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What Is Cosmopolitan Law?

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1. The Definition of Cosmopolitan Law

The notion of international law refers to a complex, multilayered and diverse legal system. Despite its complexity, we can maintain that the whole system of international law – namely, 'international law in its broader sense' or, more elegantly, 'international law *sensu lato*' – is composed of two legal sub-systems: 'international law in its narrower sense' or 'international law *stricto sensu*', and cosmopolitan law. The first component, a system of 'inter-national' norms, consists of legal documents that, as state treaties, govern relations between legally organized nations based on the consent of all signatory parties.

The situation is different with reference to 'cosmopolitan law', which imposes obligations on sovereign states even in the absence of their consent. This relatively new *corpus juris* comprises two categories of legal instruments: 'supra-state law' as the system of norms located *above the states* to protect peace and essential human rights in a worldwide setting, and 'global law' as the legal framework situated *beyond nation-states* so as to govern worldwide-impacting phenomena. Cosmopolitan law as 'supra-state law' consists of legal norms, written or customary, regarded as being valid *erga omnes*. This is because some customary norms, known as '*jus cogens*', are assumed to embody indefeasible principles of human dignity,[1] or because the treaties that make up the written part of supra-state law, as well as relevant decisions by international organizations, are also binding on non-signing parties. Therefore, since states are supposed to be bound by treaties they never signed and cannot withdraw from, and by unwritten universal norms that are believed to be independent of any individual's approval or disapproval, the legitimacy of supra-state law cannot rely on the decisions explicitly made by individual states.

On the other hand, cosmopolitan law as 'global law' arises from the need, in an ever more interconnected world, to address questions of post-national range with global measures. This necessitates a strong institutional and normative framework made up of numerous specialized authorities and their legal frameworks, which, while not having the same normative priority as supra-state institutions and laws, are nevertheless considered to be situated *beyond* nation-states because they establish a domain of governance that frequently eschews some of the standard controls carried out by domestic constitutional organs.[2] Global law does not specifically question state sovereignty or claim to be legitimate *erga omnes*. However, it also raises an indirect claim to authority regarding the individual states inasmuch as the treaties that constitute global law tend to assign substantial powers to treaty-based bodies that possess quasi-legislative or quasi-judicial competence, even though they only bind the states that ratify them.[3]

2. Paradigms of Order

Cosmopolitan law is only made possible on the basis of a specific 'paradigm of social order'. Let us briefly consider the basic elements of the relevant theory.[4] To begin with, a 'paradigm of social order' is a set of concepts that shape the understanding of what a 'well-ordered society' is and should be within a specific period of human history. This definition requires two clarifications. The first is that a 'well-ordered society' is a human community characterized by broadly accepted norms that guarantee conditions for peaceful, mutually advantageous and, in the most favourable situations, even co-operative interactions. However, in the different periods of human history, these conditions for the realization of a 'well-ordered society' were also understood in distinct ways – and each one of these distinct ways is what makes up a 'paradigm of social order'.

Secondly, each 'paradigm of social order' has its specific understanding of what a 'well-ordered society' is and should be. These differences are determined by how three main questions regarding the rules that govern society are addressed: (i) the extension and limits of the rules that ground social order; (ii) the ontological foundation of order; and (iii) the structure of order. With regards to (i), we have essentially two answers: either the conception of order is particularistic in the sense that it is only possible within limited and rather homogeneous communities (and between these social, political and legal communities, only containment of disorder would be feasible), or order is assumed to be universalistic, which means that the whole community of humankind can possibly be conceived of as a 'well-ordered society'. Concerning question (ii), there are two established answers as well: in the first case, according to a holistic view, order is the ontological result of a homogeneous community, whose interests are superior to the priorities explicitly expressed by its members, while in the second case, following an individualistic interpretation of society, the individuals forming the society are those who create its norms. Two opposite answers are also given to question (iii) regarding the structure of order: the first answer maintains that order, to be effective, must be organized in a unitary and hierarchical way, quite like a pyramid, while the second contends that order can also be understood as pluralistic, that is, made of many different institutions and legal systems which overlap with one another to build a heterarchical web of interconnections. Each 'paradigm of order' combines its answers to all three questions in its own fashion, which makes each paradigm unique.

