

Episode 14: Legal Imagination and the History of International Power

Transcription

00:00:06 Aada Pettersson (AP): Hi everyone and welcome to another episode of EuroStorie Podcast. The stories of politics, law, and history of Europe. My name is Aada Pettersson, and unfortunately my usual co-host Floris van Doorn was unable to make it, but out of true camaraderie EuroStorie's Karolina Stenlund is here today with me as my co-host for the episode. Hi Karolina!

00:00:30 Karolina Stenlund (KS): Hi.

00:00:31 AP: On this podcast we are here to talk with researchers about all things Europe, and today we've got the utmost pleasure of talking to Martti Koskenniemi. Hi Martti!

00:00:41 Martti Koskenniemi (MK): Hello.

00:00:42 KS: So Martti is an emeritus professor of international law and the director Erik Castrén Institute of International Law and Human Rights. He has held visiting professorships at New York University, the University of Cambridge, the University of Utrecht, Columbia University, The University of Sao Paulo, the University of Toronto and several different Universities of Paris and has been a centennial professor at the LSE. In addition to this, he was also a member of the Finnish diplomatic service (1978-1994) and the International Law Commission (UN) (2002-2006).

00:01:28 AP: During his academic career Martti Koskenniemi has published widely on the history and politics of international law. His main publications include *From Apology to Utopia: The Structure of International Legal Argument*, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, *The Politics of International Law* and *The Cambridge Companion to International Law*. And today we'll be talking about his latest book *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870*, which was published last year. So, before discussing the book itself, it would be great to hear more about your background and how you ended up in academia after diplomatic service, so could you maybe start by telling us what you studied in the university and was the subject of your studies a clear choice for you growing up?

00:02:30 MK: Well, I studied at Turku University in the 1970s when it was all very political, and I was a political person among the student union and participated in all kinds of demonstrations and actions et cetera, and doing law was a kind of a side show for me. I just always wanted to be a political person, but then somehow I lost interest in politics and thought that well the closest thing to that would perhaps be diplomacy, and I didn't have any particular attachment at undergraduate level to any, so I did my undergraduate thesis in international law but I didn't think much of it at the time, and I went to the foreign ministry and it was there where I started to have an interest in what this curious business is that they call international law and what is it that international lawyers do and states do, so called, when they think they're dealing with international law, and I did my PhD while in the foreign ministry then, and I always thought that I would just retire as an ambassador one day, so I didn't look for a university job, but the chair in Helsinki became vacant because the previous holder Bengt Broms retired from it earlier than he should because of his wife was seriously ill, and you know, they needed somebody, and they called me up, and I thought well I've done lots of things, why not do this as well, and then you know I gave the finger to the devil and I was left there, so that's how it happened.

00:04:09 AP: So, you worked in the diplomatic services during some turbulent periods of history, for example the dissolution of the Soviet Union, and you've also talked about the problems of academia and

how they view international law and the issue of balancing between realism and idealism. How have you incorporated your learning from the diplomatic services into academia?

00:04:31 MK: Well, it's absolutely crucial, so my diplomatic service time, I couldn't have done what I did in the academy without having been in practice, so it's all an effort to articulate a meaningful view on international law based on what I did. The textbooks that I encountered and the academic writings I thought was pretty much nonsense and they reflected none of my experience of the field, so this is not an argument in favor of realism against idealism, so that's not the thing, it was just the, how could I put it, the phenomenological world of a lawyer was not captured in those rather theoretical and abstract and philosophically oriented textbooks, the way I interpreted them, the biggest mistake many of those textbooks and the academy made was to think that international law was some sort of a deduction from philosophy, or a deduction from a political theory or a system of political thought, no I thought it was practice, it was a practice that intelligent people did in view of what they encountered as problems, what their bosses gave them to think about and it was above all a linguistic thing, you know, lawyers just speak and write, that's what they do, so I was interested in the professionalism, what does that consist of, how does one come to think and write like a lawyer in such a way that other people are persuaded that, wow this is really powerful legal stuff!

