To appear in Ratio Juris

Kant’s Legacy and the Idea of a Transitional Jus Cosmopoliticum

Claudio Corradetti

[...] just as individuals unite in a civil state, so these warring states must unite in a state of nations, in which their conflicts will be decided in accordance with positive laws. —This, anyway, is the decision of pure reason, and the federation of nations [Völkerbund] proposed by Kant for the preservation of peace is no more than an intermediary condition [...]. (Emphasis added)


Abstract. In this article I propose an interpretation of Kant’s cosmopolitanism as characterized by transitional features. I also argue that the transitional aspect of Kant’s cosmopolitanism proves particularly challenging in view of an asymmetrical relation between the universality of cosmopolitan law and its institutional counterpart. In this respect, Kant’s view accommodates the idea of cosmopolitanism as a condition to be achieved in “constitutinal stages”, that is, according to transnational progressions not resorting to a World State. By recognizing in Kant a wider number of configurations than scholarship has normally admitted, my argument is that these are placed along institutional progressions in which the Völkerstaat represents a regulative idea that implies a plurality of acceptable institutional instantiations.

§1 Kant’s Cosmopolitan Rationale: a Transitional Reading

1 Earlier versions were presented at the Prague Conference on Philosophy and Social Science 22-25 May 2014 and at the Nordic Network in Political Theory, Oslo 2 November 2013 and at the Conference “Transitional Cosmopolitanism”, Oslo 3-4 March 2014. For comments and suggestions I would like to thank A.Wood, S.Biausu, M.Kumm, A.Ferrara, S.Langvam R.Maliks, A.Føllesdal, G.Cesarale, S.Biausu, H.Pedersen. Eventually, all remaining errors are mine. This article is prepared under the auspices of MultiRights, European Research Council Advanced Grant #269841 at the University of Oslo, Norway.
At the end of the 18th Century, when Kant elaborated his major political writings, not many would have thought of history as a cosmopolitan project. Kant, however, dedicated nine propositions to elucidate his views in the *Idea for a Universal History with a Cosmopolitan Aim* (1784).\(^2\) Skepticism in this respect is referred to with the “ridiculising” attitude of that time towards the Abbé de St. Pierre’s and Rousseau’s cosmopolitan projects “because they believed its execution was too near”,\(^3\) so that “universal world history” — says Kant — should be rather understood in terms of “a regular course of improvement of state constitutions”\(^4\).

Kantian cosmopolitanism has received a wide number of interpretations. Among those which are most relevant to the one I offer here, both Kleingeld (2012) and Brown (2008) are worth mentioning. However, my interpretation differs from these in important ways. Whereas Kleingeld attributes to Kant’s change of mind the institutional shift from a weak non-coercive league to a coercive federation of a plurality of states, and Brown emphasizes the practical implementation of cosmopolitan law as a form of legal transition, I will rather attempt to reconstruct the more articulated institutional framework Kant had in mind and explain its progression on the basis of an inherent transitional character that cosmopolitan right brings about.\(^5\) In the following sections, I will therefore defend the idea that Kant’s argument relies on a distinct view of cosmopolitan law which paves the way to a distinct normative space in which certain institutional configurations play a determinate function. According to this suggested interpretation the relation in Kant between cosmopolitan law and its institutional instantiations is explained by the function that the former plays as with a “freedom generating” advancement of a cosmopolitan standard. Indeed, cosmopolitan law as a component of public law follows from Kant’s Universal Principle of Right according to which “Every action which by itself or by its maxim enables the freedom of each individual’s will to co-exist with the freedom of everyone else in accordance with a universal law is *right*”.\(^6\) But then, on the basis of this assumption, the political duty which results combines moral constraints to prudential reasons: “I can imagine a *moral politician*, that is, one who interprets the principles of political prudence in such a

\(^2\)Kant, 2009 [1784], 9-23.
\(^3\)Kant, 2009 [1784], 17.
\(^4\)Kant, 2009 [1784],21.
\(^6\)Kant, 2012 [1797], [6:230], 133.
way that they can coexist with morality, but not a political moralist, who fashions himself a morality in such a way that it works to the benefit of the statesman. It follows that the political realization of perpetual peace even if subjected to a moral standard is sensitive to political considerations and therefore cannot occur all at once. In the Doctrine of Right Kant says that a condition of full legality for the international level cannot be brought about through revolution since this would contradict — by entirely nullifying — the previous juridical status. Instead, he refers to a progression “through gradual reform, according to fixed principles.” It is to such gradual process of political, legal and ultimately institutional reform that I refer too with the use of the term “transitional”.

