
What International Law Should (Not) Become. A Comment on Koskenniemi

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Abstract

This comment argues that Koskenniemi's postmodern irony with regard to concepts such as human rights and jus cogens, which views these concepts either as 'kitsch' or as mere 'instruments in hegemonic struggle', is not plausible, because there is, contrary to Koskenniemi's postmodern-ironist assertions, no neutral platform permitting us to stand outside (and to look through) concepts such as human rights, democracy, jus cogens, and so on.

'What particular politics', Professor Koskenniemi asks in his provocative paper, 'might we have good reason to imagine as a politics of universal law?' The 'particular politics' he is looking for must be one, he argues, that 'conceives its universal ambition without the involvement of the civilizing mission, or the solipsism of Empire'. Again and again Koskenniemi, with the authority of a distinguished historian of international law,¹ describes in some historical detail how international law has in the past succumbed to, and transformed itself into a vehicle of, 'false universalism'; how invocation of its aspirational vocabulary of *jus cogens* and human rights is nothing but 'a hegemonic manoeuvre' by Europe with regard to other cultures; how the 'sophisticated suspicion of "whoever invokes humanity wants to cheat"² – referring here to Carl Schmitt – holds sway.

Koskenniemi wishes to be perceived as a staunch defender of 'universalism' in international law, but it is impossible to see upon what argumentative basis he can legitimately make that claim. Rather, the attempt to drive a wedge between American

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¹ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

² All references are, unless otherwise noted, to Koskenniemi's paper 'International Law in Europe: Between Tradition and Renewal'. Other recent publications of his I have consulted in preparing this comment are: 'International Law and Hegemony: A Reconfiguration', 17 *Cambridge Rev Int'l Affairs* (2004) 197 [hereinafter IL&H], and 'Legal Universalism. Between Morality and Power in a World of States', in S. Chen (ed.), *Law, Justice, and Power. Between Reason and Will* (2004), 46 [hereinafter LU]; *idem* and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden J Int'l L* (2002)553.

and European discourses on international law by introducing an essentialist juxtaposition between a ‘European politics of law’ and an ‘American politics of Empire’ seems to be but a kind of higher-order-Schmittian trope (with Europe now being the proxy of who counts as a demotic ‘friend’).

The substance of Koskenniemi’s argument is quickly summarized: against the background of a transatlantic divide, caused by the Iraq war, between ‘Europe’ and ‘America’, European international lawyers should rediscover themselves as Europeans by adopting an ‘ethics of formalism’ (IL&H) which rejects both authoritarian foundationalism (the idea of international law as mirroring an assumed ‘prepolitical community or structure’ (LU, at 62)) and instrumentalism (the political appropriation of international law for imperialistic ends). International law’s basic concepts such as *jus cogens* are, in Koskenniemi’s account, but endlessly negotiable within a process of ‘hegemonic contestation’ (IL&H) and ‘realist critique’ (IL&H). Adopting ‘formalism’ is a way of acknowledging that ‘universal law . . . has no voice of its own, that all we hear are voices making claims under the law’ and that ‘the choice is not between modern law and archaic politics, but between my law and yours,’ because ‘[e]verything is at stake, but for everyone.’ While contenders, within that process, remain free to disagree over ‘where the universal lies’, we – Koskenniemi’s audience – may ‘hope’ that ‘particular stories, linked with very easily definable traditions emerge from their particularity towards the universal’.

It’s difficult to make sense of this argument, let alone to endorse it. Surely, ‘realist critique’, taken by itself, can – as Schmitt’s example teaches us – just as well turn into a recipe for irrationalism, moral irresponsibility and decisionism. The requirement of a mere ‘distancing’ of political actors ‘from their idiosyncratic preferences’³ is, by itself, in no conceivable way capable of accounting for the possibility of political obligation and intersubjective moral bindingness, let alone explain how a ‘politics of universal law’ and a ‘process of the construction of a universal political community’,⁴ is possible. Nor can the ‘technique of articulating political claims in terms of legal rights’ (IL&H, at 217) provide a non-circular account of, and explain, the universal and objective appeal of human rights: people invoke human rights precisely because human rights have that appeal. Koskenniemi’s postmodern irony and external scepticism⁵ with regard to concepts such as human rights, *jus cogens* – scepticism which views them either as ‘kitsch’ or as mere ‘instruments in hegemonic struggle’ – cannot succeed, because there is, contrary to his postmodern-ironist assertions, no neutral platform permitting one to stand outside (and to look through) concepts such as human rights, democracy, *jus cogens*, etc. Koskenniemi’s scepticism is only intelligible as internal scepticism, as a stance within a constitutional-interpretive process, and, as such, ‘formalism’ itself is always implicitly a controversial substantive position.