[1] Stefan Kadelbach, "Genesis, Function and Identification of *Jus Cogens* Norms", in *Netherlands Yearbook of International Law*, 2015, vol. 46, pp. 147–172.

[2] Armin von Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions*, Springer, Heidelberg, 2010; Matthias Goldmann, *Internationale öffentliche Gewalt*, Springer, Heidelberg, 2015.

[3] Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", in *European Journal of International Law*, 2004, vol. 15, no. 5, pp. 907–931, p. 914.

[4] Sergio Dellavalle, *Paradigms of Social Order: From Holism to Pluralism and Beyond*, Palgrave Macmillan, London-New York, 2021.

3. The Paradigm of Cosmopolitan Law

The possibility to establish a legal system of cosmopolitan law depends on the circumstance that an idea – or a paradigm – of order is adopted, or is predominant in a specific period of human history within a certain society, which opts for the universalistic alternative concerning the question of the extension of order. Only a universalistic paradigm of order can support the idea and the praxis of cosmopolitan law. However, universalism was not the first understanding of the possible extension of a 'well-ordered society'. Rather, it developed from the overcoming of a previous paradigm, namely, particularism. According to how it was first described by the ancient Greek historian Thucydides, the particularistic view of the world can be summarized in three points: firstly, when no balance of power is given, power prevails over law; secondly, the law of the strongest corresponds to natural, or even divine, order; thirdly, no trust in the intervention of a third independent party, a *tertium super partes*, is justified since every party which is ready to intervene will do so on the basis of egoistic interests.[5]

Since the universalistic idea of cosmopolitan law is contrary to the particularistic understanding of order, its claims are unsurprisingly the precise opposite of the aforementioned tenets. Firstly, right must prevail over might; secondly, there are commands of reason which demand that existential competition and war give way to peace and co-operation; and, thirdly, it is possible to establish non-partisan international norms and organizations. However, to even conceive these thoughts, our ancestors had to first develop the very notion of the existence of a common humanity, which occurred rather recently in human history, that is, not before the end of the fourth century BCE. Until that moment, the only implication of the ancient Greek way of seeing 'global order' was that all human beings share certain biological characteristics as well as a general tendency to sociability, but no common political institutions. In other words, humans tend to form political and legal communities everywhere, but these were inevitably particularistic, in the sense that they only comprised a limited number of individuals, united by shared values and a common history. Beyond these communities and in their mutual relations, only containment of disorder was possible. The turning point came in the second half of the fourth century BCE, when the Stoic philosophers introduced for the first time *cosmópolis* as the concept that indicates a worldwide human community, whose inhabitants were then the *cósmou polítai*, the citizens of the well-ordered world.

The Stoic idea was revolutionary in many ways, but had little to do with a political or legal system. In fact, it remained at the level of a philosophical utopia or, at best, of a potentially global community of sages in times when the old republics gave way to the creation of much broader and more inclusive empires.[6] Yet, many of the Stoic concepts were transferred to the emerging Christian philosophy; notably, one of these was the cosmopolitan view of order. Nevertheless, later attempts to take up the project of the *cosmópolis* or to put it into practice were no more fortunate than Stoic philosophy for two different and partially opposite reasons. A first strand of authors who took up Stoic universalism – largely to be identified with the Christian philosophers of the Middle Ages[7] as well as their Catholic followers of the early Modern Ages[8] – maintained that cosmopolitanism must have a legal form, but finally grounded it in the impossible universalization of a specific religion characterized by a global mission. In the Western world, this attempt coincided with the establishment of the *respublica christiana*, in which the largely hypocritical universalistic aspiration went together with the exclusion, discrimination and even persecution of the populations which rejected the Gospel or were simply unaware of its existence. On the other hand, thinkers influenced by the Reformation made the remarkable effort of justifying the existence of worldwide rules and principles on purely rational arguments. In doing so, however, they paid a heavy price inasmuch as they abandoned the most ambitious legal dimension of these principles and rules, that is, the idea that they ought to be codified in binding legal instruments and interpreted by recognized judicial authorities. Because of this, the modern *jus gentium* was effectively seen as an expression of an unwritten natural law, making it more of a philosophical idea than a *corpus juris* in the truest sense of the word.[9]