Indeed, there are at least two different senses in which it is possible to speak of transitional law and of its impact on institutions, and only the second applies to Kant. A first contemporary sense is that related to the transformative role of law concerning regime transitions as, for instance, in the highly debated cases of authoritarian regimes turning into democracies. A second sense is that concerning democratic transitions towards transnational forms of regional and international integration. This latter is the transitionality aspect I see in Kant where the multistate confederation (Völkerstaat) represents a normative “reference point” for the regulation of the institutional progression towards a cosmopolitan condition. I suggest that Kant’s view of transitionality is particularly interesting in virtue of the non-ideal aspect of cosmopolitan law that defines the inherent paradox of his cosmopolitanism. As I will argue, this is the condition depicting the enforcement of cosmopolitan law in the absence of a world government. The transitionality aspect of legal cosmopolitanism arises precisely from this asymmetry and the construction of a wider normative notion — the transitional — as neither reducible to an ideal nor to a non-ideal conception of normativity.

This leads to two further points: the problem of feasibility and the question on the irrelevance, for Kant, of the assumption of an ideal justice approximation at the transnational level. As for the feasibility constraint, the suggestion is that of a distinction between the long-term feasibility standard according to an overall view based on the

---

7 Kant, 2006 [1795], [8:372], 96.
8 Kant, 2006 [1797], [6:355], 147.
9 A seminal work on this notion of law transitionality has been the work of Teitel, 2000.
10 Kant, 2006 [1795], [8:357], 81. I adopt the meaning of “reference point” as proposed by Azmanova, 2012, 168 ff.
orienting principles and the short-term feasibility of the foreseen advancements. The first are considerations of feasibility for a political theory, whereas the second are feasibility issues connected to political decisions. Indeed, the idea according to which it should be considered a scenario where all principles can be maximally realized confuses the question of justification of principles or simply as it is here argued — of orientation — with the question of the comparative adjudication of the given principles along given circumstances. The purported distinction between ideal and non-ideal normative principles finds its equivalents in the distinction between ideal and non-ideal institutional configurations. It seems that also in this case a clear-cut separation of non-ideal institutional principles as means to an end and global ideal institutional principles for full compliance is untenable since the proposed end, as it appears from Kant’s rejection of a world state is not a desirable condition. Again, it is rather the case that comparing alternative normative and institutional configurations according to an “as if” orienting standard is what a transitional cosmopolitan theory should aim to do.

Upon closer examination, indeed, the multistate confederation (Völkerstaat) presents distinct features both from the league of states or federation (Völkerbund) and from the “positive” instantiation of a world republic (Weltrepublik). This results from the terminological distinction Kant presents in the famous passage of the Perpetual Peace where he rejects what is ideally desirable (the Weltrepublik) in favour of what is practically feasible — the Völkerbund. I propose to translate Völkerstaat as a “multistate confederation” since this seems to better capture and emphasize the state component as well as the multiplicity of the states in the confederation. Also it coheres with the remark by Höffe for whom when Kant speaks of the “right of nations” (Völkerrecht, jus gentium) he is not interested in the rights of peoples as “gentes”, that is, as homogenous and blood-related ethnic groups, but rather as “civitates”. Accordingly, when referring to the multiple