³ ‘International Law and Hegemony’, *supra* note 2, *passim*.

⁴ *Ibid.*

⁵ On the distinction between external and internal scepticism, cf. R. Dworkin, ‘Objectivity and Truth: You’d Better Believe It’, 25 *Philosophy and Public Affairs* (1996) 2ii; *idem*, ‘Hart’s Postscript and the Character of Political Philosophy’, 24 *OJLS* (2004)1.

What is, conceptually, missing in Koskenniemi's account, then, is the recognition that concepts such as *jus cogens* are interpretive concepts, i.e. concepts that are constitutively part of a global transjurisdictionally-led debate about the sources of international law – concepts that permit, indeed, invite, deep, sharp and pervasive reasonable disagreement among interpreters over their meaning and scope. These concepts are always, and irreducibly, both at the same time subject-matter of evolving interpretation and, on the other hand, conversational constraints which discipline the interpretive process and ensure its truth-oriented character: constraints which ensure, in other words, exposure to, and inclusion of, ever wider audiences and voices, and at the same time, point towards the normative coherence of the interpretive-legal practice as a whole. To be sure, the real, deep difficulty, exacerbated by the extension to the fragmented realm of international law, is: How can we supply a general justification for constitutional interpretation without presupposing too much by way of controversial claims within that practice? Should we take 'peoples' or 'people' as its primary actors and agents?⁶ But the response to these controversial questions cannot be to eliminate ideas of interpretation, coherence and reasonableness altogether (as Koskenniemi seems to do), but to recognize that underlying the constitutional-interpretive process is an idea of deliberative reciprocity which requires interpreters to ask which norms and institutional arrangements would be considered as acceptable, on a fair basis, by all those who would be affected. This idea of deliberative reciprocity does not blind itself to, but, to the contrary, accommodates facts of reasonable disagreement: in justifying to you why a regime's claim to legitimacy deserves acceptance, I recognize your capacity to agree or to disagree with me on the basis of reasons which equally apply to both of us – i.e. your deliberative autonomy as a free and equal person.

Maybe, then, Koskenniemi wishes his message to be a 'dark' and 'realist' one – that this interpretive practice simply won't be forthcoming in the realm of international law, given facts of multiple pluralism, fragmentation and political disagreement, sharpened by transatlantic disaccord over Iraq and the role of the UN. Maybe it is defeatism which causes Koskenniemi's views to so uneasily hover between a Schmittian personification of 'Europe' on the one hand, and a surprisingly euphoric, quasi libertarian view of political culture in which discursive freedom will flourish once we get rid of foundationalist assumptions, and in which human rights, free trade norms and other instances of disaggregated law-making are just 'themes'⁷ loosely hanging together in a postmodern global public space, oscillating between unity and diversity. But, as Koskenniemi himself seems to recognize in his repeated critique of 'solipsism':⁸ like in any partnership, the first casualty of premature scepticism, if carried to its logical endpoint, is, of course, always the very idea of dialogue: and, concomitantly, of political accountability.

Is it possible, then, to offer a more constructive and forward-looking account of international law? Underlying the contemporary transatlantic debate over role and

⁶ For an overview of this debate, cf. M.S. Flaherty, 'Rights, Reality, and Utopia', in 'Symposium: Rawls and the Law, Panel IV: The Law of Peoples', 72 *Fordham LR* (2004) 1789.

⁷ 'International Law and Hegemony', *supra* note 2.

⁸ 'Legal Universalism', *supra* note 2.

conceptions of international law is a deep divide between two views which I will call ‘accommodationist’ and ‘constitutionalist’, respectively.

