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A Treatise on Legal Argumentation

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Chapter 11
Radical Decisionism: Social Justice on a Strictly Contextualist Basis

11.1 The Significance of the Institutional Meta-Theory of Law

Legal literature is a cumulative fabric of at least partially overlapping texts all of which assert something about the law and society. Some texts are mutually concurrent, while others are mutually conflicting. Some texts are freestanding and self-supporting, while others lean on other texts for their argumentive force. Still, all legal texts make the claim of contributing *something* to the prevailing or critical concept of law, providing either support or critique for some ideological stance on the law and legal phenomena.

What gives a linguistic assertion on how to construct and read the law its *legal* quality is its relation to the (primarily) institutional and (supplementarily) societal *meta-theory* or *meta-narrative* or *meta-context* of the law. The meta-theory of law lays down a certain kind of *frame of analysis* for the construction and interpretation of law, with coverage of the set of logico-conceptual, ontological, epistemological, methodological, and axiological premises involved. It in other words pins down the *constitutive* criteria of law, resulting in e.g. the concept and definition of law; the internal logic adopted in legislation and legal adjudication, i.e. the binary logic of legal rules or the multi-valued, fuzzy logic of legal principles; the sum total of the institutional and non-institutional sources of law, along with the value premises entailed in them; and the models of legal reasoning acknowledged in a legal system.

Above, the array of feasible meta-narratives of law were outlined with the following kinds of criteria:

(a) The presence or absence of an isomorphic picture relation between the two fact-constellations, or states of affairs, compared, the one as given in the fact-description of a legal rule and the other as possibly existent in the world, under the *isomorphic theory* of law.
(b) The prevalence of mutual match, reciprocal support, common alignment, absence of dissonance, and/or shared congruence of arguments derived from the institutional and non-institutional, i.e. societal, sources of law under the *coherence theory* of law.

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(c) The approval or disapproval of the method and outcomes of legal reasoning in the universal audience, taken as a subjective thought construct of the speaker, under the *new rhetoric*.
(d) The external consequences of law in society under *philosophical pragmatism* and *social consequentialism*.
(e) Retracing the original intentions of the legislator or a precedent-issuing court of justice under *legal exegesis* and *analytical legal positivism*.
(f) The effected law in action in the sense of the totality of the legal rights and legal duties effectively enforced by the courts of justice and other legal officials under *analytical legal realism*.
(g) Common acceptance or recognition of certain phenomena as legal, or the set of mutual expectations and cooperative dispositions to the said effect in a legal community, under *legal conventionalism*.
(h) The logico-conceptual and systemic qualities of law under *legal formalism*.
(i) Recourse to the precepts of absolute religious, social, or political justice under *natural law philosophy*.

Other feasible frames of legal analysis could be added to the list, as well. The meta-theory or meta-context of legal analysis might entail a reference to law as a surface-structure level ideological phenomenon that passively reflects the more foundational, deeper-structure level economic phenomena in society (*Marxist theory of law and society*); the self-evident, a priori characteristics of the phenomena as "things-in-themselves" (*phenomenology of law*); or the claimed gender-related bias in the predominant, patriarchal view on the law and society (*feminist philosophy of law*), to name but three feasible alternatives to the nine divergent meta-theories of law discerned above. Any meta-theory of law seeks to present a relatively balanced notion of the constitutive premises of the law and society by attaching the premises of legal analysis to some fixed reference ground. It is only under a *radically decisionist* account of law that the grip of any feasible *meta-theory* (or *meta-narrative*, or *meta-context*) of law can be evaded.

11.2 Denial of All Feasible Meta-Theories of Law: Kadi-Justice, the German Free Law Movement, and Carl Schmitt on the Law

A radically decisionist and contextual notion of law refuses to acknowledge the bearing of any *meta-theory* (or meta-narrative, meta-context) of law. Under fully consistent contextualism, the same goes for all kinds of non-legal meta-theories, as well. According to a decisionist approach, legal decisions ought to be made on the merits of an individual case only, without recourse to any external reference that could frame and structure the decision-making situation. As a consequence, arguments of an ad hoc or even ad hominem kind, adjusted for the individual case at hand only, will have priority over arguments derived from the traditional institutional

and societal sources of law. The goal to be pursued in such discretion is strictly case-bound justice, tailored for the facts of the case at hand only.

