International Labour Conference', 5 *Official Bulletin* 57 (1922) at 59.

<sup>82</sup> Jenks, 'The Interpretation of International Labour Conventions by the International Labour Office', 20 *Brit. Y.B. Int'l L.* 132, 133 (1939) (emphasis in original).

<sup>83</sup> See generally *Certain Expenses of the United Nations* (Article 17, Paragraph 2, of the Charter), *Advisory Opinion*, 1962 I.C.J. 151 (July 20). Also cf. *ibid.* 182 at 189-190 (July 20) (separate opinion of Judge Spender, dissenting on this point).

practice of international organizations to be an important ‘element in the development of customary law’.<sup>84</sup> The next part suggests a way in which Jenks’ sensibility combined the cautious and gradual methodology of the common law with a larger project of constitutional transformation.

## 5. Common law *constitutionalism*?

So far, I have argued that *CLM* offered a framework for thinking about international law that reflected Jenks’ training in the common law and was further shaped by his experiences in the ILO. In what sense, though, did all this comprise a *constitutional* vision of international law? I suggest that it did so in several interconnected ways.

First, Jenks’ conception of an emerging universal law was tied to an implicitly constitutional vision of the international community, bound together (*in potentia* if not yet in actuality) by a common set of moral values and legal obligations. Since at least the publication of Alfred Verdross’ landmark work in 1926,<sup>85</sup> the idea of an international community (as opposed to a more loosely organised society of nations) had signalled a constitutionalist mentality in international law.<sup>86</sup> A similar vision was discernible in Jenks’ assertion that ‘[f]or the first time in history we have the formal framework of a universal world order and the formal elements of a universal legal order’<sup>87</sup> and further reinforced in his extended discussion of the ‘structure and law-making processes of the international community’.<sup>88</sup> Indeed, for Jenks that vision at times verged on the mystical, with law placing moral demands on the individual conscience through the transcendent operation of a kind Rousseauian collective will, articulated in Durkheimian terms of solidarity and social fact:<sup>89</sup>

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<sup>84</sup> *CLM*190.

<sup>85</sup> Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* [‘The Constitution of the International Legal Community’] (1926).

<sup>86</sup> See generally Aiofe O’Donoghue, ‘Alfred Verdross and the Contemporary Constitutionalization Debate’ 32 *Oxford Journal of Legal Studies* 799 (2012) at 803-806; and Thomas Kleinlein, ‘Alfred Verdross as a Founding Father of International Constitutionalism?’ 4 *Goettingen Journal of International Law* 385 (2012).

<sup>87</sup> *CLM*2.

<sup>88</sup> *CLM*19-37.

<sup>89</sup> Jenks, *Law, Freedom and Welfare*, 90-91.

The collective consent from which the law derives its authority is to be found in the will of the world community as such, in the *Gemeinwille* as the will of the community shared in by its members rather than as the concurrent will of the individual members. ... Solidarity is a social fact which posits a duty to comply with the will of the world community as an expression of that solidarity. ... It is the sense of right of the world community and its members which gives a moral basis to the authority of the will of the world community. ... The law crystallises spontaneously by recognised procedures in accordance with the needs of international life because such is the will of the world community. The individual conscience recognises the binding force of the law accepted by the world community.

A second constitutional dimension of Jenks' thought can be identified in the role he saw international organizations performing in that community. The common law of mankind was 'the law of an organised world community, constituted on the basis of States but discharging its community functions increasingly through a complex of international and regional institutions'.<sup>90</sup> In separate opinions earlier in the decade, judges of the International Court of Justice had already referred to certain categories of multilateral conventions, including the constituent instruments of international and regional organizations, as 'the *Constitution* of international society' and 'the *new international constitutional law*';<sup>91</sup> and to the Covenant of the League of Nations as a 'constitutional instrument'.<sup>92</sup> In a similar vein, Jenks argued that a central component of the emerging legal order was the law of international institutions, which he described as 'the law governing *the constitutional framework of a developing world community*'.<sup>93</sup>

It is worth underscoring the relatively pluralist orientation of Jenks' constitutionalism in this respect. International lawyers have tended to focus their

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<sup>90</sup> *CLM*8.

<sup>91</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 49 at 51 (May 28) (Dissenting Opinion by Judge Álvarez; emphasis in original).

<sup>92</sup> *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, 1955 I.C.J. 90 at 106 (June 7) (Separate Opinion by Judge Lauterpacht).