According to the former, the accommodationist (or contractualist) view, the primary reference of international law is, and should be, to ‘states’ – frequently making agreements with one another within an entirely horizontalized global legal order.⁹ According to the latter, constitutionalist, view, by contrast, the most fundamental reference of international law is not to ‘peoples’ personified, nor to patterns of repeated prisoner’s dilemmas between states, but to ‘people’ themselves and their processes of deliberation – to individuals, both as authors and addressees of binding law, who owe each other obligations of justice, regardless of borders.¹⁰ International law, with its universalistic core of human rights and democracy, should bootstrap itself into a global ‘law of lawmaking’¹¹ with regard to states and new forms of network-governance.¹²

It is the vaulting ambition of the constitutionalist approach – the sheer abstractness of concepts such as fairness, and the spectre of reasonable disagreement over correct applications and proceduralizations of open-ended human-rights-provisions – that creates a powerful rationale for the accommodationist view. ‘Law’, as Richard Pildes in an illuminating paper (to which Koskenniemi seems to be reacting in his own piece) argues, is but ‘one tool among a set of possible tools for dealing with various international issues’,¹³ and as such is always subject to, or object of, a comprehensive cost-benefit analysis to be undertaken, ultimately, by states as rational actors. Pildes does acknowledge, indeed, he takes as his starting point, the fact that in the wake of the Holocaust and other atrocities we have witnessed an explosion of the ‘legalization of politics through constitutional law’,¹⁴ both domestically and internationally: the emergence of a ‘broader belief in the domain of legalization and judicialization itself.’ But it is, as Pildes argues, ‘attention to the vices or costs of law’, a ‘skepticism and disaffection’ with ‘legalization [as being] always in tension with the resolution of conflict through institutions of democratic governance’, and, ultimately, the wish to diminish the ‘role of courts on . . . foundational questions’,¹⁵ that pushes US legal culture towards an instrumentalist view of international law as a ‘tool’ – as opposed to European legal culture that (supposedly) remains less concerned by the costs and downsides of

⁹ I have in mind here, in particular, the view summarized and developed by R. Pildes, ‘Conflicts Between American and European Views of Law: The Dark Side of Legalism’, 44 *Va J Int’l L* (2003) 145; and the much less nuanced, and more extreme, approach taken by J.L. Goldstone and E. Posner, ‘International Agreements: A Rational Choice Approach’, 44 *Va J Int’l L* (2003) 113.

¹⁰ Bryde, ‘Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts’, 42 *Der Staat* (2003) 61; Flaherty, *supra* note 6; T.F. Franck, ‘Epistemology at a Time of Perplexity’, 13 *EJIL* (2002) 1025 (defending a notion of fairness against the objection of unbridgeable cultural chasms); P. Alston, ‘Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann’, 13 *EJIL* (2002) 815 (warning against a ‘hayeking’ and ‘hijacking’ of human rights).

¹¹ On the idea of a ‘law of lawmaking’ cf. F. Michelman, *Brennan and Democracy* (1999); cf. also his ‘A Reply to Baker and Balkin’, 39 *Tulsa L Rev* (2004) 649.

¹² A.-M. Slaughter, ‘Sovereignty and Power in a Networked World Order’, 40 *Stanford J Int’l L* (2004) 283.

¹³ *Supra* note 9.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

legalization.¹⁶ And others have urged upon us an even more drastic stance that ‘does not rely on “normativity”, morality . . . and related concepts that are standard in the international law literature’,¹⁷ – a stance, these authors suggest, that keeps our attention focused on one single question: ‘What does international law add?’¹⁸

But contrary to these predictions by the accommodationist view of what is possible, processes of a constitutionalization of international law are well underway in the real world.¹⁹ Consider a recent example from comparative constitutionalism. The US Supreme Court, in its well-known decision *Lawrence v. Texas*,²⁰ held that states cannot make it a crime for two consenting adults to engage in sodomy within the privacy of their home. Two aspects of the decision are remarkable. First, in overruling an American constitutional precedent, the Court has for the first time cited foreign case law by referring to a decision of the European Court of Human Rights.²¹ In doing so, the Court recognized the political experience of other countries – facing the challenge of accommodating their traditions with the demands of (newer) identity-based social groups – as relevant for its own domestic constitutional learning process. Indeed, once it is recognized that other constitutional regimes have learnt to extend equal treatment to hitherto despised minorities without undermining social cohesion, the prize for denying these minorities the same rights in the US goes up.²²