---

12 While generally overlooked by scholars, in the German text the terminological distinctions are clear: “[...]sich zu öffentlichen Zwangsgesetzen bequemen, und so einen (freylich immer wachsenden) Völkerstaat (civitas gentium), der zuletzt alle Völker der Erde befassen würde, bilden. Da sie dieses aber nach ihrer Idee vom Völkerrecht durchaus nicht wollen, mithin, was in thesi richtig ist, in hypothesis verwerfen, so kann an die Stelle der positiven Idee einer Weltrepublik (wenn nicht alles verlohren werden soll) nur das n e g a t i v e Surrogat eines den Krieg abwehrenden, bestehenden, und sich immer ausbreitenden Bundes, den Strom der rechtscheuenden [...]” Kant, Zum ewigen Frieden, Königsburg [1795], on-line text (emphasis added). Confront this perspective with that of Kleingeld, 2006, 7, defending a coercive league of a plurality of federated states.
13 Höffe, 2006, 190.
institutional instantiations of international law, the word “Völker” indicates a state component. Other translations obscure this aspect, as for instance Kleingeld’s “state of peoples”;¹⁴ even if she provided several textual evidences for translating “peoples” with “states” in a ground-breaking article on Kant’s cosmopolitanism.¹⁵ For different but equally relevant reasons, Reiss’ translation of the “international state” does not capture an essential feature of the Völkerstaat, namely, the plurality of the states included in the confederation.¹⁶ The pluralistic aspect of states/peoples involved in the multistate confederation would be lost in this latter case as with the emphasis of the members’ components of the state in the expression “Völkerstaat” vs “Weltrepublik”. Conceptually, the notion of the Völkerstaat relies on three basic components grounded in the history of ideas as, respectively, Rousseau’s republicanism, Hobbes’ idea of a unity of the State and, finally, Wolff’s normative hypothesis of a pact among nations.¹⁷ This essay is constituted of two parts. In the first section, I reconstruct and defend the idea in Kant of a multiplicity of transnational configurations disclosing a wider variety of institutional options than scholarship has traditionally considered. Then, in the second section, I argue in favor of a transitional reading of cosmopolitan law both in the sense of progressively transitional and in the sense of affecting institutional transformation. The aim of the paper is not to specify which cosmopolitan categories of rights can be derived from the grounding notion of Verkehr (commerce) as a right-generative notion.¹⁸ The analysis of the institutional framework is anticipated to the legal analysis in order to define, preliminarily, the normative constraints, functions and goals of transnational institutions.

§2 Institutional Progressions: the Regulative Role of the Multistate Confederation

One preliminary element favoring a transitional reading is provided by the use of the preposition “zu” (toward) in what is Kant’s most important writing on cosmopolitanism: Toward Perpetual Peace. If interpreted as indicating “movement” and not as “to the advantage of” or as a “dedication to” peace, then, the “zu” refers to a condition of

---

¹⁴ Kleingeld, 2006 [1795], [8:354], 78.
¹⁵ Kleingeld, 2004, 305.
¹⁶ Reiss, 2012, [1795], [8:354], 102.
¹⁷ On this point see Ritter, Gründer, Gottfried (eds.), Band 11, 2011, 1091.
¹⁸ Kant, 2006 [1797], [6:352], 146.
approximation of peace. Starting from the title, then, Kant puts the emphasis on the transitionality aspect of achieving peace and on the ever fulfilled duty for its achievement. The emphasis on the transformation over the end-result of the process indicates that Kant considered the transnational as subjected to institutional dynamism not resorting to institutional fixation. As I argue, the reason for such unsettlement relies on the parasitical role that transnational institutions assume for the cosmopolitan transformation of the state. To illustrate this point confront the following two models:

A. End-result interpretations

Kant presents the alternative of either the League of States (Phaedus Pacificum) or the World Republic (Weltrepublik).  

B. Transitional interpretations

Kant defends a progressive advancement of cosmopolitan transitionality starting from the Congress of States (Kongreß), proceeding to the → League of States (Völkerbund). The further advancement from this condition is regulated by the normative role played by the Multistate Confederation (Völkerstaat). It is a regulative role and it cannot conceptually lead to the actualization of → a World Republic (Weltrepublik)

The difference between end-result vis-à-vis transitional interpretations is that in the first case it is assumed that there is only one optimal institutional outcome, whereas in the second case it is possible to define a plurality of constitutional stages. It remains an open question whether Kant admitted the possibility of a simultaneous coexistence of different constitutional regimes and how they would coordinate. That Kant considered a variety of institutional configurations is also clear from what he defines in the Rechtslehre as “a union of states [...] analogous to the union through which a people becomes a state” and which

---

19 On the linguistic distinction of these two meanings, see Kleingeld’s note in the translation of Kant’s Perpetual Peace, 2006, n.1, 67.
21 Kant, 2006 [1797], [6:350-351], 145.
22 Kant, 2006, [1795], [8:357], 81.
only can grant a true and long-lasting condition of peace as a “permanent congress of states” (the states-general at The Hague). This seems to be yet another typology of states’ association, a weaker one, characterized by a voluntary congress of states (Kongreß) built with the purpose of maintaining peace and with the possibility for each state to leave the union at any time. All in all, it seems possible to trace in Kant a hypothetical progression of institutional configurations at the transnational level. This starts from the least advanced configuration of the congress of states (Kongreß), characterized by the lack of a common constitution and by states’ voluntary-only inclusion and opt-out. It then moves towards a more advanced form of interconnection as with the Völkerbund, characterized by the presence of a common republican constitution, with voluntary membership but with no possibility to opt-out, defined by some legal enforcement but with no interference into the internal affairs of the states. This latter, then, according to my suggested interpretation of the passage in the Perpetual Peace (see supra), is understood on the model of the Völkerstaat in as far as a centralized authority must be conceived for adjudication and legal enforcement, even if it be one which does not interfere into the internal affairs of the state-parties. One difficulty in what might initially appear as a coherent progression of constitutionalization of international law is that no specific answer is provided on how the institutional advancement from the League of States has to be brought about. Kant seems rather interested to define the normative space within which this occurs. The notion of “constitutionalization of International law” is a complex and problematic one both in legal and philosophical terms. Within the framework of the Kantian discussion I consider that it assumes two main features: a) the realization of a lawful condition among states and b) the subordination of states’ will to centralized authorities — either compulsory or non compulsory. Particularly in the first case, Kant faces the problem of reconciling the loss of an internal legal condition which is regained at the transnational level. Since the notion of constitution as a “rightful condition” cannot be disjoined in Kant from law and from its enforcement, it results is that advancement of the constitutionalization process requires institutional enforcement. Within the process of explaining the institutional progression towards the multistate confederation it is lacking an explanation of why states should move