What Max Weber wrote about the traditional *Kadi*-justice goes for the radically situationist conception of law in general: as "informal judgments rendered in terms of concrete ethical or other practical valuations. (...) *Kadi*-justice knows no rational 'rules of decision' (*Urteilsgründe*) whatever".[1] In contrast to Kant's *categorical imperative*, the outcome of such purely ad hoc based discretion cannot be extended to a universally binding norm, as that would require having recourse to *some* meta-theory of law and society.

The *Free Law Movement* (*Freirechtsschule*, *Freirechtsbewebung*) had its short-lived heyday in Germany, Austria, and partly even France at the first quarter of the twentieth century. Of modern schools of law, it best illustrates a strictly decisionist approach to the law, free from all meta-level constraints. Its methodological agenda was advocated by e.g. Eugen Erhlich (1862–1922), Hermann Kantorowicz (a.k.a. Gnaeus Flavius, a pseudonym, 1877–1940), Ernst Fuchs (1859–1929), Johann Georg Gmelin, and Hermann Isay (1873–1938). Oscar Bülow (1837–1907) is often named as a precursor of the free law movement.[2] In France, the idiosyncratic approach of François Gény (1861–1938), to the effect that the judge is to have recourse to a free scientific, socially oriented investigation (*libre recherche scientifique*) in the construction and interpretation of law,[3] has close resemblance to the ideas defended by the free law movement.

The free law movement was born out of the critique of the excesses of legal formalism that had been committed by Puchta and other German conceptualists. The formalists had looked upon the judge's act of legal discretion as a purely logical operation, i.e. a *logical syllogism* in which legal consequences could be logically drawn from the combination of the *norm premise*, derived from the sources of law, and the *fact premise* that consists of the material facts of the case. There was no room left for a genuine legal discretion by the judge in the act of applying the legal norms to the facts of the case. Rejecting any such futile exercises in formal logic, the proponents of the free law movement put forth the argument that the judge ought to adjust the decision to the prevailing *notion of justice* (*Rechtsgefühl*) or *value consciousness* (*Wertfühlen*) in the legal community. Echoes of Aristotle's notion of case-bound equity as an essential part of the law can perhaps be heard here.[4]

The free law movement insisted that the existence of free judicial discretion in various occasions of judicial decision-making be acknowledged, in stark contrast to

[1] Weber, *Economy and Society*, p. 976.

[2] Larenz, *Methodenlehre der Rechtswissenschaft*, pp. 59–62; Wieacker, *Privatrechtsgeschichte der Neuzeit*, pp. 579–581; Lind, "Free Law Movement", pp. 314–318. – In the essay, Lind gives a good and concise introduction in English of the main thoughts by Ernst Fuchs, Johann Georg Gmelin, Eugen Ehrlich, and François Gény, with Oskar Bülow (1837–1907) presented as a forerunner of the movement at the end of the nineteenth century.

[3] On François Gény as a legal thinker, Bouckaert, "Gény, François (1861–1959)"; Bergel, *Méthodologie juridique*, pp. 249–253.

[4] Aristotle, *Nicomachean Ethics*, p. 1796 (Book V, lines 20–32).

the position held by the more formal approaches to the law. To put it concisely, the free law movement defended the following three theses on legal analysis[5]:

(a) judicial adjudication is a free and creative act, with a significant amount of discretionary lawmaking granted to the judges;
(b) all written law, no matter whether it be in the form of codes, statutes, or precedents, is by necessity incomplete and incapable of providing answers to all pertinent legal issues; and
(c) all rules of legal construction, including those aimed at restricting free judicial discretion, entail implicit value judgments and the application of formally extra-legal principles.

Such a notion of a highly judge-centred law is not far from the idea of a *virtuous judge* whose duty it is to enforce what is just for the fact-constellation at hand, in line with the ideas advocated by natural law philosophy. As the *Rules for the Judge* put it in Sweden in the sixteenth century[6]:

> A good and clever judge is better than good law, since he may settle the issue to match with what is equitable; but if the judge is evil and wicked, there is no use of even good law, since he will bend and twist it as he likes.