<sup>93</sup> *CLM*22 (emphasis added).

constitutionalist ambitions on one or another international organization – most commonly the United Nations,<sup>94</sup> but more recently also the European Union and World Trade Organization.<sup>95</sup> In contrast, and notwithstanding his occasional reference to the UN Charter as ‘the life-giving constitution of a world community designed to endure for ages to come’,<sup>96</sup> Jenks presents a vision of multiple, overlapping and relatively autonomous constitutional orders, each attached to the specialized machinery of a particular international organization.<sup>97</sup> No doubt this catholic outlook was also the product of his immersion in the ILO, which had taken pains to assert its autonomy from the League of Nations from the outset and was by this time one of the longest continually functioning international organizations. In this view, organizations of world-wide and regional scope – such as the nascent institutions of European integration – were ‘not alternative and rival approaches’ but rather represented ‘essentially complementary tendencies, each of which can greatly strengthen the other’.<sup>98</sup> Moreover, Jenks was one of the first to recognize and grapple with the problem of coordination among specialized agencies.<sup>99</sup>

A related sense in which Jenks’ presented a constitutionalist vision relates to his view of the common law of mankind as a ‘living law’. By the early 1950s, American scholars in both international law and international relations were regularly describing the UN Charter as a ‘living Constitution’, drawing express comparisons with reference with the U.S. Constitution, and praising the Charter’s flexibility and adaptability to changing circumstances.<sup>100</sup> What is less widely recognised is Jenks’ role in popularising this domestic analogy into international legal discourse. Already

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<sup>94</sup> See, e.g., B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (2009).

<sup>95</sup> See generally G. de Búrca and J. H. H. Weiler (eds.), *The Worlds of European Constitutionalism* (2011); J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009).

<sup>96</sup> Jenks, *The World Beyond the Charter*, 86.

<sup>97</sup> See generally *CLM* 208-230.

<sup>98</sup> *CLM* 229-230.

<sup>99</sup> *CLM* 220-229.

<sup>100</sup> See, e.g., Engel, ‘De Facto Revision of the Charter of the United Nations’, 14 *J. Pol.* 132, 133 (1952) (asking rhetorically whether the UN Charter is ‘a rigid, inflexible instrument’ or ‘a “living Constitution” capable of being adapted to changing circumstances’); Engel, ‘The Changing Charter of the United Nations’, *Y.B. World Aff.* 71, 71 (1953) (opening with a reference to ‘the “living” Constitution of the United States’, and arguing that ‘like the Philadelphia Constitution, the San Francisco Charter has proved flexible enough... to be adapted to changing circumstances even without formal amendments’); Richard F. Scott, ‘Revision of the United Nations Charter: A Study of Various Approaches’, 53 *Mich. L. Rev.* 39, 52-53 (1954) (comparing the evolution of ‘organic treaties’ like the Charter to ‘the historical controversy central to interpretation of the American Constitution’).

in 1934, the nomenclature of the ILO's constituent instrument had changed, at Jenks' suggestion and initiative, from 'Part XIII' (of the Treaty of Versailles) to 'the Constitution of the International Labour Organisation'.<sup>101</sup> In contrast to the League of Nations, whose Covenant had been interpreted 'on strict constructionist lines with disastrous results', the ILO had developed a 'constitutional tradition' in which 'the concept of the constitution as a living growth was fully accepted'.<sup>102</sup> Indeed, it was precisely this concept, Jenks argued, 'became the basis of the acceptance of membership in the ILO by the United States' in 1934.<sup>103</sup>

A decade later, Jenks drew an even closer comparison with the U.S. Constitution, relying on American and international legal authorities in almost equal measure.<sup>104</sup> In the meantime, the United States had risen to become the leading member of that organization: in 1939, the first American Director of the International Labour Office was appointed; at the end of 1940, the Office moved from Geneva to Montreal, where it could gain access to the Roosevelt administration without raising doubts about the latter's neutrality in the war; and in 1941, the International Labour Conference was held in New York, chaired by the U.S. Secretary of Labor Frances Perkins, and held its closing session at the White House where it was addressed by President Roosevelt himself.<sup>105</sup> In a highly significant memorandum, written during the closing years of the war, Jenks argued that the 'constitutional practice' of the ILO, like that of the United States, was based upon 'a dynamic interpretation of [its] Constitution'.<sup>106</sup> Intellectually and symbolically aligning his vision of 'international constitutional policy' with the constitutional tradition of the country that would be most influential in shaping the postwar international order,<sup>107</sup> Jenks justified the ILO's approach to constitutional interpretation by quoting at length from the classic judgment of Chief

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<sup>101</sup> Jenks, 'The Future Development of the Constitution and Constitutional Practice of the International Labour Organisation: Memorandum by the Legal Adviser of the International Labor Office', 27 ILO Official Bulletin (1945) at 115.

<sup>102</sup> *CLM* 430.

<sup>103</sup> *CLM* 430-431.

<sup>104</sup> Jenks, Memo on Constitutional Practice, 114.