23 Kant, 2006 [1797], [6:350], 145.
24 For a reconstruction of its legal meaning within a contemporary legal context see J.Klabbers, A.Perters and G.Ulfsein, 2009, whereas for the philosophical debate consider Habermas, 2009.
25 Kant,2006 [1797], [6:311], 111.
from an interstate dispute resolution (as with the Congress of States Kant mentions with reference to “the assembly of states-general in The Hague”) to an initial form of constitutionalization of international law as in the case of the League of States. What can be inferred is that the voluntary union of the Congress which “can be dissolved at any time” is a too weak even if an essential step to “decide [...] disputes in a civil manner, through legal proceedings, as it were, and not in a barbaric manner.”

This point is crucial and it relates to a further aspect, namely, to the interconnection between the transitional idea of Kantian cosmopolitan right and the contemporary debate on global constitutionalism. This parallelism would frame the process of constitutionalization of international law under a constructivist approach where even in the absence of global demos as a source of power legitimation it remains still possible to distinguish between «higher and lower lawmaking» as in the case of Ackerman’s reconstruction of American «dualist democracy».

Nevertheless for the present purposes I limit myself to the assessment of the transformative function of cosmopolitan law and to its enhancement of stability at the global level. The dynamic aspect of Kantian cosmopolitanism not only indicates the desirability of a linear progression, but more importantly it defines a permanent tension among the institutional elements of a global transitional constitutionalism at the transnational level. To claim that peace is achievable by one optimal end result configuration obscures the relevant fact that cosmopolitan right embeds a transitional movement where peace is to be achieved not only diachronically — step by step — but also synchronically through the functional differentiation of institutional agencies. The regulative interpretation of the Völkerstaat is what I retain Kant’s most intriguing element of originality for our contemporary time.

Even if often implicitly, it is also the case that some of the most recent scholarship adopts a transitional reading of Kant, as in the case of Benhabib’s idea of “democratic iterations” and “jurisgenerative politics”. Yet, Benhabib’s analyses focus on the ways to reconcile the democratic will of the majority (Kant’s First Definitive Article of Perpetual Peace concerning the republican nature of state legitimacy) with standards of cosmopolitan justice (Third Definitive Article), but not with cosmopolitan progressions at the transnational

---

26 Kant, 2006 [1797], [6:351], 146.
27 Benhabib, 2005, 49ff.
level. While Benhabib’s account provides an insightful explanation of the mediating role of
cosmopolitan right into the domestic democratic sphere, she leaves out the role that
cosmopolitan right plays in the transition from free states towards both a federal
arrangement (Second Definitive Article) and as I suggest in the regulative idea of a multistate
confederation. Accordingly, my interpretive thesis aims at supplementing and extending
Benhabib’s jurisgenerative thesis.

§3 Kant’s Jus Publicum and the Idea of a Transitional Jus Cosmopoliticum

For Kant, the jus publicum represents a bulk of interconnecting spheres of laws
articulated internally into domestic right (civil constitutional law), and externally into
international right, the jus gentium, and cosmopolitan right — the jus cosmopoliticum.
Respectively, they all regulate the relations 1) between states and individuals (deontic right)
2) between states themselves (international right), as well as 3) between states and non-
citizens (cosmopolitan right). Public right as a whole is for Kant grounded on a priori reason
and not on an empirical, positivist view of rights; and a priori reason represents “the sum of
conditions under which the choice of one can be united with the choice of another in
accordance with a universal law of freedom.”