00:06:08 KS: That's kind of interesting because from my perspective when I'm looking at your books, they look very theoretical in a way, but you found a way then to connect praxis to theory.

00:06:19 MK: Umm, yea, that's not the program. If they look theoretical then that's just how they come out. The idea is not to create any theory, I've never been, I've never thought of myself as a person of theory and then, I mean I read a lot, but theory and method, those discussions to me seem boring and uninteresting, and I want to articulate the experience of lawyering in such a way that readers can take something from that experience, and unfortunately what we have is the academic language, and if you want to participate in an academic debate, you know, you have to use that language, so that's how they turn sometimes out to be theoretical. So, I'm greatly comforted by the fact that many of the readers say that they are an easy read, nevertheless I try to make them such.

00:07:14 AP: Yes, definitely. We're going to ask you about your quote unquote theory about the legal imagination, as you call it, later on. But before hopping in to the Uttermost Parts of the Earth, your book, could you tell us a bit about the world, what was it like in the 14th and 15th centuries, as a context for our discussion.

00:07:38 MK: Yes, I suppose you ask me this question because the book starts in the 14th and 15th century.

00:07:43 AP: Exactly.

00:07:44 MK: It's a really easy chronological choice for anyone doing history of political thought, history of legal thought et cetera. So, I was interested, as I said, in the phenomenology of lawyering, and I found that it was around the year thirteen hundred, for the first time that a European king or a European prince gathered around him a group of professional lawyers who had been recently trained in places like Orleans, Montpellier, Bologna Northern Italy, in those universities where the legal training had just started out, and this was France's Philip the Fair, and he had an interest in being counseled by Roman lawyers or lawyers who had learned the law, above else Roman law, because Roman law projected the prince as the emperor, and so once you had, your closest council thought that, and spread the word, that you were not just a feudal sovereign, but that you were actually an emperor in your own realm, that was a useful thing to have around, and so I looked at how those lawyers around Philip the Fair in the year thirteen hundred, how they acted and they were, boy they were very active indeed. And they generated a whole idea of France as a state. They used Roman law to articulate the ways, the use of power by the prince and to that extent they formulated a kind of a starting point for a much longer history of how Europeans imagine especially

jurisdictional power, that is to say the public power of the prince. But on the side also at the time, the commercial activities in Europe were spreading around and those commercial activities started to be less and less connected to Christian ideas about usury and avarice, so the question of the sinfulness of mercantile activities became less and less important, and while theology became less and less important as an understanding, as the basis of understanding commercial things, law became more and more important. And obviously law mostly had to do with Roman law, or Roman law understandings of local law.

00:10:17 KS: So one of your main statements in the book is that it's not a book about international law, it's a book about legal imagination, so what's the difference between these two concepts?

00:10:29 MK: Right, so in my previous book *The Gentle Civilizer of Nations* it has this subtitle *The Rise and Fall of International Law 1870-1960*, so I'm publicly committed to the proposition that international law began in 1870, and usually with students I say it began on the 8th of September 1873, sometime after lunch, and so my project was to look at well how did ambitious European male persons use law in the previous centuries when there wasn't such a thing as international law, and I looked at the various vocabularies they used and there were of course many, they used many kinds of linguistic operations to justify, stabilize and sometimes critique the uses of power in Europe and also by Europeans outside Europe, and they used legal vocabularies, different vocabularies, often Latin vocabularies, jus naturae et gentium, sometimes French vocabularies, droit république de l'Europe, or maybe Völkerrecht, and I used these natural languages just to highlight the fact that these lawyers came from particular places, they came from Britain, they came from France, they came from Germany, and they had learned their law as you learn them in Britain, France and Germany, as you do still today, so their view of the world was profoundly colored by their training and their background, a little bit same thing as I said a moment ago about those Roman lawyers who came to Philip the Fair's court in around 1300, and so the thesis would be that they were imaginatively, I underline the word, imaginatively applying that domestic experience and training that they had to deal with issues that had to do with the relationship of their prince or the merchant that they serviced with people coming from outside, and their domestic law, the vocabulary of domestic law, wasn't always helpful, you needed something else, so maybe you needed jus naturae et gentium, the Romans had such a vocabulary and it seemed to apply across national boundaries et cetera. So, this is not a history of international law, it could not be because international law began only in the late 19th century. It was a Victorian creation. So, this is a pre-Victorian, analysis of a pre-Victorian period, and again an effort to sketch the phenomenology of lawyering in those times, especially lawyering that had an ambition to deal with matters extending outside the domestic realm.