<sup>105</sup> See generally Hughes and Haworth, 'A Shift in the Centre of Gravity: The ILO under Harold Butler and John G. Winant', in Jasmien Van Daele (ed.), *ILO Histories* 293 (ch 12) (2010); Goodrich, 'Program of the International Labor Organization', 54 Monthly Lab. Rev. 305 (1942); and Simpson, 'The I.L.O. in Wartime', 31 Am. Lab. Legis. Rev. 108 (1941).

<sup>106</sup> *Ibid.* at 117.

<sup>107</sup> Jenks, 'Some Constitutional Problems of International Organizations', 22 Brit. Y. B. Int'l L. 11, 16 (1945).

Justice John Marshall in the case of *McCulloch v. Maryland*,<sup>108</sup> as well as the more recent decision by Justice Oliver Wendell Holmes in *Missouri v. Holland*.<sup>109</sup> Both cases had been widely cited in support of the administrative reforms and governmental expansions undertaken as part of the New Deal,<sup>110</sup> and would later become standard reference points for scholars describing the UN Charter as a 'living constitution'.

Last but not least, *CLM* outlined a constitutional *project* in which international lawyers could become active agents in forging a common law of mankind and thereby in (re)constituting the world. Throughout the book, Jenks repeatedly set action items for himself and his colleagues in the legal profession. Having observed that the 'formal elements of a universal legal order' were for the first time available, he declared that '*our* problem is to fuse these elements into a body of law which expresses and protects the common interests of an international community'.<sup>111</sup> The task which confronted him and other professionals 'in the field of international law' was primarily 'to achieve an intellectual revolution... which will give us a legal system with sufficiently broad and deep foundations to command the allegiance of a world community'.<sup>112</sup> And while other efforts of a political and economic nature would be necessary, it was 'now our task... to fuse the legal traditions of the diverse cultures of contemporary civilisation into a universal legal order'.<sup>113</sup> An earlier statement by Jenks makes the centrality of lawyers to this world-reforming enterprise even more explicit:<sup>114</sup>

International institutions will necessarily evolve slowly... Institutional development is primarily the responsibility of statesmanship . . . but it must be inspired by a teleological constitutionalism, dynamic in outlook, based on a scholarly grasp of the institutional needs of a rapidly evolving society, and

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<sup>108</sup> 17 U.S. (4 Wheaton) 316 (1819). Cited in Memo on Constitutional Practice, at 116.

<sup>109</sup> 252 U.S. 416 (1920). Cited in Memo on Constitutional Practice, at 117.

<sup>110</sup> See generally Gillman, 'The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building', 11 Stud. Am. Pol. Dev. 191 (1997).

<sup>111</sup> *CLM* 80 (emphasis added).

<sup>112</sup> *CLM* 87.

<sup>113</sup> *CLM* 172.

<sup>114</sup> Jenks, 'Some Constitutional Problems of International Organizations' 22 Brit. Y.B. Int'l L. 11 (1945) 71-72.

sustained by a keen awareness of the institutional techniques available to meet those needs. Therein lies the responsibility and the opportunity of the international lawyer in the present stage of the development of international institutions.

Once again, this was a constitutionalist project of a distinctively common law kind, deeply suspicious of grand projects of institutional redesign and preferring to proceed step by step in the basis of practical experience. The development of the ‘constitutional practice of international organisations’ had to be achieved through the exercise of good legal and political judgement, rather than ‘by the application of any formula or doctrine’.<sup>115</sup> In this task, legal advisors to international organizations needed to develop the qualities of a common lawyer, combining ‘vision and inventiveness with tact and judgment and... the practical wisdom which distinguishes instinctively between a time for boldness and a time for patience’.<sup>116</sup> *CLM*s account of the essentials of ‘good craftsmanship’ in international law – including ‘practical skill in interpreting, applying and developing a complex and growing body of precedent and experience’ and ‘unswerving allegiance to ... the law in process of development rather than to the law in a particular stage of development’ – likewise reflected an unmistakably common law outlook.<sup>117</sup> Rather than offer substantive solutions, the goal of the international legal advisor was to establish the procedural ‘rules of the game’ in such a way that they encouraged negotiation and agreement among states with different aims and traditions.<sup>118</sup> For better or for worse, this picture of apolitical expertise in the service of international law remains an attractive, if perhaps ultimately misleading, ideal.

## **6. Conclusion**

This article has argued that Jenks’ vision of an evolving, universal legal order exemplifies what may be termed a common law constitutionalist style in public

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<sup>115</sup> *CLM* 431.

<sup>116</sup> *CLM* 428.

<sup>117</sup> *CLM* 442.

<sup>118</sup> *CLM* 432.

international law. The goal of this article has been to explore that vision through a close reading of the central themes of *CLM* and related texts, in the context of Jenks' long experience as common lawyer working in an international organization. It has also intended to suggest some of ways in which the legal advisors to international organizations can serve as channels for the migration of ideas and methods from domestic public law into international legal theory and practice.