In the German Weimar Republic, a radically contextualist notion of law and sovereignty was put forth by the constitutional lawyer and one of the top-ranking legal advisors of the *Dritte Reich* in the 1930s, Carl Schmitt (1888–1985). Schmitt's notion of law is a prime example of decisionist stance vis-à-vis the seminal issues of legal and political philosophy.[7] In the heated debate with Hans Kelsen, Schmitt argued for the *Führerprinzip* or *Führerbefehl* ideology with reference to the ultimate power to declare the state of emergency. Kelsen, on the other hand, defended the sovereignty of the parliament under the traditional rule of law ideology.[8] According to Schmitt and the legal positivists alike, ultimate power in society is derived from

[5]Lind, "Free Law Movement", p. 315.

[6]Cf.: "What is not right and equitable cannot be the law either; it is due to its equitableness that the law is acknowledged" (# 9); "All laws need to be applied with good reason, since the greatest [i.e. most severe] justice is the greatest injustice, and there must be an element of charity in law, as well." (# 10); "The benefit of the common people is the best law; and therefore, what proves to be for common benefit shall be law even, if written law would seem to order otherwise" (# 13). (Translations by the present author.) – Olaus Petri (1493–1552), a Swedish scholar and clergyman, drafted the *Rules for the Judge* (*Domarregler*) in the early sixteenth century. Even today, Olaus Petri's rules for the judge are printed at the beginning of the law book in Finland. Of course, they do not have the force of law but only denote the moral and social context of judging.

[7]Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, pp. 20–24; Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*; Medina, "Decisionist Philosophy of Law". – The best commentary in English to Schmitt's legal and social thinking is David Dyzenhaus' *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, where the three legal philosophers are concisely compared.

[8]Schmitt, *Der Hüter der Verfassung*; Kelsen, "Wer Soll der Hüter der Verfassung Sein?". Cf. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*.

the will of the sovereign ruler, but the notion of the *sovereign* is defined in different terms within the two intellectual traditions. For Schmitt, the sovereign was not necessarily the national Parliament, as the legal positivists would have it. Rather, the sovereign is the one institution that is endowed with the power to proclaim the *state of emergency*: "Sovereign is he who decides on the exception."[9]

Schmitt sought to distance his notion of the law and state from the traditional positivist theory where the ideas of a social contract, sovereignty under the rule of law, and parliamentary legislation have a key position.[10] Though Schmitt may have evaded the impact of *legal* meta-theories in his decisionist notion of law and society, he could not unshackle his political philosophy from the various kinds of social, political, or ideological meta-theories. Working in the service of the *Dritte Reich* since 1933, Schmitt placed his faith in the ultimate success of the National Socialist ideology, which can hardly be claimed to be free from the impact of ideological metanarratives on law, society, and politics. As it stands, the National Socialist ideology was based on an array of quasi-scientific metanarratives of the social order, such as the *Blot und Boden* ("blood and soil") ideology, the *Führerprinzip* or *Führerbefehl* ideology under which the will of the *Führer* had the force of law, and the absolute *Herrschaft* of the Aryan race in respect to the other races, plus other dogmas of National Socialism.[11]

Before Schmitt, a radically decisionist account of the law and human society had been defended by Jean Bodin (1530–1596) and Thomas Hobbes (1588–1679).[12] The impact of Friedrich Nietzsche's philosophy, too, can be seen at the back of Schmitt's notion of law.[13] The focus of Schmitt's philosophy of law was on the questions of constitutive law and the concept of the sovereign, not on issues on how to construct and read the law or the limits placed on the judge's legal discretion. Therefore, I will not enter Schmitt's conception of law in more detail. Instead, I will consider two candidates for a decisionist view on the law and society, viz. Thomas Wilhelmsson and Martti Koskenniemi.

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[9] Schmitt, *Political Theology*, p. 5. Cf. also: "All law is 'situational law'. The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based on law." Schmitt, *Political Theology*, p. 15.

[10] According to article 48 of the Weimar constitution, the President of the Republic was bestowed the right to proclaim the state of emergency to restore general order and security if the state had fallen into social unrest. The state of emergency was proclaimed twice during the Weimar republic, i.e. in 1919–1924 and 1930–1932, and then again after the fire of the *Reichstag* building in Berlin in February 1933. Tuori, "Carl Schmitt ja vastavallankumouksen teoria", pp. 15–16; Medina, "Decisionist Philosophy of Law", p. 185.