00:13:20 AP: Your other argument of the book is that European power has always come as a combination between sovereignty and property, and you even write in your book that sovereignty and property are the Ying and Yang of European power. Could you tell us more about this?

00:12:38 MK: Well, I've always been obsessed about power, since I was a student. I think law is interesting only, and to the extent, that it deals with power. It opens a way to think about and speak about and of course exercise power. And my hope was to be able to sketch the phenomenology of lawyering in such a way as to depict lawyers, as in this case European men, with some ambition in the world of power as they approach power, as they articulate power, as they use powerful language to attack enemies, to defend clients et cetera. And I noticed, better or not quite accidentally but maybe with some purpose, I noticed that the vocabulary was divided in to two basic idioms, the idiom of public that we nowadays call public law and the idiom of private law. And I had a hunch that these two, that the separation of these two in the European legal history is an ideological concoction of some importance. And I wanted to, how would I say, deconstruct or do away with that dichotomy, look rather more into the dichotomy, and the experience suggested to me that whenever you see public power somewhere, scratch the surface and you will see money and financial resources and ownership rights behind it. But my experience also told me that if you

see a powerful merchant and, or, commercial activity of some significance, scratch its surface and it doesn't take long until you find military force, police, public power behind there. And so, I concocted this thesis that public and private are the two sides of the same coin, and I wanted to avoid using, I don't like big words, words like capitalism. Sometimes they are useful, sometimes they are obstacles for thinking. But for the purposes of this conversation maybe one can think that I was interested in the structures of capitalism in that long period. There are of course histories of political thought, histories of economy, histories of European politics, that well add length with capitalism, but they rarely have, they are rarely well informed as to the role of law. And I wanted to fill that gap also to say that in order for this thing that you call capitalism maybe with or without reason, but we now more or less intuitively what you mean, then you need to understand how law operates so as to uphold and stabilize that structure of power.

00:16:39 AP: You also talk about role of the companies, for example you give the example of Virginia Company set up in 1606, so what type of role these companies played in all of this?

00:16:56 MK: Well, the companies are quite crucial. And this of course relates to what I said a moment ago. So, these companies, colonial companies, were chartered by the state but usually financed by private enterprises, by private operators. Sometimes as in the case of France I discussed at length, the King himself or the royal family invests very heavily in those companies, but nonetheless the companies act as private operators when they are out there, they are private operators with a twitch however, to the extent that their charters usually entitle them to wage war, to carry out diplomatic relations et cetera., just to give an example. So, the Levant Company, which was the British colonial company chartered by Queen Elizabeth already in the 16th century. The Levant Company appointed the British ambassador to Constantinople, or Istanbul, until the 1820s, so until the 19th century. So, you will see in Levant Company a clear example of the amalgam of public and private, so it's a company, the company appoints the ambassador, the ambassador serves the king or the queen, so you mentioned a moment ago that I wrote there that sovereignty and property are Ying and Yang of European power. The colonial company is a good example, it is the grain of sand in which the universe of capitalism is reflected, that's why I emphasize those companies a lot. I could have done more and I wish that other people would continue this and would do more work on the history of the company.

00:16:43 KS: So how is then property and sovereignty connected to the idea of legal imagination?

