
Book Reviews

Korhonen, Outi. *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community*. The Hague/London/Boston: Kluwer Law International, 2000. Pp 311, xviii, Index. €125, \$135, £85.

Although, or perhaps because, law is largely a hermeneutical enterprise, the insights of philosophical hermeneutics¹ have had only a limited impact on legal theory.² Except for passing references to it,³ international legal theory has rather referred to American liberalism or French (post)structuralism. But when asserting with the latter that 'international law discourse is a conversation without content—a ritualized exchange which avoids confronting the very question it purports to address',⁴ it may well have thrown out the baby with the bathwater. In her SJD dissertation, published in a slightly modified form in the book under review, Outi Korhonen purports to fill the *lacuna* by analysing the

embeddedness of legal argument in culture, history and community, without falling into the trap of denying the possibility of distinctly legal communication altogether (even if she, too, draws heavily, and this is another strength of her book, on recent postmodern literature in law, philosophy and other disciplines).

At the outset, Professor Korhonen develops the concept of situationality.⁵ Following Gadamer, she posits a 'dialogical' understanding of the lawyer's situation, in which 'the subject and its other question themselves, each other, the world, and their relationships indefinitely'.⁶ In her opinion, this does not amount to a dilution of the substance of law. Rather,

the lawyer's commitment and the commitment to situationality analysis—awareness of the situational co-ordinates and working through them—support each other. The lawyer can be committed to guarding the law ... better when she investigates the cross-influencing relationship of the law, her situation, and the world. Both commitments work against alienation, nihilism, and mystification of justice. (14)

The book exemplifies the 'situationality' of the international lawyer through the responses of international lawyers to the 'Finnish Question' at the beginning of the 20th century. For these lawyers, mostly positivists, the gradual revocation by the Russian Tsar of the privileges granted to the Finnish province after acquiring it from Sweden at the beginning of the 19th century posed particular problems because Finland was, without

¹ See especially H.-G. Gadamer, *Wahrheit und Methode* (1960, 6th ed. 1990; *Truth and Method*, trans., 1998).

² The influence was largely limited to German authors. See, e.g., J. Esser, *Vorverständnis und Methodenlehre in der Rechtsfindung* (2nd ed. 1972); A. Kaufmann, *Beiträge zur juristischen Hermeneutik* (1984).

³ See, e.g., M. Koskeniemi, *From Apology to Utopia* (1989), at 469 n. 23. For a more detailed discussion, see, however, U. Fastenrath, *Lücken im Völkerrecht* (1991), at 73–74, 173–176 *et passim*.

⁴ Kennedy, 'Theses about International Law Discourse', 23 *German YIL* (1980) 353, at 376; similarly Koskeniemi, *supra* note 3, at 137. For a critique, see Fastenrath, *supra* note 3, at 73. As far as the reviewer can see, neither Kennedy nor Koskeniemi have repeated that pessimistic view recently.

⁵ See also Korhonen, 'New International Law: Silence, Defence or Deliverance?', 7 *EJIL* (1996) 1, at 4–9.

⁶ At 8. Footnotes omitted. *cf.* Gadamer, *Truth and Method* (1998) 302.

doubt, not a state in the international meaning of the term and therefore lacked the necessary standing to bring its claims onto the international plane. Whatever position international lawyers adopted, they had to resort to extra-legal arguments, such as culture, history and community.

Korhonen describes the oppositions between culture and nature, between the international legal culture and a-cultural legal 'objectivity', and between culture as a positive-connoted notion versus a neutral, anthropological understanding of the term. She emphasizes, with Gadamer, the historical development of culture as 'a universal sense (*Sinn*)' enabling 'the human rationality to prevail over particularism, parochialism, and the associated desires and passions', as 'antidote to such desires from the perspective of the humanities' (57). She recognizes both the positive and negative aspects of this definition in international law and the juridical profession. '[T]he cosmopolitan lawyer desires to see the imposition of his favoured rules and regimes (out-going influence) reach universal dimensions but does not so easily open his eyes to alternating viewpoints which come from different corners of the universe or even from within.' (59)

