THE CONTENT OF THE RULE: CONCRETENESS AND NORMATIVITY

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INTRODUCTION
One of the most significant current discussions in legal philosophy are Prof. Koskenniemi’s provocative works. As being both an academician and diplomat, Prof. Koskenniemi tries to establish a new methodology in order to examine international law. But, it seems that Koskenniemi’s understanding of the new methodology of international law is questionable. As Rajagopal points, Koskenniemi’s works are ‘too European’. In this paper, the following structure will be used to understand the basic arguments of Koskenniemi.

Firstly, the basic phenomenon and notions of this article will be discussed. At the same time, the book called ‘From Apology to Utopia: The Structure of Legal Argument’, will be a beneficial pathfinder to this paper. Sometimes there will be some quotations from this book, because of the fact that this article is a condensed version of some the themes in his reference book. Secondly, authors structure will be followed and while doing this some objections will be put forward. Finally, a general criticism will be given.

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2Rajagopal, B. (2006). "Martti Koskenniemi’s From Apology to Utopia: a Reflection." German Law Journal 7(12): 1089-1094, p.1090. I agree that the framework of Koskenniemi’s works is too European, although the author mentioned that his ideas towards Koskenniemi have changed.
3Also see Kennedy, op.cit., p.983.
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According to Koskenniemi, scholars set down two norms for evidence of objectivity. Legal thinking “…aims to ensure the concreteness of the law by distancing it from theories of natural justice, on the other hand it aims to guarantee the normativity of the law by creating distance between it and actual state behaviour, will, or interest”. The need of the objectivity can only be established if these two norms are fulfilled at the same time.

In this sense, modern international lawyers try to prevent themselves from being apologist or utopian. According to Koskenniemi;

“(a) law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way”.

In this respect, if modern lawyers demand to illustrate the objectivity of law, law should be both ‘concreteness’ and ‘normativity’ simultaneously. He continues to explain why international lawyers think that ‘law’ needs to carry the features of these two elements, mentioning his own words,

“The requirement of concreteness results from the liberal principle of the subjectivity of value. To avoid political subjectivism and illegitimate

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6 Ibid.
8 Ibid.
constraint, we must base law on something concrete - on the actual (verifiable) behaviour, will and interest of the members of society-states”.

On the other hand, Koskenniemi says that, modern international lawyers are also seeking for ‘normativity’ in order to make a distinction between law and actual state practice. But there is a dilemma that Koskenniemi mentioned, it is impossible to put concreteness and normativity together at the same time. “Two requirements cancel each other.” In Koskenniemi’s point of view, the more concreteness the principle is the more dependent on state practice. In doing so, indeed, the more a principle is dependent on state practice, the more it becomes apologist. On the contrary, if a rule is over normative, this brings the term utopianism together.

DOCTRINAL STRUCTURE

International law is faced with two basic criticisms. Both of them are stemmed from the same consequences. The former critic asserts that international law depends on political factors too much, as doing so, this dependence brings apology together. But on the other hand, it is said that international law is too political because of the fact that it is founded on speculative utopias. There is no correct answer for this criticism that international lawyers have.

According to Koskenniemi, there are four positions that international lawyers hold for verifying the relevance of their doctrines. Firstly, Koskenniemi held the rule approach, which is represent by HerschLauterpacht, Alfred Verdross, and Hans Kelsen. These

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10Ibid., p. 8.
11Ibid.
12Ibid.
13“Either the normative code is superior to the State or the State is superior to the code. A middle position seems excluded.” Koskenniemi, From Apology to Utopia..., p. 59.
15Ibid.
scholars accused pre-war doctrines of being over dependent on the state practice and criticize them for becoming apologists. Continuing with Koskenniemi, these scholars tried to establish a new doctrine, which is based on the independence of law from state politics.\textsuperscript{16} Common belief is that Koskenniemi takes an opposite view to Kelsen. Because, “Martti Koskenniemi contends that it is impossible for international lawyers to maintain a specifically ‘legal’ identity separated from that of a social scientist or politician”. According to Koskenniemi, “… there is no room for a neutral legal sphere outside politics and that lawyers should integrate this basic insight in their professional identity”.\textsuperscript{17} To support his idea Koskenniemi cited Fawcett who says that, “… no state is an island. There have always been and had to be transnational contacts between them, and the formation and function of law in international relations are subtler and more complicated than these polarizations of law and power suggest”.\textsuperscript{18} To continue with Fawcett, “…there can be said to be international legal order, because the formation and observance of certain rules and standards, both nationally and in international relations, meet in fact certain political, social, or economic needs of nation-states”.\textsuperscript{19} Conflicting with Koskenniemi, Kelsen tried to establish a point of view, which contains the idea of an objective and separate law thought from politics.\textsuperscript{20} But on the other hand, Kelsen does not deny the reality of state practice and the changing contents of law. He just tries to identify the nature of law. There is a common misunderstanding about what Kelsen mentions.