Accordingly, the notion of public right is constructed on the model of the categorical
imperative, and particularly on the idea of a submission of one’s maxims as if one were “a
law-making member in the universal kingdom of ends”. For Kant, public right is also what
generates a constitution (constitutio) as a “rightful condition” of a unifying will within the
three areas of public rights already mentioned: the domestic, the international and the
cosmopolitan. In the case of the Kantian cosmopolitan rights to freedom of movement,
public use of reason, free trade etc., the legal progression is provided by the realization of an

28 As Benhabib claims: “[…] The distinguishing feature of the period we are in cannot be captured through the
bon mots of ‘globalization’ and ‘empire’; rather, we are also facing the rise of an international human rights
regime and the spread of cosmopolitan norms, while the relationship between state sovereignty and such
norms is becoming more contentious and conflictual (IV). Such conflicts render starkly visible the ‘paradox of
democratic legitimacy’, namely, the necessary and inevitable limitation of democratic forms of representation
and accountability in terms of the formal distinction between members and nonmembers (V). This is the core
tension, even if not contradiction, between democratic self-determination and the norms of cosmopolitan
justice” Benhabib, 2005, 17.
29 Kant, 1996 [1797], [6:230], 24.
30 Kant, 1981[1785], [4:434], 40.
31 Kant, 2006 [1797], [6:311], 111.
idea of human beings as moral agents and, thus, from the perspective of the protection of the human innate right to freedom. Particularly in the case of cosmopolitan right, freedom is linked to the idea of an original condition of a rightful common possession of land, that is, on a right to receive a legitimate location on earth. In §62 of the *Metaphysics of Morals*, Kant discusses the third section of public right, namely, cosmopolitan right. The argument presented here proceeds quite distinctly and it is therefore worth reconstructing its main steps. First of all, Kant reminds us that cosmopolitan right is not philanthropy, but a proper “principle of right”. As for its content, it consists of “the possible unification of all peoples with the intention of establishing certain universal laws governing their possible commerce”. The word “commerce” is here the translation of the semantically wider notion of *Verkehr* — “interrelation”. Since the term is used to explain the more inclusive content and scope of cosmopolitan right, its interpretation cannot be limited to the commercial aspect only. Kant proceeds, thus, to the deduction of cosmopolitan right from a geographical consideration: in order to legitimize earth’s finitude as limiting physical possession, an original community (of *commercium* but not of legal possession) of universal relations for “possible physical interaction,” and consequently of potential right-acquisitions must be postulated. One could also claim that the unity of the general will grounds the *a priori* deduction of cosmopolitan right as a right to an original community of universal relations. It is from this *a priori* perspective that Kant measures the extent to which the “peoples of the earth” have already entered into a universal community, so that the “violation of right at any one place on the earth is felt in all places”. Difficulties arise, however, when trying to define what counts as the best institutional order for a rightful cosmopolitan condition and it is here that the idea of an inherently transitional notion of cosmopolitan law not resorting to a final end-state configuration finds its explanatory plausibility. Within the context of transnational actors, Kant’s cosmopolitan law realizes two interconnected goals: 1) it favors the institutional advancement of a legitimate cosmopolitan condition as with a multistate confederation; 2) also, it provides the transnational legal standards for the legitimate exercise of state power. These two aspects

---

32 As Brown notices: “These principles [of freedom and of original common possession] are synthetic a priori truths related to a condition of right and do not exist as facts, but as a concept of reason which alone yields a principle making it possible for individuals, families, nations or states to use land compatibly with principles of right.” Brown, 2009, 58.
33 Kant, 2006 [1797], [6:355], 146.
34 Kant, 2006 [1793], [8:360], 84.
are inherently related in so far as the redefinition of the institutional constellation is the result of transformation brought about by cosmopolitan law. The normative driving force of such institutional reshaping is after all of a moral nature. In the Metaphysics of Morals, Kant states that while “perpetual peace [...] is admittedly an idea that cannot be realized” there is, nevertheless, a “duty” to favor “a continual approach toward perpetual peace”. It seems, thus, that Kant foresaw a particular role for specific transitional legal advancements towards peace grounded primarily on the political duty (in accordance to morality) to realize each individual’s original right to have a share on earth, namely, “[...] of a universal relation of one to all others to present oneself for possible commerce [Verkehr] with each other”.