It is the red thread of Korhonen's, at times lengthy, analysis of the stances of different lawyers to the Finnish Question that 'legalist arguments constituted only a part of the discourse. The lawyers argued and thought about issues of culture as well as history and the precepts of community-building. Yet, the legalist and the other arguments were not separable but grew as an interdependent whole.' (61) The distinction between legal and non-legal arguments is presented as a rhetorical device to exclude unwelcome arguments. For instance, Finnish voices presented the distinctness of Finnish culture as an argument for autonomy, whereas Russian jurists deemed it irrelevant for legal analysis. West European authors regarded the Finnish Question as a chance to express their 'progressive' views or their adherence to positivist doctrines in spite of other political inclinations. In this writing, culture is either

interpreted as a localized nationalist position that needs to be overcome, or culture is seen as a means of international integration on the level of legal ideals and professional allegiance (121). Korhonen finds traces of these uses of culture also in modern theoretical writing. Thus, she rejects the alleged neutrality of (neo)liberal international law theory for its naiveté and even neo-imperialism (125), and criticizes, although remaining sympathetic to his enterprise, Philip Allott⁷ for the possibility of totalitarian abuse in his 'self-judging' and 'self-transcending' society spirit (126). In her analysis, legal writing from all camps, whether at the beginning or the end of the 20th century, proves unable to expel culture from the legal realm. Only when taking a stance towards culture, Korhonen concludes, can the lawyer fulfil her task.

Similarly, in her analysis of the legal use of history, Korhonen discovers two mutually exclusive approaches: one uses history in a 'notarial' vein, as a point in time establishing certain facts; the other, more complex, understanding regards history as an open process. In fact, analogous to postmodern research in international law, 'new history' has questioned an objectivist reading of history which excludes the subjectivity of the observer-historian. Reality turns out to rely on intersubjective conventions rather than objective reality. As long as such conventions cannot be established, the legal discourse seems condemned to mere advocacy. In the Finnish Question, the diverse interpretations of the Porvoo Act of 1809, in which the Tsar had committed himself to a respect for Finnish autonomy, provide a powerful example of the impact of the subjectivity of lawyers on the solution advocated. The lawyer, it seems, cannot do without taking historical stances beyond neutrality, even if she strives to maintain her impartiality. Stability and change, history and politics influence each other, without opening the possibility of a middle ground (206).

The dependence of the lawyer on exter-

⁷ P. Allott, *Eunomia, New Order for a New World* (1990, paperback ed. with new preface 2001).

nalities culminates in the use of the community concept. Korhonen briefly recalls the shift of legal writing from the emphasis on sovereignty along the lines of the 'Lotus' principle⁸ towards a more communitarian interpretation emphasizing the limits of sovereignty required by the existence of an international public order (or *ordre public*).⁹ She describes the link between community and communication among its members, that is, the dependence of the former on the latter. The limits of communication, as stressed in recent postmodernist writing,¹⁰ produce silences and exclusions in the legal community. On the other hand, Korhonen rightly emphasizes that silences may also be part of constructing a community. (215) Again, the lawyer comes into play: the closure of the legal system is not determined by the law, but by the lawyer. She has to define the borderline between law and non-law every time anew, thereby engaging the outside as much as the inside. As anything else, law cannot solve the agent-structure problem. Referring to Derrida's language theory,¹¹ Korhonen describes the lawyer's position as *autonomy-heteronomy*: on the one hand, the lawyer is constrained by the legal claims to autonomy. On the other, due to the incompleteness of any system, she cannot practise law without, consciously or unconsciously, constantly working with insights drawn from other disciplines. Korhonen expresses this relationship in a paradox: 'The structure and the agent are interdependent, yet autonomous in themselves, and, therefore, heteronomous to each other.' (223)

⁸ S.S. 'Lotus', PCIJ, Ser. A Nr. 10 (1927).

⁹ See only B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994-VI), at 217.

¹⁰ See, e.g., as quoted by Korhonen, Koskenniemi, 'Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons', 10 *Leiden JIL* (1997) 137; Charlesworth, 'Feminist Methods in International Law', 93 *AJIL* (1999) 379. See also Korhonen's own writing, *supra*, note 5.

