

Conversations with Professor Martti Koskenniemi Second Interview: 18th August 2009

This is the inaugural interview for the Eminent Scholars Archive with the incumbent of the Arthur Goodhart Visiting Professor of Legal Science. Professor Martti Koskenniemi is Professor of International Law and Director of the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki.

The interviewer is Lesley Dingle. Her questions and topics are in bold type, while Professor Koskenniemi's answers are in normal type. The interview was recorded at the Goodhart Lodge, Cambridge, and the audio version is available on this website.

Questions and answers are sequentially numbered from the first interview. All footnotes are added by LD.

9. Professor Koskenniemi, eight months ago, at the start of your tenth year here as the Goodhart Visiting Professor, you were kind enough to talk to me for the Eminent Scholars Archive about some of your ideas on international law and what you hoped to achieve during your stay here at Cambridge. Here we are at the end of your visit, and I'm very grateful to you that you've agreed to give a follow-up interview, in which we can look back on your time here. In your first interview you concluded by saying that you might, and I quote "have a discourse on my experience here in Cambridge and my interaction with colleagues". Once you leave what will be your outstanding memories?

Of course, already coming in, I knew that the system of scholarship and study and teaching here is very different from what it is on the Continent. I knew it in an abstract way, now I have a more concrete sense of what this means, and I suppose it's learning the Cambridge system, which is the most important impression I carry with me from here. That is to say more specifically the huge importance that the Colleges have and the scientific community and the community of friendship that Colleges entertain. It seems to me that they suck some of the life of the faculties out. Now, this has its good sides, but also its negative sides I think, so this means that the Law Faculty, as a place of scholarly interaction or events or intellectual exchanges is clearly less important than the Colleges, as well as then of course specialist institutions like the Lauterpacht Centre¹. But, in a sense, for me the Faculty has been just an administrative centre, and of course the Library, but not an intellectual centre or a centre of socialising, meeting colleagues. Of course, most of us don't even have offices in the Law Faculty itself. But this is very distinctive I think, and very different from my experience in the United States or on the Continent.

10. Are there any colleagues with whom you had a particularly fruitful association?

Well, many of them, quite understandably mostly in the International Law. I feel of course with James Crawford² I associated quite a bit. With Amanda Perreau-Saussine³, also with other colleagues, but mostly I have to say with International lawyers. Dr. Ibbetson, the

¹ <http://www.lcil.cam.ac.uk/>

² Whewell Professor of International Law, Cambridge

³ University Lecturer, Cambridge



Professor of Legal History⁴ has been very helpful, but then he became Dean in the middle of my stay here, and obviously has been taken over by the duties that come with that. Now because most of my work has been work in the field of legal history or history of ideas, I've also associated quite a bit with historians from the History Faculty and from the Political Science Faculty. Overall I would say and yes of course I have to mention Philip Allott⁵ of course, my old friend and Christine Gray⁶, with both of them I've had exchanges and visits, both socialising and intellectually. As far as the colleagues in general are concerned here, let's say from the private law side, even from the public law side; no, I have barely seen them, and that seems to be a specific feature of the Cambridge system. One actually has to push very thoroughly in order to be able to make contacts or maintain contacts as the case is.

11. Coming to your teaching, overall did you enjoy the experience, and did you find that your ideas were well received?

Yes, I have to say that of course I had very little teaching. The Goodhart Professorship is blessed with the opportunity of concentrating on research and the teaching was really quite marginal, so one day a week, two hours during term time, that's very little. But the group I had and the course that I held, I think was successful. I think we had interesting discussions in the class. I have to say of course that I'm this very old fashioned, European teacher, who just monotonously goes on, so I don't give that much opportunity for students to express themselves in class. However, I try to be open to them outside class, and also I've invited them over and have socialised with them elsewhere, and sometimes we've had great conversations. So I think it's been a good class and I thoroughly enjoyed it; but, as I said, enjoyed it in this rather monotonous European fashion.

12. Can we talk about the research that you said you were here to undertake? You specifically mentioned historical research in answer to one of my questions. How did this proceed and did you find you were able to lay your hands on the materials that you needed?

Let me put it this way, I don't think anywhere else I could have laid my hands with the kinds of material of the type of relevance that I found here. The University Library and of course, you as the librarian from the Law Faculty, getting me books from all over Europe, have been invaluable, invaluable. So although, and perhaps we can come back to this, the research hasn't been easy, and perhaps the results aren't quite what I had expected, that has absolutely nothing to do with the resources available here in Cambridge. It's just, I would say, the old head that hasn't been up to the task quite given that I gave to it in the fore.

13. During your time here, at least two articles dealing with international law have appeared in important journals, and having looked briefly at them, I recognised that they both deal in part with some of the topics that you mentioned during your first interview. I wonder if I could ask you to comment on these. In your *European Journal*

⁴ David Ibbetson, Regius Professor of Civil Law, Cambridge

⁵ Emeritus Professor of International Public Law, Cambridge

⁶ Professor in International Law, Cambridge



of International Law⁷ paper entitled “The Politics of International Law: 20 Years Later”, you elaborated on the theme of the fragmentation of international law and the recent process of what you call “managerialism”. The latter you suggest leads to a fantasy position which panders to what you delightfully call “holding the Prince’s ear” and that the practitioners’ actions ultimately aim to “smooth the Prince’s path”. Can we assume that you are drawing an analogy with the ever plotting Princes of Renaissance Italy and which office bearers in the modern world, did you have in mind?