As already introduced, Kant presents different options in the various texts. In the writing On the Common Saying (1793), he observes that as it has been the case historically with large states the idea of a “state of universal peace” is likely to lead to “the most horrible despotism” and only a “federation” (Föderation) is suggested as a legitimate institutional arrangement worthy of pursuing; similarly, in the Perpetual Peace, Kant refers to “a universal monarchy” as “a soulless despotism [which] ultimately declines into anarchy” and presents the “negative surrogate” of a “league of states” (a Völkerbund, that is, a phaedus pacificum) as a preferable alternative to both the view of a multistate confederation (Völkerstaat) and to the idea of a World Republic (Weltrepublik). In this respect, the dilemma that Kant faces consists in reconciling his idea of valid universal legislation with the legitimate autonomy of the states. Since states cannot be coerced, due to the fact that this would endanger their autonomy and the indivisibility of their powers, only the uncoercive constraint of a league of (republican) states granting a cosmopolitan “right to visit” could be legitimately admitted. As Kleingeld observes “Kant does not actually write that the concept of a state of states [Völkerstaat my addition] is contradictory. Rather, he claims that there is a contradiction between the concept of a state of states, on the one hand, and a fundamental ‘presupposition’ of international right, on the other”. This is because the functions and the autonomy of a state cannot be fully retained within a state of states. As I

---

35 Kant, 2006 [1797], [6:350], 145.
36 Kant, 2006 [1797], [6:352], 146.
37 Kant, 2006 [1793], [8:311], 63. For an interesting interpretation of how a world republic becomes despotic on the basis of the manipulative political behavior of the stronger states, see Kleingeld, 2004, 310 ff.
38 Respectively, Kant 2006 [1795], [8:367], 91 and [8:356-7], 81. Wood has drawn the attention to the distinction in Kant of three institutional models, see Wood, 2006, 251. Also, I wish to thank Wood for further exchanges on this point.
will later argue, on the solution of such contradiction depends the same possibility of transforming international law or at least some of its components into cosmopolitan law and consequently the transformation of the state into a cosmopolitan state. This advancement is what the process of constitutionalization of international law based on a transitional *jus cosmopolitanicum* is called to realize. Yet, the promotion of a more rightful condition occurs on the initial premises of a league of states. Therefore, the question arises in regard to which role should be assigned to the multistate confederation once the league of states is suggested by Kant as a suboptimal institutional solution. As introduced before, the idea is that while states overcome their legal separateness through a league, they also interpret their mutual relations “as if” part of one single *Völkerstaat or civitas gentium*. In other words, the legal accommodation of states’ transnational relations within the *Völkerbund* is itself dependent on states’ self-interpretation as legal subjects of an ideal multistate confederation. The regulatory function of the multistate confederation advances, therefore, the transitionality aspect of cosmopolitan right while it simultaneously preserves states pluralism. As a regulative standard, it never turns into a factual condition.\(^{40}\) Such interpretation is allowed from the passage of the *Perpetual Peace* where, as observed, Kant draws a distinction between what is right in *hypothesi* (in practice) and what is right in *thesi* (in theory).\(^{41}\) According to such a distinction, reflecting also the opposition between the situated vs the ideal observer, the transition towards the multistate confederation — the *Völkerstaat* — is right in principle (“in thesi”) even if not in practice (“in hypothesi”). Its function is therefore assumed to be that of a regulative concept as an “as if” standard. Yet, this reading of Kant finds some complications in the optimism he had shown two years before the publication of the *Perpetual Peace* (1795) in the writing titled *On the Common Saying* (1793). Here, Kant defined the *Völkerstaat* as “possible (in praxi)” and “that it can exist”.\(^{42}\) One might argue that Kant was hesitant to suggest whether he favored the league or the multistate confederation and that he changed his mind on this point by assigning a regulative function to the *Völkerstaat*. This would cohere with what Kant says in regard to the general aim of perpetual peace in which regard “[…] we must act as if it is real, which it

---

\(^{40}\)This is the point where my interpretation of Kant differs radically from Kleingeld’s idea of a “state of states” as a factual hypothesis. In Kleingeld, 2004, 305 ff.

\(^{41}\) On the interpretation of the theory/practice distinction, see note 7 by Kleingeld in Kant’s “On the Common Saying”, 2006 [1793] n.7, 81.

\(^{42}\) Kant, 2006, [1793],[8:313], 65.
may not be, and work toward establishing it and the constitution that seems the most suitable to that end [...]”. 43 The way in which the role of this regulative idea translates into a political duty is according to limited but progressive institutional reforms which maintain an unresolved asymmetry between the universal scope of cosmopolitan law and its contingent transnational institutionalization. 44 It is just such a mismatch between the universal validity of cosmopolitan law and its non-ideal institutional implementation that is relevant for understanding the peculiarity in Kant of the normativity of law at the transnational level.

