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EDITORIAL

The End of Globalization: Cosmopolitanism, Militancy, and the Promises of Jus Cogens

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The new millennium has now begun and the world commercial exchanges are progressively shrinking. Is the end of globalization also the end of liberal cosmopolitan values? Will the new millennium see an unreserved struggle between nationalist autocracies and cosmopolitan states? Can we reconcile cosmopolitanism with selective citizenship?

Cosmopolitanism and globalization are not — in principle — coextensive terms. This has never been so since the first modern theorizations of liberal cosmopolitanism. Kantian cosmopolitanism, for instance, never *required* but simply *permitted* a globalized world. Kant's notion of "the right to visit" ultimately understood as non-refoulement is the quintessential, non-derogable, protection that cosmopolitanism requires, but one which excludes the possibility that commercial visits are also mandatory rights. Kant's cosmopolitanism can afford itself to survive in a minimalist way even if it incorporates a constructivist — maximalist — dynamic. In times of hardships, as they are today, cosmopolitanism should be seen in terms of militant cosmopolitanism.

In the following sections I will address this intellectual turn and consider how the notion of jus cogens has progressively replaced concept of cosmopolitan law as non-derogable law.

To begin with, what future can we imagine for cosmopolitanism if it is the case that the end of the global world does not mark also the end of cosmopolitanism?

Consider the following points:

- A synthetic reconstruction of Kantian cosmopolitan law and the value it puts in place for individuals and states;
- The idea of how cosmopolitan law can be conceived in times of crisis, that is, in conditions of limitation of its exercise. This will provide an attempt to develop Kantian reflection and adapt it to modern times.

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For Kant, international politics envisages a combination of statism and cosmopolitanism: one does not exclude the other. On the contrary, states, back then forming in the guise of modern states with complex bureaucratic apparatuses, not only relate to each other according to the law of people, but also regulate the relations with foreign visitors, this is, the domain of cosmopolitan law.

For Kant, therefore, the world might not have been globalized — as in fact it was not then — but this would not have prevented the affirmation of cosmopolitan law. Kantian cosmopolitan law provides for the existence of (republican) states, and these provide for the possibility of citizens to come into contact with foreign states — satisfying a range of prerogatives of various kinds, from jus commercium generally understood to the right of visit as non-refoulement.

With a fundamental difference, in fact, if for Kant the exercise of the right of international trade is subject to the permission of the individual receiving states, the right of universal hospitality is not subject to legal positivist limitations. In other words, it is a natural right that cannot be limited by positive state jurisdictions (Corradetti 2020).[1]

In Kant's vision, therefore, if a non-globalized world remains compatible with the exercise of the cosmopolitan right to visit (when in danger), the latter becomes a right not to refoulement but not of global commercial law.

The tension between these two polarities establishes the range of possibilities — more demanding or less demanding — of the various types of cosmopolitanism that can be articulated starting from a Kantian perspective.

One might wonder what exactly the minimalist vision of Kantian cosmopolitanism rests on, that is, what origins and functions does the Kantian right of visit that defines global citizenship have?

If the right of state-citizenship tout court comes from the jus soli or the jus sanguinis and in any case from a system of positive state norms that establish the criteria for acquiring citizenship, as far as cosmopolitan citizenship is concerned, the process of justifying this status must be necessarily of a different type. In fact, not being able to count on a world state, no cosmopolitan law can be ab origine of a positive type.

And in fact Kant speaks of the origin of cosmopolitan law as something connected to the concept of an original possession of the land given in common (Kant [1795] 1999).[2] Furthermore, Kant refers to this right in terms of "compensation" (expression already used by Rousseau in the transition from the state of nature to the civil state in the *Contract*) (Rousseau [1762] 2008).[3] With this expression Kant wants to indicate the counterpart that no one would ever give up when accepting the transition from the state of nature to the civil condition. Kant obviously reasons in counterfactual terms in justifying this passage.

Therefore, we have a right of visit precisely because we have abandoned the natural state and have accepted to become part of particular states. The

[1] C. Corradetti, 159 ff.

[2] "[...] the right of possession in common of the earth's surface" I. Kant [1795], 1999, 8:358, 329.

[3] More precisely, he speaks of "compensating advantages [*ces compensations*]," J. J. Rousseau, [1762] 2008, 59.

compensation giving rise to the Kantian right of visit is justified precisely in the fact that we have renounced the unconditional exercise of the visit typical of a still natural condition, however maintaining this possibility only in a qualified way or as the right to request asylum (temporary hospitality) if one's life is endangered. Therefore, with the creation of states, despite the territorial limitation in the exercise of enforceable and sanctionable rights that they impose, we remain holders of an original right to visit. For Kant it would be unreasonable to assume the renunciation of this original right even in the acceptance of the benefits derived from becoming a citizen of a state.