00:16:49 MK: So, yeah, I'm a post linguistic turn kind of a guy, which means that I don't really believe in people thinking and then uttering what they say. I believe there are languages out there and people kind of go into those languages and become the machines that speak those languages that are offered to them. And the languages of sovereignty and property are both languages that have a Roman law origin in the way that we use them in Europe and they in the course of centuries, that I tried to trace there, they have been developed to a great detail, and I try to examine these men of ambition learn those languages, learn those languages in order for to be able to use power by using those languages in the right circumstances, but if you are a lawyer you know that it's not that simple, so you need to have imagination. Stuff is thrown at you, and you have to react. And the two things that every lawyer knows in practice is that when you react you never have sufficient time to react properly and secondly that the reacting is a production of sentences. A production of words, idioms, and the point of this is to persuade an audience somewhere, it may be a court but very rarely, usually it's maybe a committee or, you know your negotiating partner, or maybe a PhD jury, so that's what we do, and in order to compose those sentences that persuade audiences in a situation where there's not enough time, when you feel that somebody else could do this better or that you're not going to be able to persuade them, then that is the essential essence of the phenomenology of the lawyer of which I spoke, that is the legal experience par excellence. And that requires imagination, so in practice I saw people, and I'm really thankful for this, I saw people who had lots of imagination, I saw also people, lawyers, who didn't have that much imagination, and one could quite rapidly make the distinction

and then when you had this thing, or something happens, you have to ask the question, well it's now 1990 and the country that existed east of Finnish border no longer exists, so what exists there. And you know the president wants a response tomorrow, so what, how do you respond to that? So, you create sentences, you look at whatever materials there are in your room. I use in the, in the latest book, I use the term taken from the French anthropologist Claude Lévi-Strauss, bricolage, as in order to describe that kind of a work where time is scarce, you have only some materials which are lying around there because of what you have been bringing in from the library and your colleagues, you can't talk to everybody but you can talk to maybe two people because they are, you know, close in the office and you have to. So, this is, bricolage is, where you collect a response, you respond to a situation, a new situation rapidly, trying to use the materials that you are aware of and you can, you know, you can manage them and you try your best, so that's where imagination mixes up with linguistic task as well as the effort to be there when power is exercised.

00:22:24 KS: So, to continue this metaphor, like property and sovereignty are two bricks in the bricolage?

00:22:30 MK: Absolutely, absolutely you can say that.

00:22:33 AP: So, if we set aside the term legal imagination and the bricolage, is the underlying argument that international law, before the 19th century, was primarily a way to justify different actions, usually of the sovereign, through prominent discourses of that period? You give examples of Dominium and Christianity, natural law and the traits of human nature within the sphere of natural law.

00:23:04 MK: Well, now we have to be clear, so there wasn't international law before the Victorian period. There were various legal vocabularies, and those vocabularies appeared useful for people with ambition to exercise power. And then they, through bricolage, then they grasped at those languages. A good example is the language of the royal prerogative in Britain. When I first encountered royal prerogative in this, I didn't know what on earth was being spoken of, this was an alien concept to me. We don't have royal prerogative in Finland or in much of Europe, but it turned out that for British lawyers royal prerogative was the set off rules and principles and practices through which the king of England and Scotland, the British king organized the international relations that he had. Not only public law relations but also private law relations. British merchants operated outside Britain under the royal prerogative, and so this was an exotic thing in my mind but, you know, it turned out to be hugely efficient because Britain became the world ruling power under royal prerogative. And so, this would be an example of, a specific example, of the claim that this is not a history of international law, it's a history of the legal imagination of a series of legal vocabularies that are being used there.

00:24:41 KS: Yeah so, what would you say is the relevance of the history of legal imagination to our contemporary world today?