Why does such asymmetry remain unsolved? According to the interpretation advanced here, this is because Kant changed his mind on the extent to which he could pursue the analogy between individuals and states, on the one hand, and states and transnational organizations, on the other. Indeed, the departure from a lawless condition by individuals entering into state-relations and the overcoming of an international state of nature by these latter with the formation of a transnational arrangement does not reflect the definition that Kant provides on analogy as “which surely does not signify, as the word is usually taken, an imperfect similarity between two things, but rather a perfect similarity between two relations in wholly dissimilar things”. 45 The relation (and not the analogy) between the two spheres reflects a real vs. ideal opposition which, once again, frees space to a transitional advancement and institutional configuration beyond the Völkerbund. In the case of the transnational sphere, states in fact possess already a constitution and meet a minimum standard of a rule of law. It follows that there is no duty to abandon completely the domestic condition, but only to supplement this with cosmopolitan obligations. Since the multinational state-like confederation arrangement cannot be imposed on already legitimate sovereign states, it remains a regulative tool for advancing the league model.

Thus, also according to a transitional reading of cosmopolitan law, the lack of rejection under ideal circumstances of the Völkerstaat means that Kant admitted as a legitimate institutional ideal the progression of the Völkerbund towards the multistate confederation (Völkerstaat). Since the Völkerstaat remains entrapped within the two extremes of the institutional negative surrogate of the phaedus pacificum and the undesirable realization of a (despotic) world state the only role the Völkerstaat can be said to play is that of representing the counterfactual hypothesis of a transitional progression of

---

43 Kant, 2006 [1797], [6:354],148.
44 Kant, 2006 [1797], [6:355], 147.
the league of states towards a more legally advanced framework for peace. How can the multistate confederation arguably advance the minimal constitutional stage of the federation? It might be assumed that whereas in the first case the condition of basic legality is mostly maintained by states’ equal worth on the basis of converging intents (self-protection) and political features (republican nature), in the case of the multistate confederation, the legal interdependence of states is interpreted as regulatively subjected to a compulsory form of transnational jurisdiction. That Kant had in mind this more advanced phase of constitutionalization of international law is part of his reasoning in the *Metaphysics of Morals* where he refers to the relations set by international law as “merely provisional,” and where “only in a general *union of states* can this [right of peoples] become *peremptorily* valid”\(^46\). The more advanced case of transnational constitutionalism that the regulative function of the multistate confederation would bring about implies: 1) a recognition of a legal constitutional core and a hierarchization of the legal sources; 2) the adoption of a standard of coherency and of uniformity in the application of the law; and 3) a partial transfer of party states competences into transnational agencies exercising coercive functions. Such transnational transfer of power-relations would then be counterbalanced by the respect for a plurality of state-parties and their legitimate sovereignty.

If this interpretation is plausible, then, the apparent contradiction to which Kant seems to fall prey, that of states not willing to enter a multistate confederation even if ideally desirable, finds a solution. The question which remains open, nonetheless, is which institutional subjects are most capable of advancing the process of global constitutionalization of international law, as for instance third party arbitration between states with international courts or transnational networks. Kant remains silent on this point. While the structural transformation of the Westphalian system has initiated only in the last fifty years, Kant can be still said to have captured the normative terrain of this trajectory.\(^47\)

As noticed, Kant had in mind several transnational phases in which to embed the constitutional advancement of international law.

\(^{46}\)Kant, 2006 [1797], [6:350], 145.

\(^{47}\)Höffe’s reading of Kant’s cosmopolitanism is the closest to the thesis defended here. Yet, while he recognizes in Kant the necessity to move towards a multistate confederation, he falls short of providing a textual reading in this direction and criticizes Kant for thinking “in terms of the overly simple alternative: either full sovereignty or none” as well as for not considering the possibility of “the intermediate state of a federal world state”, Höffe, 2006, 197.
The question becomes then how to understand such distinctions as part of a unified picture for the institutional progression at the transnational level. If we follow a “transitional” reading, with the exclusion of the world republic, the configurations identified here exemplify an incremental set of options for institutional progression backed by an increment of cosmopolitan rights. As a whole, the cosmopolitan right, represents a principle of law aiming to realize the transitional move towards a constitutional condition referred to by Kant in the concluding paragraph of the *Rechtslehre*.[48] The suggestion of a gradual process of reform shows Kant’s attempt to isolate a process of constitutionalization at the transnational level that presents itself as being different from the revolutionary events in America and France. Accordingly, Kant’s idea of constitutional progression towards perpetual peace testifies cosmopolitanism as a distinct process, to be assessed on its own terms, and whose understanding cannot be equated to that of a state’s constitutionalism but rather to some aspects of contemporary transnational constitutionalism.