[11] After 1936, Schmitt fell from grace within the National Socialist movement, but thanks to his connections he retained his chair as a law professor in Berlin.

[12] Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, pp. 22–24; Medina, "Decisionist Philosophy of Law", p. 184.

[13] Medina, "Decisionist Philosophy of Law", p. 184.

11.3 Decisionism in Jurisprudence, I: Thomas Wilhelmsson on the Small-Scale, Good Narratives on Legal Responsibility

In the recent Nordic literature, Thomas Wilhelmsson has defended the agenda of a *social civil law*, i.e. private law that is adapted so as to be highly responsive to the need for enhanced protection of the weaker party to a private law contract or other arrangement.[14] As a means to attaining the said goal, Wilhelmsson, firstly, advocates the adoption of *concrete*, *situational concepts* in legal analysis, like e.g. a debtor or an employee who has been affected by some grave, unexpected economic misfortune, such as serious illness or unemployment, while the outcome is not mainly due to his own fault; at the cost of the traditional, *abstract role concepts*, such as the debtor/creditor or the employer/employee taken in the abstract sense, i.e. without reference to the economic or other "extra-legal" circumstances of the case. With a few exceptions mainly in the field of consumer law, the latter types of legal concepts are yet commonly adopted in legislation and in judicial decisions.[15]

Secondly, Wilhelmsson is committed to the idea of observing *goal-rationality* in legislation and judicial decision-making, paving the way for the protection of the weaker party to a private law agreement "writ large" and serving as a common model for all types of private law transactions. And thirdly, Wilhelmsson has defended the idea of radically transforming the mainstream conception of legal systematics and legal interpretation into a more dynamic, socially more responsive conception of the law, to the effect of turning some individual legislative provision or precedent-based rule that is generally taken as an *exception* to the main rule into a *main rule* to be followed in the subsequent legal adjudication, if the ideological goals related to the interests of the weaker party to a private law transaction or the like arrangement are thereby advanced.

The idea of turning the settled *main rule/exceptions to the main rule* categories in some branch of law upside down will make it possible to present "alternative", critical interpretations of law, with reference to the *l'uso alternativo del diritto* ideology that was envisioned by a group of left-wing Italian judges after World War II. Wilhelmsson's agenda of social civil law, with its idea of seeing the law as a catalyst of welfare-oriented social reform, is based on the notion of *l'uso alternativo del diritto*, as now modified for the needs of the protection of the weaker

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[14] Wilhelmsson, *Social civilrätt*; Wilhelmsson, "Sosiaalisen siviilioikeuden metodiset lähtökohdat"; Wilhelmsson, "Sosiaalinen siviilioikeus"; Wilhelmsson, "Sosiaalinen suorituseste"; Wilhelmsson, *Social Contra ct Law and European Integration*.

[15] Wilhelmsson, *Social civilrätt*, p. 139; Pöyhönen, *Sopimusoikeuden järjestelmä ja sopimusten sovittelu*, p. 274. – Article 11 of the Finnish Interest Act makes it possible to alleviate the legal interest of an overdue payment, if grave economic difficulties have fallen upon the debtor because of illness, unemployment, or similar reason, said state of affairs has not been induced mainly by fault of the debtor himself, and there are weighty reasons present for alleviating the interest.

party to a private law contract.[16] As a consequence, Wilhelmsson downgrades the role of traditional legal systematics, due to the emergence of a new kind of non-systematicity in law that can be most clearly detected in the law of the European Union. According to Wilhelmsson, the rules and principles of EU law from time to time behave like a "jack-in-the-box" vis-à-vis the national law, to the effect of emerging out of the box when you least expect it to happen.[17]

In addition, Wilhelmsson introduces the idea of the *small-scale*, *good narratives on legal responsibility*, to be duly recognized and enforced by the courts and other officials. According to Wilhelmsson, the social context of law and legal analysis have gone through a profound change, to the effect of having deprived the traditional meta-narratives of modern law of their initial appeal, and having left the lawyers in a world of *fragmented* legal doctrines and disbelief in any all-encompassing theory or systematics of law. Under the *postmodern condition* of law, the idea of an all-encompassing system of law or grand-scale narratives of legal responsibility have to be renounced as no longer valid, giving way to a loose set of small-scale, good narratives on legal responsibility only.[18]

