Debating Cosmopolitan Law – 9 Years On

Christoph Brendel 2024-04-30T08:00:26

When this esteemed blog was still in its infancy, I contributed a fictional conversation with two giants of philosophy and international law: Immanuel Kant (1724-1804) and Georg Friedrich von Martens (1756-1821). The form of my text was experimental, the content scratched at disciplinary boundaries (and maybe inspired this piece on Zeit Online, which appeared shortly afterwards and had striking similarities). Nevertheless, or precisely because of this, my unorthodox contribution was suitable for a young blog about international public law and international legal thought. The text shed light on a Kantian conceptual innovation and neologism in its historical context: *Weltbürgerrecht*, *weltbürgerliches Recht*, or *ius cosmopoliticum*. To get the debate going, I confronted its proponent from philosophy with a counterpart from law who rejected the concept, Georg Friedrich von Martens. My idea was to present a scientific discussion about a concept at the boundary between philosophy and law at a historic turning point (end of the 18th century, after the French Revolution).

When Natural Law and the Law of Nations Parted Company

The professor of *Logik und Metaphysik* (logic and metaphysics) from Königsberg and the professor of *Natur- und Völkerrecht* (natural law and the law of nations) from Göttingen stood on the threshold of the law of nations emancipating itself from the long-standing influential tradition of natural or rational law. Georg Friedrich von Martens (not to be confused with Russian diplomat and pioneer of international humanitarian law Friedrich Fromhold Martens, 1845-1909) concentrated in his scientific work on collecting and systematizing the treaties, costumes, and disputes between the states and peoples. He was also a practitioner of law and is considered one of the pioneers of legal positivism in international law. Kant, on the other hand, still took it for granted that it was the philosophers who carried the torch, also in front of international lawyers. Since then, with the further rise of positivism in jurisprudence during the 19th century, philosophy has lost this self-confidence.

The fictional conversation with von Martens and Kant touches on some explicit as well as implicit questions. Curiously enough, the two professors sometimes seemed to talk past each other at the imaginary meeting in 1801 near Königsberg. They knew the affairs of states and peoples worldwide very well, not only of the European states in their relations with each other but also vis-à-vis the non-European nations. Yet, the widening disciplinary gap between philosophers and jurists, once closely intertwined in the debate on natural law, seemed to be increasingly obscuring the view of the other. Von Martens was not convinced by Kant's *ius cosmopoliticum* and its principles which von Martens relegated to the realm of philosophy, not positive law. For Kant, on the other hand, reason dictated that *all* states and peoples on earth without exception leave the *state of nature* and enter into a *state of law* with

each other. He clearly saw the limits, the particularity of (European) international law, which were associated with the development of its modern conception in the 18th century. Kant's proposed cosmopolitan law, as the third layer of public law, with its principle of hospitality was to close this perceived gap in an era before the globalisation or universalisation of international law as we know it today.

Why Philosophy and History?

I will spare the reader any further details and humbly invite you to re-read the conversation with von Martens and Kant on Völkerrechtsblog. Instead, I would like to address the unspoken, more fundamental question posed by the text regarding the value of philosophy and history for international law. Does international law need philosophy and history and, if so, why? It should be noted, however, that in my 2015 text I limited myself to the historical debate. I did not make any references as to the present relevance of Kant's cosmopolitan legal theory. And although discussing and possibly updating the Kantian philosophy would be of course an exciting endeavour, I should also confine myself here to a few more general remarks.

Today, very few philosophers and even fewer lawyers still look to philosophy with the expectation of obtaining absolute truths about law. Natural law as a scientific category or even a sub-discipline seems to be irrevocably a thing of the past. Nevertheless, the philosophy of international law is still rightly given due space, and Kant's international and cosmopolitan theory also quite rightly plays a prominent role in it (see, for instance, here and here). Few people expect "lessons from history" for current problems of international law either. Nevertheless, the history of international law has gained a great deal of interest in recent decades and taken its rightful place (see, for example, the *Journal of the History of International Law / Revue d'histoire du droit international* or *The Oxford Handbook of the History of International Law*).

If, on the one hand, we can observe the firm establishment of the philosophy and history of international law, on the other hand, the interest seems to follow the course of time and academic fashions. This also applies to Kant's cosmopolitan legal theory. Indeed, cosmopolitanism is an expression of high individualism and a sign of a time when people are discovering new worlds and no longer feel at home in the old (Burckhardt, 135f.). The last great cosmopolitan wave began in the 1990s in (Western) academia, which spilled over into the fields of international public law and international legal thought. The archives of ideas offered by the history and philosophy of international law were enthusiastically explored. In particular, Kant's *On Perpetual Peace* (1795) was re-interpreted and updated in its cosmopolitan dimension. Yet, the concept of cosmopolitan law itself remained underexposed and often misunderstood. Kant even had to be defended against his appropriation by overly radical cosmopolitans. And those who are quick to accuse him of racism should at least take note of his cosmopolitan theory of law, which also aimed to protect against conquest and colonialism and, last but not least, demanded a global principle of non-refoulement.

Above all, the study of the philosophy and history of international law makes us aware of its evolution and contingency. This becomes particularly crucial when the present international legal order seems to be taken for granted by too many. It

may offer orientation and sharpen the sense of possibility (*Möglichkeitssinn*) in a changing global legal order. With my contribution at Völkerrechtsblog, I wanted to emphasize this value of philosophy and history for international law – and extend an invitation to further reflection.

Without a doubt, legal blogging is a fruitful extension of academic activity and freedom. Völkerrechtsblog, as a globally accessible online debate forum on international legal thought, reaches out to a wide circle of authors and readers. This opening up of the public discourse would certainly have met with the enthusiasm of Immanuel Kant and Georg Friedrich von Martens. I am sure the two professors would have congratulated Völkerrechtsblog on its 10th birthday and wished all the best for the future.