Immanuel Kant's contribution marked a quality leap in comparison to his predecessors.[10] Indeed, his concept of 'cosmopolitan law' went beyond the notion of world order being the result of an unwritten natural law, which was central to the rationalist 'comforters' of the early Modern Ages.[11] Kant thus transformed the concept of cosmopolitan order from just a philosophical and moral aspiration to an explicitly legal concept. Thereby, philosophical cosmopolitanism evolved into cosmopolitan law. Additionally, Kant aimed to move away from the religious biases present in the Christian-Catholic version of cosmopolitanism by basing his proposal on considerations unrelated to the *respublica christiana*. Nonetheless, the contents of Kant's envisioned cosmopolitan legal order were surprisingly thin, considering the innovative potential of his idea. Essentially, they were limited to the concept of pure 'hospitality', which means the entitlement to not be treated as an enemy while being in a foreign country, whether by choice or necessity.[12] Approximately one and a half century after Kant, Hans Kelsen took up the concept of a global legal system that would apply to all international actors, from individuals to nations, and addressed the challenge of how to structure this system with an uncompromising approach. While Kant still grappled with the conflict between the sovereignty of individual nations and the necessity of a cosmopolitan legal order, leaving him in an intellectual deadlock, Kelsen suggested the creation of a radically monist legal framework, where international law – in the sense of a supra-state law – was put, for the first time in the history of legal theory, at the apex of the hierarchy of norms. Under this system, state law, including constitutional law, would only regulate interactions within the boundaries set by international law.[13]

Kelsen's perspective clearly demonstrates the intricate relationship between cosmopolitan law, international law, and constitutional law. In his legal framework, these three dimensions largely intersect. Cosmopolitan law and international law essentially coincide, both holding constitutional status, which denotes their hierarchical superiority within the legal system. However, this approach raises at least two significant issues. The first problem arises from the fact that reducing the constitutional aspect of cosmopolitan law to its hierarchical

5 Thucydides, *The Peloponnesian War*, in Richard Schlatter (ed.), *Hobbes's Thucydides*, Rutgers University Press, New Brunswick, 1975, Book V, Chapter 84 *et seq*., pp. 377 ff.

6 Johannes von Arnim, *Stoicorum Veterum Fragmenta*, Volumes I and III, Teubneri, Lipsiae, 1903–1905.

7 Thomas Aquinas, *Summa Theologica*, 1265–1273, see William Benton (ed.), *Encyclopedia Britannica*, 15th ed., Chicago, 1980.

8 Francisco Suárez, "De legibus, ac Deo legislatore", 1612, in *id*., *Selections From Three Works*, Clarendon Press, Oxford, 1944, pp. 1–646.

9 Hugo Grotius, *De Jure Belli ac Pacis*, 1625, in English: Richard Tuck (ed.), *The Rights of War and Peace*, Liberty Fund, Indianapolis, 2005; Samuel Pufendorf, *De jure naturae et gentium libri octo*, 1672, complete English translation by Basil Kennet, printed by Lichfield *et al*., Oxford, 1703, partial English translation by Michael J. Seidler, in Craig L. Carr (ed.), *The Political Writings of Samuel Pufendorf*, Oxford University Press, 1994.

10 Immanuel Kant, *Die Metaphysik der Sitten*, 1797, in *id*., *Werkausgabe*, Volume VIII, edited by Wilhelm Weischedel, Suhrkamp Verlag, Frankfurt, 1977, pp. 309–634, Parts II and III, para. 62, pp. 475 ff. (English translation by Mary J. Gregor, *The Metaphysics of Morals*, Cambridge University Press, 1991, pp. 185 ff.).