\textsuperscript{16} Ibid., pp. 9-10.
\textsuperscript{17} Bernstorff, J. (2006), “Sisyphus was an international lawyer: on Martti Koskenniemi’s” From Apology to Utopia” and the place of law in international politics.” German Law Journal 7(12): 1015-1036, p. 1018.
\textsuperscript{18} Fawcett, J. (1982), Law and Power in International Relations, London, Faber, p. 36.
\textsuperscript{19} Ibid., p. 37.
\textsuperscript{20} “It (the pure theory of law) answers the question of what the law is, not what it ought to be. The latter question is one of politics, while the pure theory of law is science.” (emphasis added) See Kelsen, H. (1941). “The Pure Theory of Law and Analytical Jurisprudence.” Harvard Law Review 55(1): 44-70, p. 44.
“From a comparison of all the phenomena which go under the name of law, it seeks to discover the nature of law itself, to determine its structure and its typical forms, independent of the changing content which it exhibits at different times and among different peoples.”\(^{21}\) (emphasis added).

Kelsen knows how law is created, and is seeking to show if there is a common or general principle of law. According to him, the general principle of law is the rule creator hiding behind all the legal structure. In saying so, he gives some examples about the importance of that general law. In his speech, a court decision is valid because “the decision came into being by the application of general norms of statutory or customary law that empower the court to decide a concrete case in a certain manner”.\(^{22}\)

To make it clear, Koskenniemi’s criticism is not valid in this matter, because Kelsen does not deny the existence of state behaviour or its role to create law. Kelsen pointed out that, states can create law and if they want they have the ability to change it. The process of law making is not the basic matter of his theory. He addresses that international lawyers must look at and analyse what the law is and they must not examine moral instruments, otherwise, law cannot be valid. Here, a question can be asked to Koskenniemi that if international lawyers ignore the normativity of law, how can they understand the relationship between societies, which have existed since the beginning of humanity?

While Koskenniemi is trying to criticize the objectivity of normativity, he unconsciously builds an objective point of view. In this sense, especially in social sciences, objectivity is an artificial intention.

The second criticism of international law is based on the criticism of the 19\(^{th}\) century legal thought. According to this criticism, the 19\(^{th}\) century belief in the endless order of the

\(^{21}\)Ibid., p. 44.
\(^{22}\)Ibid., p. 63.
Congress System is ‘naïve utopianism’. The basic point in this thought is that international law cannot be understood without examining the reality of social needs. Koskenniemi calls this approach ‘the policy approach’. However, this approach does not have the ability to escape from Koskenniemi’s fault-finding. According to Koskenniemi, the policy approach relies too much on state behaviour and this situation causes it to become ‘apologist’. 

**SUBSTANTIVE STRUCTURES**

Koskenniemi, after he had examined the need for concreteness and normativity, started to put forth ‘…two contrasting methods of explaining the origin of the law’s substance.’ These contrasting methods both included two point of views. According to Koskenniemi’s words:

“One explanation holds sovereignty as basic in the sense that it is simply imposed upon the law by the world of facts. Sovereignty and together with it a set of territorial rights and duties are something external to the law, something the law must recognize but which it cannot control… Another explanation holds sovereignty and everything associated with it as one part of the law’s substance, determined and constantly determinable within the legal system, just like any other norms”.

This antagonism can be seen in the doctrine of ‘sources’ as well. In his article, Koskenniemi gave some examples in order to disprove the use of these two contrasting points of view in which international lawyers opt only for one as a mainstay of their thought. In this frame, these contrasting arguments should rely on each other. This argument reflects a common belief that most of the writers have mentioned before. For instance, according to Wildhaber,

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24 Ibid., p.11.
‘sovereignty’ has a dual nature. Sovereignty is divided into two parts, one is ‘internal’ sovereignty and the other is ‘external’ sovereignty. For external sovereignty, which is our research subject, “…a potential competence of the sovereign and readiness to absorb all state tasks and to determine autonomously tasks, means and priorities of the state”. Afterwards, the author applied Judge Dionisio Anzilotti’s individual opinion in the Austro-German Customs Regime Case. According to Anzilotti:

“Independence as thus understood is really no more than the normal condition of States according to international law; it may also bedescribed as sovereignty (supremapotestas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law”.