00:24:48 MK: Well, yes, so I'm a crit, as they say, I'm a leftie international lawyer. My interest in academic work is to try to show that the tremendously unjust world in which we live is not what it is because of some necessity, it is because people made choices along the way in situations where history could have gone the other way as well. I'm specifically interested in the way in which we tend to think that ownership and public power are somehow fixed entities that have a certain content because they could not be otherwise. And so by producing this history I can show that people have imagined these two things, sovereignty and property, in a zillion different ways and that we can also do that, that there is nothing necessary about these concepts and these vocabularies. I'm specifically interested in undermining those fields such as economics and social science that often borrow these legal vocabularies from lawyers and easily speak about statehood and sovereignty and ownership as if those were somehow entities carved in stone. And I want to show, well that's not the case at all, they are really very complex entities in which on which lawyers have thought very different ways, which have been used in very different ways in practice and that they could be so used today as well. All of this to open the box, or the prison house, in which we live today where the

languages of political engagements are part of the problem of the world, you cannot participate in the world in order to change it by speaking today's languages because the languages tie you already to a system that's profoundly unjust.

00:26:48 KS: Just in connection to that, also the fact that if property and sovereignty have been, as you said used in a zillion different ways in history it can be used differently in the future, so I'd like to ask a maybe a more factual question in regarding you are in to that because, as I understand it from reading your book, property and sovereignty was very much connected throughout history, so you said like the companies were, like the French king were investing in French companies, and they were in control of the power, control over from the sovereign, whereas in today it looks like its very much separated, like colonies, post colonies of today, they have, well they're sovereigns, but the companies are not controlled by the sovereigns, so would you say that there's been a flip for difference here or is it, you know, connected?

00:27:26 MK: Well, I challenge the premise a little bit. So, I also wanted to show that at the very moment when Louis the fourteenth was at the peak of his power, so when he apocryphally is supposed to have said *L'etat, c'es mois*, I am the state, at that very moment correct description, or the correct answer, to the question, what is France, would be France consists of fifty thousand venal office holders who have bought their way into state office and who own that office as private property so that their eldest sons can inherit that position. Louis the fourteenth couldn't lift a finger without, you know, being completely tied up with oligarchic arrangements with the ruling families, most ruling families who are also financiers of the king. So, I wanted to say that the Ying and Yang is really true, so these are, so sovereignty and property, now listen to me carefully, sovereignty and property are competing descriptions of the same thing. It's like the duck and rabbit image. So, is it duck, is it rabbit? So, it is the same power, and I have few heroes among these European dead guys, but some of them are the Spanish Dominican clergymen from the 16th century who operated with a single concept of dominium, you mentioned it a moment ago, and then developed from that dominium proprietatis and dominium jurisdictionis, but were constantly aware, and stressed the fact, that these two types of dominium actually embodied one single type of power, which was the power of human beings over other human beings. And I wanted to resuscitate and bring that understanding to the present so that we understand that when ownership is at issue today and when the power of the parliament is at issue, that those are the same kind of power and that same types of justifications, same types of criticisms, apply to both but we have forgotten this.

00:30:08 AP: I think we're coming to the end of the podcast. At the end of each episode, we like to ask our guests to tell us something that they do outside of academia to bust the myth of academics only reading on their spare time, so I gave an example of myself, so I like watching biathlon on my free time. So, do you Martti have something that you enjoy outside of academia?

00:30:38 MK: Oh boy, outside of academia, well you already preempted me from saying well "I read a lot". But what can I say, I read a lot. I love French bandes dessinées, so I read a lot of that. Is that academic? Well, it does help me do my academic thing. So, I like, until very recently because I've had some health problems, I like running a lot. But, you know, in running one thinks academic things, so I think that's one of the reasons why I left foreign ministry then finally although I liked it, and I had nothing against being an ambassador one day. So, one reason was that the academic life can fill your whole 24 hours a day, and while some people say 'oh you poor Martti' because you are working all the time, I say 'no I'm just enjoying my life all the time 24 hours, what's work?'

00:31:34 AP: Yeah, it seems that most of the academics see that the hobby, the spare time, and the work is within academia.

00:31:42 MK: Absolutely.

00:31:43 KS: Yeah, work/life-balance is a false dichotomy. There's only life.

00:31:48 AP: Exactly. But thank you Martti Koskenniemi for joining us for today's podcast.

00:31:54 MK: Thank you very much.