11 Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, 1795, in *id*., *Werkausgabe*, Volume XI, pp. 193–251, p. 210, *supra* note 10. (English translation by Hugh B. Nisbet, *Perpetual Peace: A Philosophical Sketch*, Hans S. Reiss (ed.), *Kant: Political Writings*, Cambridge University Press, 1991, pp. 93–130, p. 103).

12 *Ibid*., pp. 213 ff. (English: pp. 105 ff.); Immanuel Kant, *Die Metaphysik der Sitten*, pp. 475 ff., see *supra* note 10 (English: pp. 185 ff.).

13 Hans Kelsen, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, Deuticke, Leipzig-Wien, 1934.

precedence over other laws eliminates room for legal pluralism. However, legal pluralism is crucial in transnational law, as it ensures the best implementation of the distinct rationalities characterizing different forms of international interaction. Secondly, an all-encompassing monistic legal system would jeopardize the constitutional identity of individual states, where the most consistent and reliable source of political and cultural legitimacy of public power is inevitably rooted.

4. Cosmopolitan Law, Pluralism, and the Communicative Paradigm of Order

Kelsen's monistic system with international law – understood as cosmopolitan law – at its apex is not only actually unfeasible, but also normatively undesirable. Therefore, in the last decades, the theory of international law has progressively distanced itself from Kelsen's idea of the hierarchy of norms. This process led to the re-discovery of the importance of legal pluralism.[14] Three theoretical approaches have contributed to this epoch-making turnaround. However, two of them – namely systems theory, on the one hand,[15] and radical legal pluralism, as it has emerged from postmodern thinking, on the other[16] – are incompatible with cosmopolitan law, as the cosmopolitan idea of the political and legal order requires a universalistic understanding of rationality, something that is explicitly denied by both theories. If we want to uphold the idea of cosmopolitan law while advocating, at the same time, the importance of pluralism, we have to move on to the third post-unitary understanding of social order, namely, the communicative paradigm.[17]

The communicative paradigm's fundamental assumption is that society consists of a lifeworld of inter-subjective relations, involving various forms of interaction. This means that social life encompasses multiple dimensions, each corresponding to our diverse social needs, and each interaction serves the purpose of developing one of these dimensions. Within the broader societal context, numerous interactions (or forms of communication) occur, each with different goals related to specific social needs and distinct contents of the discourses that shape and characterize these communications.[18] A significant category of social interactions is expressed through discourses that can be defined as *political*.

Two distinct forms of political interaction address the question of 'how should we respond to questions of common concern'. The first form involves discussions about organizing public life within a specific territory, pertaining to the community of individuals residing there, as well as those with a special connection to the territory and its inhabitants, even if they do not live there. This form constitutes a national political community, defined as a 'nation of citizens' without any ethnic implication.[19] Topics addressed in national political discourse should not delve into beliefs or the existential quest for individual meaning of life. To encompass all citizens of the national political community, the discussions should focus on practical matters such as resource distribution, the organization of the social subsystems, and the form of government. As a result, the identity forged by the social interaction concerning the question of 'how to respond to questions of common concern within the borders of a limited political community' essentially revolves around internalizing the rules of political communication.

The second form of political interaction pertains to the idea that individuals also come together and engage with each other beyond the boundaries of specific countries, regardless of their affiliation with a particular political community. This form of interaction is also governed by law, specifically by the *corpus juris* of cosmopolitan law, which comprises the principles and regulations ensuring peaceful and collaborative interaction among individuals in the broadest scope of communication, transcending the status of being citizens of a specific state. At the core of these rules and principles lies the recognition that we owe to every human being as a result of the universal capacity to communicate. The discourse surrounding cosmopolitan interaction – shaped by cosmopolitan law – addresses the question of 'how to address matters of common concern to the whole humankind'.