At the same time, Wildhaber emphasized the law based theory of ‘sovereignty’ by citing from Ian Brownlie. According to Brownlie,

“(t)he sovereignty and equality of states represent the basic constitutional doctrine of law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states … defined by law”.

Furthermore, Koskenniemi began to give such examples to illustrate how modern writers fail to defend their argument, because of the fact that these writers have the disadvantages to become apologist or utopian. In his book From Apology to Utopia, Koskenniemi used Carl Smitt’s and Hans Kelsen’s doctrines. According to Koskenniemi, “In Schmitt’s system,
sovereignty is a matter of fact-description and law a normative consequence thereof. In Kelsen, the law is normative and “sovereignty” merely a descriptive shorthand for the rights, liberties and competences which the law has allocated to the State”.\textsuperscript{31} A question arises here: what is the solution? How can we analyse the absence of law by using sovereignty?

Generally in his article and also in his book we have difficulties in finding the answer. But on the other hand Koskenniemi addressed the central aim of his book while he was focusing on the objectivity of concreteness and normativity approaches by saying this: “…now, the bulk of this work has gone to demonstrate that these conditions cannot simultaneously be met”.\textsuperscript{32}

In his book Koskenniemi set forth an idea that can be the answer to these questions. While Koskenniemi was examining the contrasting nature of idealism and realism, he pointed out that “…while idealism and realism seem opposite they still need to rely oneach other”.\textsuperscript{33}

Throughout his book and essay, Koskenniemi adopted to combine the contrasting points. In addition to this, in his article Koskenniemi points out his approach about the absence of international law. As can be understood by examining the examples, which he gave in his article may be the path of his thought.\textsuperscript{34}

Koskenniemi reflects the impression that he wants to deal with Marxism in a slavish way that he does not want to go deep inside the Marxist theory. According to his words, “An objective realism (Marx) explains that facts are ‘‘out there’’ and determining what we can see in them…” and continues with the criticism of Marxism by saying that “…but cannot explain how the amorphous mass of information which our senses have about those facts can become

\textsuperscript{31}Koskenniemi, From Apology to Utopia…, p.227.
\textsuperscript{32}\textit{Ibid.}, p.513.
\textsuperscript{33}\textit{Ibid.}, p.517.
\textsuperscript{34}In his article Koskenniemi sets forth a projection and he makes an imagination of two countries. He asks, ‘how can these countries support their claims by not falling into being authoritarian?’ He pointed out that a country should use both individualistic and communitarian points of view. Koskenniemi, “The Politics of International Law”, pp. 29-30.
organized into “knowledge”.

And in his other provocative book, Koskenniemi deals with Marxism’s definition of state by saying this, “…the most effective of these(Sociological theory) was the historical materialism of Karl Marx and Friedrich Engels that reduced the State to an ephemeral reflection of economic forces”.

But on the other hand Marxism is not the theory, which depends upon Marx or Engels alone. There is a cumulative process. AndKoskenniemi also failed in the explanation of how Marxists examine the progress of history. “According to theory of historical materialism, the catalyst behind the evolution of societies lies in conflicts between the forces of production and the relations of production which produce revolutionary ideas.”

Furthermore, “… political institutions, moral values and theoretical ideas are fully understood only when seen in their relation to the economic basis upon which they stand, and in their place in the flow of historical development by which they are continually altered”.

As it is shown above, Marxism tries to examine the meaning of the terms by determining their place in a specific historical era. The absence of Marxism relies on the terms of base and superstructure. But the changing environment of the world also affected Marxism and the relationship between base and superstructure theory has been altered. According to this, the orthodox theory of Marxism has been reformed and it is said that superstructure can also affect base. Koskenniemi fails to explain the dual nature of both theories(Marxism and Kelsen’s ‘pure law’); because of the fact that, both theories include their opposites inside and never ignore each other.

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35 Koskenniemi, From Apology to Utopia..., p.516.
CONCLUSION

In this review, the aim was to assess the inadequacies of the work of Prof. Koskenniemi. According to this aim, there are few essential points needed to be addressed. As mentioned in the preceding pages, Koskenniemi took various internationalist’s works into consideration. Considering these scholars work, an impression is appeared that Koskenniemi while he is criticising these author’s methodologies, he fails into the same mistakes that he pointed, particularly the parts that Koskenniemi deals with Marxism and Kelsen.

Koskenniemi explains tacitly the meaning of the term utopianism in a pejorative way. But on the other hand, he criticizes normativity by using the subjectivity of values.\(^39\) In doing so, Koskenniemi, again, puts himself into the place that what he criticizes.

Furthermore, it is not clear to find out what Koskenniemi put forward as a solution to the absence of international law. In addition to this, his central matters are not obvious both in his essay and his book.

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