Still, to the extent that the *goodness* of such small-scale, good narratives on legal responsibility in Thomas Wilhelmsson's novel narratology of law is judged in light of the values entailed in, and fostered by, the Nordic *welfare state* ideology, i.e. the rule of law ideology as twisted by the protection of the weaker party to a private law contract or other arrangements that deviate from the maxim of *pacta sunt servanda*, there is no escape from the reach of a large-scale meta-context or meta-narrative of law. We are firmly back on the legal ground defined by the Nordic welfare state ideology, once the inherent *goodness* of such "small-scale, good narratives on legal responsibility" is to be judged by the circumstances of the weaker party to a contract. In other words, we are back in square one where the Grand Narratives of Modernity loom large.

In his later essay "The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law", Wilhelmsson puts forth the bold but patently self-refuting claim that the *constitutional rights* may now be taken as a promising candidate for a "grand legal narrative" for the postmodern law.[19] The claim is self-refuting, since there cannot be a legitimate reference to any meta-theory or meta-narrative of law, if the allegedly post-modern condition of law is taken seriously. Thus, the key question remains unanswered: on what account do Wilhelmsson's "small-scale, good narratives on legal responsibility" qualify as *good*, if the impact of any meta-theories or meta-narratives of law is denied?

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[16] In Finland, the Marxist ideology of the *l'uso alternativo del diritto* gained popularity among radical legal academics and scholars in the political turmoil of the 1970s, with Lars D. Eriksson as one of the intellectual pathfinders of the leftist movement in the academic world.

[17] Wilhelmsson, "Jack-in-the-Box Theory of European Community Law".

[18] Wilhelmsson, *Senmodern ansvarsrätt*, p. 193 et seq.

[19] Wilhelmsson, "The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law", pp. 141–146.

11.4 Decisionism in Jurisprudence, II: Martti Koskenniemi on the International Lawyer's Radically Situational Ethics

Martti Koskenniemi is an author in international law, known for his inclination towards critical legal studies. In his breakthrough treatise *From Apology to Utopia: The Structure of International Legal Argument*, he drew inspiration from and leaned heavily on the methodological tools provided by the *Critical Legal Studies* movement. In the book, Koskenniemi ruthlessly subjected the patterns of argumentation in international law to a methodological *deconstruction* à la the Critical Legal Studies movement, leaving behind a shattered collection of "ruins and ashes" there where the shiny doctrines of international law – such as the doctrines of state sovereignty, customary law, the doctrine of legal sources in international law, and so on – had once been raised with great ambition.[20]

In the CLS-spirited discourse on law since the 1970s, Jacques Derrida's idea of philosophical deconstruction has been welcome as a quick *methodological* tool for revealing and turning around the prevailing ranking order of the conceptual dichotomies within the law. That, however, is hardly what the French philosopher and main architect of deconstruction, Jacques Derrida (1930–2004), had in mind when he wrote the key texts of deconstruction. In fact, Derrida expressly rejected the idea that deconstruction might be turned into a straightforward method or tool for philosophical analysis: "Deconstruction is not a method and cannot be transformed into one."[21] Instead, deconstruction as envisioned by Jacques Derrida deals with the enigmatic *ultimate premises* and extreme boundaries of any philosophical idea or conception within the Western metaphysics, concerning for instance the ultimate prerequisites of language and human knowledge.

In Koskenniemi's shrewd analysis, the structure or pattern of international legal argumentation is proven highly volatile and inherently unstable in the face of competing, mutually exclusive claims as presented by the parties to an international legal dispute. In a hard case of international law, all traditional legal arguments, like the one based on *state sovereignty*, can equally well – and equally poorly – be employed by both of the parties to a legal dispute. The use of such arguments may lead either to the ultimate success or total failure for either of the two parties involved, depending on the ideological preferences of the court, arbitrator, or tribunal concerned,[22] and the same goes for any other type of legal argument analysed by Koskenniemi. As a consequence, any legal argument that might be brought up by the disputants to a case will ultimately fail, ultimately having the effect of cancelling each other

[20] The apt phrase of the "ruins and ashes" of international law was coined by Jarna Petman, who so depicted the outcome of Koskenniemi's methodological deconstruction in the post-graduate seminar conducted by me on September 28th, 1998. Prof. Koskenniemi was present at the seminar as well.