If this is the overall characterization of the Kantian right of visit, then the question to ask is: how does this right perform a creative function of a global cosmopolitan system of laws?

Answering this point means recognizing what I define as the constructivist character of Kant's cosmopolitan law, that is, the ability of the corresponding right to generate a series of internationally enforceable positive claims.

The global character to which cosmopolitan law gives rise is that of a regulated global world, that is, a space of rules with respect to which the citizen of any state regains what he has lost by entering a state dimension (his original relationship with the planet Earth as a whole like Erdbürger, Kant would say).

At this point we can draw a first conclusion which has already been anticipated: is juridical cosmopolitanism, the one that develops starting from Kant, able to survive the crumbling of the globalized world, or is it able to persist even in post-global conditions?

The answer is "certainly, yes!" Even if the range of action of cosmopolitanism is decidedly limited only to states that allow mutual commercial relations to develop, this does not mean, however, that the claims of cosmopolitanism fail when a global market disappears. The commercial figure is not the figure we want to give to Kantian-style globalization. Rather, it is the original right to have a place on earth over being able to live safely once states have arisen. Whoever places himself outside this constraint places himself outside legitimate juridical-institutional relationships.

As seen, in Kant, the space of cosmopolitanism is configured first of all as a pre-contractual, pre-state juridical space, that is, as a sphere of norms in the subject-world relationship; only then they regulate the relations of a (foreign) citizen to a state. In this sense, cosmopolitan law goes beyond the boundaries of the commercial sphere.

This is where Kant arrives.

I would like now to examine the possibility that Kant offers with respect to its contemporary actualization.

In this respect, the question I ask is: can we step a little further today and develop, on the basis of some Kantian intuitions, reflections relating to the area of non-negotiable law, that is, the possibility of defending a non-positive foundation of law as a source of normativity? (from which to derive a juridical-positive normativity?)

I believe that the reflection on what is left of cosmopolitan law after the disintegration of the global world is very relevant today given the appearance of new barbarities that forcefully threaten the very legal space built so laboriously by the cosmopolitan exercise of law.

I am referring to the recent loss of legal but even more political-visionary grip of many international institutions that have arisen since the Second World War onward, and in particular the European Union, the Council of Europe, the UN, the WTO, etc. These institutions and their laws are now being questioned precisely because they respond to an idea of man and citizen of the world who want to be silenced.

What then is the task of cosmopolitanism in the face of the threat of such a demolition of rights? Can we think of a sort of cosmopolitan militancy as it was thought in the past the idea of militant democracy? Can we extend the scope of cosmopolitanism to a level of citizen protection that goes beyond the scope of refoulement by also including conditions of serious and systematic violations within the borders of one's state by public and private bodies?

In the second part of this reflection I move forward to discuss what is meant today with the Latin expression "jus cogens" — an area of inalienable values around which the very possibility of conceiving an international community of states is built together with minimum conditions of global citizenship.

The internal link between jus cogens and cosmopolitan law lays in conceiving — in truly Kantian terms — the internal (constitutional) and external (international and cosmopolitan) state law as part of a single legal system founded on ultimate and therefore unavoidable values. In this respect, jus cogens provides the legitimate foundation of positive law, that is, of public law as conceived within the state sphere (constitutional law).

What is jus cogens?

Among the norms of customary law, jus cogens stands as customary constitutional law of higher rank. The recognition of a superior legal status of mandatory norms fills the gaps left open by Article 38 (Corradetti 2020) of the Statute of the International Court of Justice (ICJ) of 1946 which did not establish a hierarchy of the sources of law.

In this regard, article 53 of the Vienna Convention of the Law of Treaties of 1969 (in force since 1980) clarifies that any treaty is void if "it conflicts with a peremptory norm of general international law" (Vienna Convention of the Law of Treatises 1969).[4] The modification of the mandatory norms is possible but only with "a subsequent norm of general international law having the same character" (Vienna Convention of the Law of Treatises 1969).[5]

A further aspect linked to the application of jus cogens is the erga omnes character of these norms. The erga omnes norms apply without distinction to all states that are ready to accept them. But while the norms of jus cogens are all erga omnes, the latter (the norms erga omnes) are not necessarily of jus cogens. It remains true, therefore, that the norms of jus cogens prevail over the norms that are not of jus cogens but only erga omnes. The erga omnes character of the rules is evident in the application of the obligations of any state to the entire

[4] See Vienna Convention of the Law of Treatises (1969), https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[5] Ibid.

international community. This implies that every state has an interest in punishing the violation of erga omnes norms.