With regards to the legal system, the communicative paradigm of order paves the way for a concept where the manifold dimensions within the global legal system are fully acknowledged, but in a manner that differs from the analysis and perspective developed by the advocates of radical legal pluralism. In fact, contrary to the latter approach, the communicative paradigm integrates plurality into a comprehensive structure, united by the implementation of communicative rationality in all aspects of society and, consequently, in all legal sub-systems as well. As a post-unitary, non-hierarchical and non-pyramidal whole, the legal system of the communicative paradigm assumes the shape of a constitutionalism beyond the borders of the nation-state. When interpreting global constitutionalism in the light of cosmopolitan law, it is assumed that this form of worldwide order must possess distinct characteristics that set it apart from the constitutional traditions of nation-states. In particular, rather than asserting unquestionable hierarchical superiority, the global constitutionalism of cosmopolitan law acknowledges the validity of legal pluralism and serves as the framework that keeps the distinct legal sub-systems connected. While the global constitutionalism of cosmopolitan law advocates for the existence of a 'centre of authority' within the constitutional world order,[20] this authority does not impose binding decisions through top-down processes. On the contrary, though maintaining that cosmopolitan law has normative superiority, the global constitutionalism of cosmopolitan law is rather understood to implement its normative superiority by means of horizontal interactions, open contestation and dialogue.

5. How to Address Some Issues of Cosmopolitan Law From the Viewpoint of the Communicative Paradigm of Order

The communicative understanding of social order is characterized by the identification of distinct forms of social interaction, each developing a specific discourse and a distinctive belonging to a community. In other words, according to this approach, we become members of a communication community when we engage with the questions on which the exchange of arguments and, in general, the interactions within that community are focused. However, we can participate in several different discourses and interactions, so that we are inevitably involved in the life of more than just one community. This view of the social world can help us to address three issues strictly related to the idea of cosmopolitan law or affected by its introduction, namely, (a) the concept of sovereignty, (b) the conflict between national identity and the right to refuge, and, finally, (c) the relation between national and international criminal law.

(a) The communicative paradigm suggests that each of us engages in various interactions while maintaining our unique integrity. This presents a new perspective on the relationship between the national community and its cosmopolitan counterpart. Following the particularistic paradigm, individuals are considered to belong solely to a specific political community. On the other hand, the opposite paradigm of universalism views individuals as part of the global community

[14] Sergio Dellavalle, "Addressing Diversity in Post-unitary Theories of Order", in *Oxford Journal of Legal Studies*, 2020, vol. 40, no. 2, pp. 347–376.

[15] Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", in *Michigan Journal of International Law*, 2004, vol. 25, no. 4, pp. 999–1046.

[16] Nico Krisch, *Beyond Constitutionalism*, Oxford University Press, 2010; Paul Schiff Berman, *Global Legal Pluralism*, Cambridge University Press, 2012.

[17] Dellavalle, 2021, pp. 405 ff., see *supra* note 4.

[18] Jürgen Habermas, *Erläuterungen zur Diskursethik*, Suhrkamp Verlag, Frankfurt, 1991 (English translation by Ciaran P. Cronin, *Justification and Application*, MIT Press, Cambridge, 2001 (first print in 1994)).

[19] Jürgen Habermas, *Die postnationale Konstellation*, Suhrkamp Verlag, Frankfurt, 1998 (English translation by Max Pensky, *The Postnational Constellation*, MIT Press, Cambridge, 2001).

[20] Jan Klabbers, "Setting the Scene", in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, 2009, pp. 1–44, p. 18.

of humankind. Previously, these options were seen as mutually exclusive. In contrast, from the communicative paradigm's viewpoint, individuals can be at the same time citizens of a specific national society *and* members of the global community. As citizens of a national community, individuals participate in decision-making processes that promote domestic interests. However, as members of the global communication community, domestic decisions must also consider obligations to fellow humans on a global scale. Therefore, individuals realize their role as citizens through participation in national decision-making processes, while also fulfilling responsibilities towards the global community. A modern and normatively enhanced notion of sovereignty implies that political power is sovereign when legitimized by the citizens and acts as a "trustee of humanity" while considering the interests of the polity.[21]