Secondly, the Court interpreted the Due Process Clause as attributing constitutional value to ‘enduring’ personal relationships that are to be free from the control of or stigmatization by the state.²³ Not only does the Court thereby move beyond an – at best inconclusive, at worst divisive – reasoning in terms of autonomy or private liberty, but focusing on ‘personal relationships’ without the government defining the meaning of the relationship or its boundaries also has the effect of shifting constitutional attention to the contextual presuppositions of what constitutes a ‘personal relationship’ – on the good or value that is pursued by that relationship. The practice of comparative constitutionalism thus points towards a concept of constitutional law that is both more universalist and more contextualist – that combines an emphasis

¹⁶ For a far-reaching and deep analysis of the paradoxes of juridification which precedes much of US legal scholarship on the issue cf. G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (1986).

¹⁷ Goldstein and Posner, *supra* note 9.

¹⁸ *Ibid.*

¹⁹ So strong is the appeal of this sceptical argument that even Rawls – the main protagonist of a constitutional approach – premised his own analysis of ‘The Law of Peoples’ on the very notions of national sovereignty that international human rights law by definition sought to erode: as a way of acknowledging the moral significance of collective self-governance.

²⁰ 123 S Ct 2472 (2003) (overruling *Bowers v Hardwick*, 478 US 186 (1986)).

²¹ This aspect is emphasized by Eskridge, Jr., ‘*Lawrence v. Texas* and the Imperative of Comparative Constitutionalism’, 2 *Int'l J Const L* (2004) 555; Neuman, ‘The Uses of International Law in Constitutional Interpretation’, 98 *AJIL* (2004) 82 (who usefully distinguishes between the consensual, suprapositive, and institutional characteristics of legal rights). The decision by the ECtHR is *Dudgeon v UK*, Series A No 45 (EctHR) (1981).

²² Eskridge, *supra* note 21.

²³ This aspect is impressively developed by Post in ‘Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law’, 117 *Harvard LR* (2003) 4.

on the wrongness of unjustified discrimination on the basis of sexual orientation with a more consequentialist assessment of the effects, benefits and costs, of specific justifications remedying that wrong. What emerges in this case law is a denationalized ‘constitutional law of personal relationships’ that is neither conventionally ‘the state’, nor merely ‘societal’, neither a ‘freestanding’ judicial creation, nor merely a pre-existing cultural ‘given’. This ‘constitutional law’ is normatively determinate enough to extend recognition to gays and lesbians as long suppressed minority groups, but at the same time open enough in order to permit – by providing deontological side-constraints – pluralism, context-sensitive governance and experimentation: as a law of law-making, this ‘constitutional law’ acknowledges that the normatively mandated state-of-affairs – the remedying of injustice by disentrenching a culturally-patterned exclusively ‘heterosexual’ understanding of ‘personal relationship’ – can be achieved in more than one way: not only by explicitly recognizing same-sex marriage, but also, for example, by decoupling entitlements such as the right to succeed to a tenancy²⁴ or health insurance from marital status and reassigning them on the basis of the constitutional value of enduring interpersonal connection.

What this example, then, shows is that the judgment that certain (discriminatory) practices constitute a wrong does not automatically pave the way to a naïve court-centrism (contrary to what instrumentalists assert), and also that it is only by acknowledging the interpretive nature of law that we can understand the importance of ‘politics’ (contrary to Koskeniemi’s approach).

I will not say much about Koskeniemi’s other assumptions made in passing and which, to me, seem insufficiently thought through: the suggestion of there being a slippery slope from Kantian universalism to any kind of *Vernichtungsbefehl*; Koskeniemi’s wilful forgetfulness of the fact that without the US, contemporary Europe would not have been possible (cf. fn. 34 of his text).

What remains a puzzle for me, personally, is why Schmitt continues to exert such an attraction to ‘critical’ legal scholars. International law in Europe and elsewhere would be better off without that influence.

²⁴ E.g. Application no 40016/98, *Karner v Austria*, EctHR judgment of 24 Oct. 2003.