[21] Derrida, "Letter to a Japanese Friend", p. 3.

[22] Koskenniemi, *From Apology to Utopia*, pp. 208–209 (*Right of Passage* Case (1960) between India and Portugal), pp. 212–213 (*Nuclear Tests* Case (1974) between Australia & New Zealand and France).

out and leaving the judge, arbitrator, or other international tribunal with no *legal* arguments to lean on in his decision-making.

An intellectual surprise awaits the reader of Koskenniemi's lucid prose at the end of the book, when the so far constant, and unproductive, interplay of the two lines of argumentation, the one *apologetic* and the other *utopian*, is suddenly given up, and a novel shift in philosophical argumentation is adopted.[23] Having carefully "deconstructed" the shiny edifice of international law, Koskenniemi cannot leave the matter as it is, with international law turned into a shack of ruins and ashes, or a shattered body of conflicting theories, misfiring conceptual dichotomies, and failing doctrines of international law. Rather than letting the story end in such a nihilistic vision reserved for international law by the *Crits*-inspired methodological deconstruction, the agenda of critical social theory is "saved" by having recourse to a set of novel premises of analysis that are not *legal* in any viable sense of the term. In the enigmatic end chapter of the book, i.e. "Beyond Objectivism",[24] Koskenniemi rejects the Critical Legal Studies ideology and outlines a *radically decisionist* stance towards legal argumentation in international law.

Thus, a lawyer engaged in international law is advised to be "normative in the small";[25] to make room for interdisciplinary and discursive openness in his discretion, in disregard of any conventional borderlines erected between the different branches of enquiry; to adopt an ad hoc notion of justice,[26] in the sense of having an authentic ethical commitment to the values of critical social or political morality and giving effect to the idea of integrity as a lawyer. In effect, the lawyer engaged in issues of international law is required to reject all the common tools of legal analysis, along with his professional self-conception of what it means to "think like a lawyer".[27]

[23] Here, I refer to the end of the first edition of the book, and not to the Epilogue in its second printing.

[24] Koskenniemi, *From Apology to Utopia*, pp. 458–501.

[25] "Rather than be normative in the whole (and be vulnerable to the objections of apologism-utopianism) he [i.e. the international lawyer] should be *normative in the small*. He can attempt, to the best of his capability, to isolate the issues which are significant in conflict, assess them with an impartial mind and offer a solution which seems best to fulfil the demands of the critical programme, as outlined in the previous section. In this way, he can fulfil his *authentic commitment*, his *integrity as a lawyer*." Koskenniemi, *From Apology to Utopia*, pp. 496–497. (Italics added.)

[26] "For issues of *ad hoc* justice are both difficult to solve and can never be solved with the kind of certainty lawyers once hoped to attain. Their solution in a justifiable way requires entering intellectual realms formerly held prohibited from the lawyer. (...) this involves venturing into history, economics and sociology, on the one hand, and politics on the other. It involves the isolation and appreciation of what is significant in the particular case – in other words, realizing whatever authentic commitment there might exist for the parties in conflict. This is a task of practical reason. If my formulation of it seems question-begging and *leaves open the 'method'* whereby it should be conducted, this is only because *no such given 'method' can be outlined in the abstract* which would fulfil what is reasonable in some particular circumstance." Koskenniemi, *From Apology to Utopia*, p. 497. (Italics added.)

[27] "Engaging in practical reasoning, the lawyer shall have to recognize that solving normative problems in a justifiable way requires, besides impartiality and commitment, also wide knowledge of

Koskenniemi's novel intellectual stance is like the perfect counter-image of Kelsen's pure theory of law, i.e. an *impure theory of law* under which all traditional concepts, sources, doctrines, models, and arguments of international law, such as international legal conventions, customary law, legal principles, and state sovereignty, and legal opinions presented in the legal doctrine, will all have to go, leaving the field of discourse open for arguments derived from the realm of international politics and personal moral commitments of the lawyer concerned. In a discourse on international law so carefully "purged" from anything even remotely legal, it is arguments derived from critical political morality and the corresponding practices of international law that are now given effect. In his later writings Koskenniemi has not returned to or revived the idea of the lawyer's authentic ethical commitment, and – so it seems – he has silently dropped the notion.