Let me recapture the transitionality aspect of Kantian cosmopolitan law and conclude with a remark on Kantian cosmopolitan legacy in Habermas and Benhabib. Since for Kant the constitutionalization of international relations through cosmopolitan law occurs in stages, it becomes possible to account for the transition from the federation or league of states (*Völkerbund*) as a surrogate solution to the too often overlooked Kantian idea of a multistate confederation (*Völkerstaat*). Taken as an “as if” organizational paradigm, the multistate confederation is the only institutional framework capable of advancing the project of a federation of states without resorting to a despotic world state. In addition, the multistate confederation, by providing a formal standard for the regulation of interstate relations, transforms the same legal relations of the federation by advancing the constitutional project. If this is the dynamics of Kant’s cosmopolitanism, then, it also seems possible to respond to what Habermas sees as the “incomplete” element of Kant’s cosmopolitan theory.[49] Indeed, if the model of the *Völkerstaat* is adopted as a regulative tool for individual and interstate cosmopolitan constitutionalization, it becomes possible along Habermasian lines: a) to construct a “multilevel system” as a pluralistic form of legitimate power and capable of transforming the sovereign indivisibility of the “we the people” of the Republics; b) to construct a constitutional arrangement “of a world society without world government”; and

---

finally c) to progress along a “temporal pattern of incremental advances in the constitutionalization process, initiated and backed by governments rather than by citizens”.

Consequently, along this Kantian line, Benhabib’s insights into the jurisgenerative process of incorporation of cosmopolitan law into the domestic domain can be expanded and connected to a non-domestic (cosmopolitan) sphere of citizens’ rights. In this respect, there is full continuity between Kant’s and Benhabib’s cosmopolitan theory in so far as the right to hospitality is “[... situate] at the boundaries of the polity”. Yet, if the Kantian project is advanced further in the direction of the constitutionalization of international law, then the same legal categorization of the ‘right to hospitality’ becomes part of a global constitutional project as a cosmopolitan ideal. As Kant observes: “In this way, remote parts of the world can establish relations peacefully with one another, relations which ultimately become regulated by public laws and can thus finally bring the human species ever closer to a cosmopolitan constitution” (emphasis added).

Conclusion

At the opening I have quoted as epigraph Fichte’s Review of the Perpetual Peace where he emphasizes the “intermediary condition” that the federation of nations [Völkerbund] represents. My suggestion is that to speak of an intermediary condition leads to either an interpretation of cosmopolitan law as grounded on an End-state view or, alternatively, to a transitional reading. The argument, therefore, has consisted in showing how in Kant it is possible to argue for a transitional reading as an intrinsic element of cosmopolitan law. The transitional aspect of cosmopolitan law is in Kant only sketched but certainly grounding the binary trajectory of the institutional progressions presented here. It seems that only within such forward institutional movement governed by transitional cosmopolitan law it becomes possible to explain Kant’s constitutional project as well as to provide further insight into Habermas’ cosmopolitan theory. Indeed, it would be a rather unsatisfactory form of constitutionalization of the entire system of international law that...

---

50 Habermas, 2007, 333.
52 Kant, 2006, [8:358], 82.
53 See, for instance, Habermas, 2006 and 2009.
process which would not also be compatible with some degree of enforcement through transnational regulating agencies. The problem remains that of advancing constitutionalization without renouncing to a minimally acceptable democratic standard also at the transnational level. This condition also seems to be endorsed by Kant’s First Definitive Article of the Perpetual Peace, particularly in the concern expressed for the requisite of the republican nature of a self-legislatating confederal body together with the units of which it is composed. The jurisgenerative process of law production considered by Benhabib at the domestic level should thus also be included and replicated at the transnational level given that the constitutionalization of international law must proceed through a democratic interaction among states and along a hypothesized set of legitimate confederal arrangements. Kant had not foreseen all of the implications and institutional options opened by the advancements of cosmopolitan law, even though the legal dynamism he sketched allows both an incremental view of cosmopolitan right as well as an ordering of interstate relations on the basis of the regulative role of a multistate constitution.

University of Oslo
Department of Public and International Law
Karl Johans gt.47
N-0162 Oslo
Norway
E-mail: Claudio.Corradetti@jus.uio.no

References