Well that’s very perceptive of you. Yes of course I use those metaphors because I had been working on the Renaissance lawyers, and on the Machiavellian heritage, and it’s not that I would be critical about the Machiavellian heritage itself, I think it’s a part of the game; also of the legal game and certainly of the political one. Now I am, and I have been, in my recent articles, critical of what I call “managerialism” and I have wanted to point out to how technical experts, including economic experts, are seizing the field of politics from politicians and from perhaps idealistically said, citizens in general. And that the way they aim to grasp the Prince’s ear is different from the way we as citizens or lawyers or advocates of political causes want to seize the Prince’s ear. I think it’s a problem with the Prince too, in the sense that he or she lends their ear today more easily to the kind of technical expertise which would never have entered the Courts of the Princes in the Renaissance period. We have translated political problems very often into technical problems, as if they were technical problems, and therefore we have empowered the technicians. They have become the closest counsel to the Princes that we have. And the danger there is that they are in a particularly invulnerable position, because they represent technical expertise, they are open only for criticism from the particular technical perspective that they represent. They take their bias, and the Prince sometimes takes their bias as not a bias at all, but as an objective representation of something based on knowledge about this world. Now, I personally think that’s nonsense and my historical work tries to tell the story of the various generations of aspiring actors who have tried with various means and through various vocabularies and languages to seize the Prince’s ear. And I would want to point to technical experts and to economic experts, as just continuation, part of the succession of this type of politics; I want to re-characterise their expertise as a political type of an expertise. Not because I would not value that expertise, but to lift the wall of invulnerability and to say “well that’s what you say, but you are wrong”.

14. So apropos this theme, you imply that International law, as exemplified by European Constitutional Formalism and American Imperialism, is flawed. What notion, Professor Koskeniemi would you like to see ideally filling the role, even if in realpolitik this is an unlikely possibility?

Yes, so I obviously think that the Prince should be heard by as many representatives of different interests as possible, and that the democratic process should be such as to filter the voices into some acceptable solution for the community in general. I have to say, as a scholar, I am very critical of the obsession in scholarship of coming up with a policy proposal at the end of one’s article, or at the end of one’s book, or at the end of one’s public discourse. I am against policy proposals because I think that they have two particular problems with them. One is that once you give your policy proposal, then nobody is going to hear anything more. And all the reasoning, all the critique, all the reflection that went into the proposal is forgotten, that’s the first thing. The second is of course that often that reasoning, that critique and reflection is much more important than the proposal itself. So I have perhaps wanted to

⁷ 2009, 20(1) 27-67



avoid some critiques sometimes thrown against me by this manoeuvre of saying, “I have no policy proposal, I have just critiques, reflections, and ideas”. And if my readers or listeners feel that those ideas or critiques touch on something that they feel is true or right, or that they also recognise, then I’m happy, and I’m happy then to discuss what proposal can we make in a particular institution or setting. But I am no believer in those institutional proposals. In particular I am not a believer in the international law obsession of making worldwide institutional proposals. Those proposals will always turn out to be Utopian. They will always turn out to have consequences which people didn’t intend to create through them. The fantasy position of the international lawyer, of speaking to the Universe at large, to everybody and nobody at the same time, I’ve always found ridiculous.

15. On this issue, you ask “what kind of, or whose law, and what type of, and whose preferences?” And this fundamental questioning reminds me of a recent interview I had with Emeritus Professor Jolowicz, who spent much of his illustrious career questioning fundamental concepts of his chosen field, UK civil procedure: “What’s it for?” he asks many times. Is this questioning common amongst other legal disciplines do you find?

I don’t find legal disciplines fruitful arenas of reflection and criticism. There’s a lot of stagnation about. The self understanding of legal disciplines, as you call them, even at Universities, is divided between two types of ways to think about them. One is to think about them as craft, or as preparation for craft. I’ve seen a lot of promising scholars, students here, who don’t really think of law in terms of much more than something that it endures, you are a barrister and you lead your life and you defend cases, or defend clients and take cases to court; write the occasional article perhaps if you have some intellectual ambition, but basically it’s a craft. And that’s of course, yes it’s true, it is a craft, but then it’s not only a craft. And then there is this other understanding, perhaps a more Continental European understanding that law is an intellectual discipline in which you can write PhDs etcetera. Again, it’s true of course that law can be intellectually thought of. However, very often, I would say worryingly often, intellectual reflection on law turns out to be intellectual reflection on political philosophy or philosophy in general, ethics, economics, etcetera. So law often loses its proprium, its own identity in those abstractions. So I see the self-understanding of the discipline being divided between the idea of law as craft and the idea of law as an intellectual venture. Now you asked me whether it’s a time for reflection, whether there is a time for going to basic questions in the law. Now, if you think of it as a craft, then there are no basic questions; you just do your craft better. You fix some procedure better than it was yesterday, you enact a new law, and perhaps the barristers adopt a new way of proceeding, whatever. Those are the only kinds of questions that you ask. Again, if you are in the philosophical mode or in the reflective mode, then of course you constantly pose fundamental questions. If you don’t pose those questions, then you are not in that genre at all. So, one oscillates between these two positions, and of course much in the legal culture in one way or another relates to their continuous opposition, their continuous rivalry if you wish. I try not to take a best position there either, but just to remain perhaps an observer. My own career having reflected the first 17 years in the Foreign Ministry as some craftsmanship, and thereafter some reflection. I tend to think that both are at their best when they are aware of each other’s existence.