But how could Koskenniemi's novel situational approach with its emphasis on a loose combination of contextual justice, methodological and interdisciplinary openness, the lawyer's authentic ethical commitment to some subject-bound moral ideals, and the (no more than) small-scale normativity evade the philosophical pitfalls of a methodological deconstruction that proved so fatal for the mainstream conception of international law? As I see it, Koskenniemi's novel situationist, contextualist, and decisionist notion of international law is as vulnerable to the ever-present threat of CLS-inspired methodological deconstruction as Thomas Wilhelmsson's idea of the small-scale, good narratives on legal responsibility proved to be. There simply is no escape from the pervasive, all-encompassing "logic of deconstruction", once reference is made to some Grand Theory of Law, such as the theory of social justice and allocation of social risk in a welfare state (à la Wilhelmsson) or the critical theory of law (à la Koskenniemi). A genuinely decisionist, ad hoc based ethics of law would be a different issue, but then one could not make any claims as to the attainment of the set of more or less leftist values fostered by the American *Crits* or the proponents of the Scandinavian welfare state ideology. The grand meta-narratives of modernity, with the CLS-inspired idea of methodological deconstruction being one of them, cannot be avoided, if the claim of the somehow reason-based quality of the outcome of decision-making is put forth.

Having successfully deconstructed the shiny edifice of modern international law, Koskenniemi's ultimately futile effort of "saving the phenomena" with the help of critical theory is like the forced ending of a stage play in the Antique Greece, where the *deus ex machina* was finally lowered down on the stage in a basket in the final act of the play, providing all the answers to the complexities and open endings

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social causality and of political value and, above all, capacity to imagine alternative forms of social organization to cope with conflict. It shall lead him to overstep the boundaries between practice and doctrine, doctrine and theory. The construction of *contextual justice* will demand an imaginative effort *to rethink the contexts* in which traditional roles have been formulated and in which their social effects have remained so unsatisfactory. The rethinking of contexts, again, makes it possible to imagine alternative social routines both for the lawyer and his "clients" while the very dynamism of the process *excludes claims of objectivity and universal normative truth*." Koskenniemi, *From Apology to Utopia*, p. 498. (Italics added.)

of the drama. But why should critical social theory be any less vulnerable to the demolishing touch of deconstruction than the more mainstream-spirited theories of international law, both enladen with a metaphysical dint of its own? The impact of CLS-spirited deconstruction is like the mirror image of *King Midas' touch*: it turns everything it touches, not into gold was the case with King Midas' touch, but into a heap of ruins and ashes. The grip of the meta-narratives of modernity, with CLS-inspired methodological deconstruction included among them, cannot be avoided, if the claim of the *acceptable* or *reasonable* quality of the outcome of such decision-making is voiced, as it is made in Koskenniemi's analysis.

In the *Epilogue* to the second printing of *From Apology to Utopia*, published in 2005, Koskenniemi in effect restates his original position vis-à-vis the inherent tension of the argumentation patterns in international law.[28] The radically decisionist CLS stance on law as no more than "politics all the way down" is even now echoed in the Epilogue to Koskenniemi's *From Apology to Utopia*,[29] and so is the resolute recourse to case-bound situationality.[30]

Koskenniemi's shrewd analysis of international law is continued in his second major work, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, published in 2002. At the end of the book, Koskenniemi envisions an optimistic return to a *cultural formalism* that would not seem to differ much from the plain formalism of Kelsen's *Pure Theory of Law*, except for the (postmodern) *irony* entailed in the former.[31] In Kelsen's theory of law, on the other hand, there is no trace of irony to be found in his scientific and philosophical reflections. So, how could Koskenniemi's novel doctrinal position of cultural formalism evade the reach of deconstruction, the devastating outcomes of which were so skilfully unfolded in Koskenniemi's earlier treatise?

Read side by side, Koskenniemi's two books on international law make up a vicious circle of argumentation, where the CLS-spirited reading of international law in *From Apology to Utopia* relentlessly deconstructs, dissolves, and breaks down the reconstructive cultural formalism that *The Gentle Civilizer of Nations* so hopefully leans on and seeks to enforce; while *The Gentle Civilizer of Nations*, in turn, promises an eternal return to the bliss of a legal and cultural formalism that

[28] Koskenniemi, "Epilogue", pp. 562–617.