More problematic are the answers to the question of whether states individually have the right to enforce these rules. Unilateral actions in international law are always prohibited even when violations of jus cogens are not at stake.

Rather, obligations to the international community can only be claimed by a collective measure of self-defense. These are some of the open questions related to the applicability of erga omnes norms within the international community of states.

The rules of jus cogens are mandatory rules of law. The derogation is equivalent to the total or partial repeal of a rule. An example of a derogation in international law is the principle of the lex specialis which derogates from a lex generale. This does not apply in the case of jus cogens. For example, a treaty signed after the recognition of a general rule of jus cogens does not derogate from any part of the rule as provided for by Article 53 of the Vienna Convention.

However, derogation is not the same as the changing of a rule. According to article 53 of the Vienna Convention, in the case of ius cogens, modifications are possible only by substitution with other norms of the same character. The modification of a norm of jus cogens implies the enlargement of the scope of the norm or its refinement, but not its restriction.

The replacement of the current rules of jus cogens was considered admissible by the ILC when it drafted Article 53 of the Vienna Convention. In any case, the modification of the norms of jus cogens is never simply the result of unilateral acts, but it depends always on a conceptual change, that is, on a collective community self-perception.

Since the norms of jus cogens express the communitarian conception of the international public order, the modification signals a change in the overall conception of the social order. The unilateral acts of states that behave as persistent objectors cancel the attempt to modify the norms of jus cogens.

But what are the rights included in the jus cogens paradigm?

Consider the following — non-exhaustive — list of jus cogens norms according to four categories: principles, rights, prohibitions, and obligations:

- Principles: sovereign equality of states, equality before the law and non-discrimination, pacta sunt servanda, non-refoulement, etc.
- Rights: self-determination, self-defense, international humanitarian law, fundamental human rights, etc.
- Prohibitions: aggression, slavery and slave trade, piracy, genocide, crimes against humanity, war crimes, and torture.
- Obligations: to compensate damages at the request of the injured party, to promote respect for human rights and fundamental freedoms, etc.

Jus cogens is a branch of norm formation often linked to the practices of states. Unlike other types of customary law, the imperative norms of jus cogens embody a commitment to fundamental values and principles of law which can generally be defined as moral.

The rules of jus cogens establish a basic justificatory framework for the entire system of international public law. Consequently, these norms define the basic constitutional platform from which a notion of threshold for international justice can be articulated. As shown, the justification of these norms does not depend on a consensus-based theory of international law — according to which validity requires the approval of states.

On the contrary, the legal validity of imperative norms rests on an extended notion of opinio juris, including a multiplicity of moral normative sources and not dependent on a factual endorsement by the states. Rather, the practices of the states provide the conditions for initiating a legislative process in a decentralized system such as the international legal system. In the absence of a centralized institution, that is, a Parliament, the creation of law follows informal models of consolidation and customary practices. In the case of jus cogens norms, these require associating the practices of states at the deepest level of legal legitimacy and assuming that juridical normativity necessarily depends on a presupposition of a moral type. The task of legal interpreters and judges is first of all to investigate how these moral assumptions are articulated on historically contingent bases as well as on case-by-case instances, thus providing them with a positivistic legal reality.

In conclusion, although Kantian-based juridical cosmopolitanism is going through an extremely difficult phase today, the maintenance of a threshold level of civilization between states and citizens passes through the recognition of a militancy — juridical and political — capable of establishing universal equal criteria for the whole international community.

It matters little if today's times inform us of a retreat in the space of rights: the states that since the Second World War have acknowledged the importance of building their own systems on universalistic and liberal assumptions have the task of safeguarding the legal achievements obtained. Cosmopolitanism survives even when it shrinks to its minimal conditions. Nevertheless, when confined, cosmopolitanism asks for a posture of intellectual militancy. Today this means to give unreserved support to the principles of jus cogens. Only by extensively upholding these principles of law we can expect to realize one day the possibility of a cosmopolitan constitution (Weltbürgeliche Verfassung) (Kant [1795] 1999)[6], something already Kant prefigured as a necessary legal-political outcome for guaranteeing stable conditions of justice among states. Protecting ourselves from autocratic threats, violent aggressions, and disruption of freedoms means to fight back to uphold an international rule of law. If the hope for international peace is to be maintained, we must have the courage to mobilitate for the defense of our liberal ideals.

[6] I. Kant, [1795] 1999, 8:358, 329.

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