¹¹ J. Derrida, *Le monolinguisme de l'autre, ou, La prothèse d'origine* (1996, engl. transl. 1998) 27, as cited by Korhonen, at 220 *et seq.*

Korhonen puts a brave face on these contradictions: 'It is this dual potential that counter-acts the constrainedness of the singular structures and thus offers an invaluable element of the exercise of individual responsibility or any community-ethics within a discipline.' (225) And indeed, this analysis only excludes an imperial determinism which has always been illusory. '[N]o community, no communication nor a rule structure ever completely closes off its openings to the outsides, not even the hegemonic one, even if its foremost characteristic is exclusionary or colonising. This absence of final closure is both a significant limitation and a potential as the situationality analysis shows' (293)

Korhonen's emphasis on the individual lawyer challenges a traditional, objectivist image of public international law in which the objective law effaces the individual lawyer applying it. It is the central argument of the book that lawyers do not fulfil their function if they fail to take account of the extra-legal environment in which legal work takes place. As a negative example, Korhonen mentions the interpretation of the UN Convention on the Law of the Sea by the International Tribunal of the Law of the Sea in the *M/V Saiga*:

Could any international jurist be content that an inaugural case of the Tribunal . . . could not but dismiss the question of development as irrelevant . . . decline to pronounce on general policy questions concerning the new phenomenon of 'bunkering' . . . brush over the avoidance of ship registration and its obvious and severe consequences . . . overlook the obvious links of the case with the protection of the marine environment at various points, and obscure the meaning of the title 'exclusive economic zone' . . . ? (2)

As an alternative, Professor Korhonen suggests, 'at the very least, that together with the *res iudicata* the many varieties of *ad hoc* management, private networking, "crisis control", and various legal architectures influencing further outcomes should be kept traced and not ignored in legal opinions' (5).

And yet, why should the Tribunal judges be

capable of solving the very issues which neither the parties nor the 'international community' has been able to resolve before?¹² Where does the lawyer take the justification of substituting her solution for the lack of solution by the policy-makers? Is not, all too often, the search for superficial, 'second-best', technical – and at times technocratic – *modi vivendi* rather than all-out 'solutions' the very task which society expects the lawyer to fulfil? While not denying the value of 'questioning' the extra-legal conditions for international legal work, one nevertheless might ask where this deconstruction leaves the future of international law.

Referring to Nathaniel Berman,¹³ on the one hand, and Martti Koskenniemi,¹⁴ on the other, the author offers two possibilities for legal practice today: a culturalist approach would embrace the heteronomies and search for a multi-dimensional space in which the different claims can be accommodated. The second approach would limit the lawyer to those issues which fit into the 'reason' of the system they represent, thereby arguing 'for the exclusion of the hopes, passions, morals, and fantasies from the legal discourse and, simultaneously, against their reduction to it. [Koskenniemi] wants them to inhabit an other a priori realm, not that of (international) law.' (271). Although her book can be read as a plea for the first proposition, Korhonen does not say so but maintains that a 'wholesale solution . . . cannot be reached. The response must be situational in the demanding sense of the term.' (278)

Professor Korhonen emphasizes that '*questioning* does not mean annihilation or "whole-

sale deconstruction"'. (16) However, she admits that she 'personally' prefers questioning to rebuilding, because it remains necessary in the midst of the emergence of ever-new reifications and misconceptions. This may well be the case. Nevertheless, the legal practitioner cannot leave the reconstruction to others. And the turn to the lawyer may well conceal the lack of answers concerning the substance of the law. The challenge may lie in the development of another kind of legal practice – a practice which would self-critically admit both the limits of legal thinking and the entanglement of the lawyer in his or her extra-legal 'situationality', but yet continue to hold the exercise of power accountable to legal norms accepted by the international community at large. As Professor Korhonen herself puts it, the question is 'how a synthetic order, which is both common enough to produce cohesion and pluralistic enough not to reduce the various cultural differences, can be achieved without succumbing to either hegemony or unmanageable fragmentation' (at 42).

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¹² For the – probably overstated – argument that UNCLOS is almost completely devoid of such 'solutions', see D. Kennedy, *International Legal Structures* (1986).

¹³ Berman, 'Legalizing Jerusalem or, Of Law, Fantasy, and Faith', 45 *Catholic Univ. Of America LR* (1996) 823.

¹⁴ Koskenniemi, *supra* note 10, at 137. It is not without irony that Koskenniemi is cited here for the latter view. He could as well be cited for the opposite proposition, see *idem*, *From Apology to Utopia* (1989), at Ch. VIII.