[29] Koskenniemi, "Epilogue", p. 596: "There is no space in international law that would be "free" from decisionism, no aspect of the legal craft that would not involve a "choice" – that would not be, in this sense, a *politics of international law*." Cf.: "*False Necessity* (...) carries to extremes the thesis that everything in society is politics, mere politics, and then draws out of this seemingly negativistic and paradoxical idea a detailed understanding of social life." Unger, *False Necessity*, p. 1.

[30] Koskenniemi, "Epilogue", p. 616.

[31] Koskenniemi, *The Gentle Civilizer of Nations*, pp. 494–509, and 503–504, 508–509 in specific. – Koskenniemi was the visiting lecturer at my seminar for post-graduate students on 6th November 2002, answering to a set of questions prepared in advance by three (then) post-graduate students of international law, Päivi Leino, Anja Lindroos, and Jarna Petman. The question posited by Petman – and Koskenniemi's answer – as to the relation between cultural formalism and Kelsen's formal theory of law were brought up in that context.

the "deconstructive turn" of the *From Apology to Utopia* turned down and proved unfounded. The interplay of the nihilistic *deconstruction* in the *From Apology to Utopia* and the formalism-reaffirming *reconstruction* in *The Gentle Civilizer of Nations* leaves the reader puzzled in the midst of a philosophical whirlwind, without any solid philosophical ground to lean on.[32] Only the strained and ultimately unconvincing final chapter of *From Apology to Utopia*, "Beyond Objectivism", breaks out from the never-ending circle of deconstruction and reconstruction.[33] That, however, is as vulnerable to the *deconstructive* critique of the other parts of the said book as it is defenceless against the *reconstructive* critique entailed in *The Gentle Civilizer of Nations*. There is no escape from the logic of deconstruction.

11.5 A Critical Comment of Radical Decisionism

Legal decisionism, strictly defined, is fully detached from any meta-theories or meta-narratives of law that would reach for the institutional and non-institutional, or societal, sources of law. Still, once the institutional and societal sources of law are bypassed in legal argumentation, there is nothing left that could possibly warrant the *legality* of the outcome of such deliberation. As Aleksander Peczenik pointed out, the criteria of the legality of decision-making in any Western type of legal system are intertwined with the concept of the (mainly) institutional sources of law[34]:

> The sources of law are, moreover, related to the *concept* of "legal argumentation". One cannot reject all or almost all of them and still be involved in *legal* argumentation.

Moreover, it seems that extreme contextualism or situationism in law is not so easy a stance to sustain after all. Above, Carl Schmitt's situationist social and political thinking still made a commitment to the ideological tenets of National Socialism in the 1930s. Preference for *small-scale*, *good narratives on legal responsibility* in Thomas Wilhelmsson's would-be contextualist legal thinking proved to be conditional on the grand meta-theory of human rights in a Nordic welfare state. Similarly, the idea of the lawyer's radically *situational ethics* or *authentic ethical commitment* in the field of international law at the end of Martti Koskenniemi's *From Apology to Utopia*, with reference to a combination of contextual justice, methodological and interdisciplinary openness, and no more than small-scale normativity, could not

[32] If the (meta)narrative of international law is read chronologically, with *The Gentle Civilizer of Nations* providing for the "rise and fall" of international law in 1870–1960 and *From Apology to Utopia* providing for the end of the story ever after, the question still remains: why should the (meta)narrative of international law remain immune to the touch of deconstruction in its heyday 1870–1960?

[33] Recourse to situationality is repeated in Koskenniemi, "Epilogue", p. 616.

[34] "Rättskällorna är dessutom relaterade till *begreppet* 'juridisk argumentation'. Det går inte att på en och samma gång förkasta alla eller nästan alla av dem och ändå argumentera *juridiskt*." Peczenik, *Vad är rätt?*, p. 226. (Italics in original; translation by the present author.)

provide effective protection against the dissolving forces of methodological deconstruction. It is only on the condition that *all* the feasible premises of analysis that lean on *any* meta-theory, or meta-narrative, of law are discarded that a truly situationist conception of law can be attained. The price for such an argumentative move is paid in the loss of any *legal* qualities of decisions reached under such premises.