Aspects of Jenks' common law constitutionalism continue to resonate in present day public law framings in international law. His anxiety with fault lines in the international legal system – expressed in terms of conflicts between law making treaties and the 'underlying strains' brought about and exposed by decolonization and the Cold War – have resurfaced under the rubric of fragmentation.<sup>119</sup> His solution to those weaknesses – an effort to take resort from politics in the comforting vocabulary of constitutionalism – is also reflected in a similar move made lately by many international lawyers.<sup>120</sup> The metaphor of a 'living constitution' retains a subtle power in presentations of international organizations law.<sup>121</sup> Likewise, Jenks' restrained and modest common law sensibility has a significant amount in common with recent accounts of 'framework originalism' in constitutional law, constitutional pluralism, and experimentalist approaches to global governance.

Yet Jenks also presents cautionary lessons for would-be projects of reform in the discipline. His description of the international community, as we have seen, contained a tension between pluralism and collectivism that was never completely reconciled in theoretical terms – only deferred to a later practical resolution to be attained, if ever) through an indefinitely extended process of evolution. That process was to be guided in turn by a cohort of international lawyers possessing an extraordinary combination of attributes: practical wisdom, vision and inventiveness,

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<sup>119</sup> Also see generally Jenks, 'The Conflict of Law-Making Treaties' 30 *British Year Book of International Law* 401 (1953).

<sup>120</sup> See generally Dunoff, 'Why Constitutionalism Now? Text, Context and the Historical Contingency of Ideas' 1 *J. Int'l L & Int'l Rel.* 191 (2004-2005).

<sup>121</sup> See, e.g., S. Chesterman, T. M. Franck and D. M. Malone, *Law and Practice of the United Nations* 10, 11 (2008); B. Fassbender, *The United Nations Charter as the Constitution of the International Community* 130-131 (2009); and H. G. Schermers and N. M. Blokker, *International Institutional Law* (4th rev. ed., 2003) ¶1156.



tact and judgement, broad scholarship, skill at drafting... international lawyers, that is to say, very much like Jenks himself.

Indeed, for all his genuine concern to ensure that it reflected all the major legal traditions of the world, Jenks' project of constructing a common law of mankind was unmistakably based in the values and assumptions of Western law. Those values included not only 'the rule of law among nations', 'political freedom and... the rule of law within nations', but also 'legal guarantees for international investment, international trade and international communications'.<sup>122</sup> The *sine qua non* of a universal legal order was that it gave 'reasonable expression to *our* sense of right and justice'.<sup>123</sup> While achieving a 'wider synthesis' with other traditions, Jenks argued, international lawyers from common law backgrounds must therefore 'ensure that that synthesis adequately protects *our own freedom and security* and gives full expression to *our own sense of right and justice*'.<sup>124</sup> To achieve that outcome, he proposed a kind of 'Fulbright plan for international law', including a program of technical assistance to promote the study of international law and make 'the major texts of European legal thought' available in non-Western states.<sup>125</sup>

The proponents of public law framings of international law face much the same dilemmas today. In grappling with the vast social, political and economic changes wrought by globalization, should traditional notions of sovereignty be discarded or retained as a bulwark against greater inequality in the international system?<sup>126</sup> Are national, international, or cosmopolitan publics to be given priority in mechanisms of accountability?<sup>127</sup> How are we to ensure that ostensibly universal, seemingly pluralist principles and values are not simply cover for yet more worrisome local interests,<sup>128</sup> or for imperialism under a new guise?<sup>129</sup> No easy answers are available,

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<sup>122</sup> CLM 171-172.

<sup>123</sup> CLM 169 (emphasis added).

<sup>124</sup> Jenks, 'Challenge of Universality', 90 (emphasis added).

<sup>125</sup> CLM 171 fn 36.

<sup>126</sup> Kingsbury, 'Sovereignty and Inequality' 9 EJIL 599 (1998).

<sup>127</sup> Krisch, 'The Pluralism of Global Administrative Law' 17 EJIL 247 (2006).

<sup>128</sup> Harlow, 'Global Administrative Law: The Quest for Principles and Values' 17 EJIL 187 (2006).

<sup>129</sup> Chimni, 'Co-optation and Resistance: Two Faces of Global Administrative Law' 37 N.Y.U. J. Int'l L. & Pol. 799 (2005).

but retrieving and re-examining past efforts at disciplinary renewal, such as Wilfred Jenks' common law constitutionalism, may alert us to some of the dangers.<sup>130</sup>

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<sup>130</sup> See generally Kennedy, 'When Renewal Repeats: Thinking Against the Box' 32 N.Y.U. J. Int'l L. & Pol. 335 (2000).