16. Thank you. You mentioned in the politics of international law and in the interview that we had earlier, that international law as Hersch Lauterpacht understood it, started in 1873 with the foundation of the *Institut de droit international* and ended in 1960. Was



the latter because it was the year that Sir Hersch died, or did it coincide with another event?

Well these years are of course very crude markers in a history that's much more fluid and open and I make these points very sharply. So for students at lecture I say international law began on 8th September 1783, sometime after lunch, in order to point to a particular culture or moment that can be fixed or a particular symbolic event, in this case the afternoon meeting of the *Institut de droit international* when they adopted the statute of the Institute. Now, why 1960? Well Sir Hersch died in 1960 and other people of his generation around that time. I detail the dates in the *Gentle Civiliser*⁸ 61, maybe 62 etcetera. But I have the sense, and the bigger point I wanted to make there, is that something happened in the 1960s that made the west different from what it had been before, and again I don't want to pinpoint anything, I don't want to make this point any more specific because I think most of us understand this. We look at popular culture, we look at literature etcetera, and we have the awareness that something happened in the 1960s in the world, and it would have been a great surprise had it not happened in international law as well - or perhaps law, but specifically in international law. I want to add here that friends and colleagues have asked me whether I want to write a history from that point, from 1960 to nowadays; and so far I've firmly said "No, I don't want to do this, it's too close". I'm a part of that history I don't have the kind of distance that's needed. Maybe that's going to change, I don't know, but at least presently I'm still going well, backwards in time rather than closer to where we now are.

17. Professor Koskenniemi, I've found your article in the *Edinburgh Law Review* paper very interesting, "The Advantage of Treaties, International Law and the Enlightenment"⁹, because it drew on the writings of David Hume and Adam Smith. And I recently interviewed Professor Peter Stein, who at Aberdeen with David Daube, became very interested in the Scottish Enlightenment, and wrote on the views of both Hume and Smith. One of the things that Stein did of course, was to contrast the strong influence of Roman law on Scots law, rather than English law, and I wondered whether you think it is a general notion, there is any evidence that the works of Hume and Smith have today more influence on Scottish trained international lawyers than they do on English trained international lawyers? In other words, is there any vestige of the legacy of the Enlightenment still extant in these two legal stables within the UK fraternity?

In order to answer this intelligently I should know more about Scots law than I actually do, and I have just an off the cuff impression that Hume and Adam Smith are more important in Scotland than they are in England nowadays. There's very little apart from impressions that I can support myself with, but I think both of these men, Hume and Adam Smith have an importance that widely exceeds the context of the Scottish Enlightenment or indeed the context of Britain at that time, or immediately afterwards in the 19th Century. And I wanted to lift them out from that context because they, in my sense, are an evidence of this turn to economic thinking and technical expertise that I have then called "managerialism", and that I think infects thinking in a negative way afterwards. This is not to be critical of Hume and Smith, no; they in a sense were able to answer precisely the kinds of questions which people were posing at that time, towards that late moment of the Enlightenment. Natural Law had been there, so what? What could Natural Law say? These two men gave

⁸ Koskenniemi, M. 2001. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge University Press, 569pp

⁹ 2009, 13 (1) 27- 67



Natural law a concrete voice, saying that well actually in human relationships you can look at them, you can calculate them, you can get up very close to what it is that the good life that people strive to, can mean for political decision makers for example, and that's their enduring significance which goes beyond whatever particular significance they have in Scotland and England. And again I want to say that I can't really answer this question because I don't know about it. It's an interesting question and Peter Stein, of course, would be wonderfully well placed to answer that question. I'm not.

18. It has been a great pleasure interviewing you. As you know, this is the first time that the Incumbent of the Goodhart chair has been interviewed for the Eminent Scholars Archive, and from our side it has been an incredibly valuable addition to the Faculty's historical archive, and it sets an excellent bench mark for the future. It just remains for me to thank you very much again for your valuable contribution, and to wish you all the best for the future.

Thank you very much. Let me use this opportunity also to thank the Library and you in persona for all the help that you have given me in the course of this year. I said earlier that I haven't progressed perhaps as well as I would have wanted to, but I have made progress and much of that is due to the immense help that I received from your colleagues and from you. Thank you.

Thank you very much.