(b) If we examine the right to political identity and the right to seek asylum, both rights appear to be self-evident. Nevertheless, they are often perceived as mutually exclusive. This apparent contradiction can be linked to the association of each right with one of the two main paradigms of international law: the prioritization of the right to political identity stems from a *particularistic* view of social order, while the precedence given to the right to refuge assumes a *universalistic* belief according to which order can encompass the whole *cosmópolis*. The traditional dichotomy of particularism and universalism implies that the preference for one option inherently excludes the other. Relying on the communicative paradigm, however, we can develop a framework that transcends the dichotomy while outlining a potential solution. Indeed, the dual belonging and loyalty of every human being, as a citizen of a specific state and as a *cósmou polítes*, allows us to acknowledge the right of aliens to refuge, while also recognizing that citizens justifiably possess a 'thicker' set of rights compared to foreigners. Consequently, the right to refuge is no longer to be seen as irreconcilable with the centrality of the political identity of the individual community.

(c) International criminal law is an important part of cosmopolitan law. For international criminal law to be justified, it must be based on a universalistic understanding of order. If we assume that some form of peaceful order can be established on a cosmopolitan level, there is an immediate need for norms to protect the worldwide 'well-ordered society' and to punish those who violate its foundational rules. It was once again Hans Kelsen who brought about a significant change in legal thinking by proposing a hierarchically predominant international order which explicitly included procedures for prosecuting those who violate essential rules of human interaction. According to Kelsen's understanding, since certain crimes are against the interests of all humankind and the international legal system supersedes national institutions, the responsibility of conducting trials against potential wrongdoers to restore cosmopolitan order had to be entrusted to international criminal tribunals. These criminal courts were assumed to act beyond the jurisdiction of national legal systems and even against their opposition if necessary. However innovative and courageous Kelsen's approach might have been, its excessive centralism and fixation on a rigid hierarchy of norms had a negative impact also on his idea of a new system of international criminal law. Indeed, international tribunals, including those handling criminal cases, were seen as central bodies of cosmopolitan jurisdiction, which resulted in little consideration for the specific contextual circumstances in which crimes against humanity had been committed. Additionally, the assumption of the superiority of international tribunals over national counterparts led to a lack of engagement with local legal institutions. Consequently, international criminal law risked being perceived as an unfair imposition from the outside. More recently, a pluralistic understanding of the concept of a 'well-ordered society' – largely based on the communicative paradigm of order – has led to a new perspective on how violations of essential norms of human interaction should be addressed outside the boundaries of individual nations. The notion that perpetrators of crimes against all of humanity should exclusively be brought to trial by international tribunals representing the entire human race has thus been largely set aside. Instead, there has been a growing acceptance of the idea that even crimes against humanity should initially be addressed by local courts. These courts, acting in the name of universal human values, have the benefit of involving the affected populace, thereby promoting social healing. In terms of the involvement of international organizations, they can provide support to the local legal system, thus showing public awareness that what happened in a specific country affected the whole humankind inasmuch as its most fundamental rules of interaction were violated. However, international organizations should only replace local courts if the latter are unable or unwilling to prosecute the crimes.[22]

Some concluding remarks can be drawn from what has been argued so far. Firstly, cosmopolitan law is an essential and unavoidable part of international law, since any kind of international order must rely on the assumption that worldwide rules and principles are not only desirable but also possible. Secondly, the idea of the *cosmópolis* requires a universalistic understanding of the 'well-ordered society' to be adopted. Thirdly, in order for cosmopolitan law to take the pluralistic dimension of transnational legal order into due account, the universalistic paradigm of social order must overcome its original monist conception and embrace a communicative view of society. Fourthly, because of its capacity to conceive of social interaction as a multilayered and diverse phenomenon, the communicative paradigm of order paves the way for the possibility of moving beyond the traditional dichotomy between national identities and cosmopolitan obligations by creating a conceptual framework that allows for multiple social belongings.

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[21] Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders", in *American Journal of International Law*, 2013, vol. 107, no. 2, pp. 295–333.

[22] Giada Girelli, *Understanding Transitional Justice*, Palgrave Macmillan, London-New York, 2017.

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