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INTERVIEW

Debating Cosmopolitan Law

CHRISTOPH BRENDEL — 29 July, 2015

Print 1

An interview with Immanuel Kant and Georg Friedrich von Martens (Part I)

Christoph Brendel

This fictional conversation will bring together two persons of outstanding importance for science in the late 18th and early 19th century who never met face-to-face. One was a professor of logic and metaphysics from Königsberg (now Kaliningrad), the other a professor of natural and international law from Göttingen. The former revolutionised philosophy through his critical method, the latter paved the way for the modern discipline of international law. Their names are Immanuel Kant (1724-1804) and Georg Friedrich

von Martens (1756-1821). The matter in dispute will be Kant's idea of a cosmopolitan law which he had introduced in 'Zum ewigen Frieden. Ein philosophischer Entwurf' (Toward Perpetual Peace, 1795) and the 'Metaphysische Anfangsgründe der Rechtslehre' (Doctrine of Law, 1797) [1]. Von Martens, much as he respected Kant, was critical regarding the philosopher's novel concept. In the second edition of his 'Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage' (1801) he had bluntly denied that cosmopolitan law was positive law at all. Hence little stands in the way of a stimulating debate – set sometime in the year 1801 in a country house a few miles outside of Königsberg and originally conducted in the German language – which may provide insights for the discussions in political philosophy and international law even today.

Christoph Brendel: Professor Kant, Professor von Martens, is the idea of cosmopolitan law a fantastic and overstrained conception of law – or a necessary complement to domestic and international law?

Immanuel Kant: There can be no doubt that what I call Weltbürgerrecht, weltbürgerliches Recht or ius cosmopoliticum, in fact describes a legal, not an ethical order. And it certainly is an indispensable part of public law in the approximation of perpetual peace (Toward Perpetual Peace, 3rd definitive article; Doctrine of Law, § 62).

Georg Friedrich von Martens: I respectfully disagree. Although we all have to give credit to our esteemed colleague for his efforts to distinguish law from ethics, the ius cosmopoliticum and its principles belong to the field of philosophy, not of positive law. Let me briefly summarise how I understand this idea of Mr. Kant: The principles of

cosmopolitan law are supposed to be different from those of international law. They are inferred from (1) the fact that all states, peoples, and individuals inhabit one and the same globe, (2) the claim that the soil of the earth originally was common to all, and (3) the belief that it would be possible one day to establish a positive society among all (Précis, § 9). I simply cannot accept the proposition that this conception of a cosmopolitan law constitutes positive law.

Brendel: Let me take a step back. What is your approach to international law?

Kant: As you all know, I am not a jurist, but I have taught natural law according to the textbook by Gottfried Achenwall for many years, including the natural law of nations. I have read more books on international law than the average law professor. But let me be clear about this: my interest is to uncover the metaphysical first principles of the doctrine of law based on reason alone. I want to show what the legal principles among nations should be, not what they are. The jurists may determine what is legal at a certain place at a particular time, but in order to know whether this is also right we need a metaphysical system. Philosophers, as long as you give them full freedom of speech, are in the best position to develop such a system (Doctrine of Law, preface and introduction; compare also 'Der Streit der Fakultäten (The Conflict of the Faculties, 1798)').

von Martens: With all due respect, while I do think that the study of natural law and ethics can teach us jurists a lot – and I discuss both concepts in the very first paragraphs of my book –, the focus of legal scholarship is on the positive essence of international law. I try to distill it primarily from the existing treaties and customs among nations.

Brendel: So there is common ground between your views nevertheless?

von Martens: Yes, of course, we share a great deal. Both of us conceive of nations as moral persons in a state of nature ruled by natural law, comparable to human individuals before the foundation of the state. I applaud my esteemed colleague from the Albertina for his insight that the simple principles of natural law do not suffice and that states have to develop positive arrangements capable of remedying the inconveniences of the state of nature (Précis, § 9). I am, however, sceptical as regards the feasibility of a federation of all states of Europe, let alone the whole earth (ibid., § 17; compare also Einleitung in das positive europäische Völkerrecht auf Verträge und Herkommen gegründet, 1796, Vorbericht).

Kant: As is well known, I have long been fond of the idea of a European federation of states, which the Abbé de Saint-Pierre and Jean-Jacques Rousseau proposed. It is a pity my otherwise very knowledgeable counterpart thinks such a union is utopian, but lawyers tend to have a rather limited power of imagination… Yet, I very much welcome his project of a science of a general, positive European law of nations. It provides a fresh start and could be emulated in other parts of the world. I only caution not to forget that the idea of international law, or law in general, cannot and must not be reduced to the empirical facts.

Brendel: Now in order to understand how cosmopolitan law fits into the picture I want to raise a question which is rarely asked: Why cosmopolitan law? Why is another sphere of public law, beyond the international and domestic, necessary in the first place, Professor Kant?

Kant: First of all, you have to understand the rationale of my philosophy of public law. It rests on the postulate that all persons who interact with one another must belong to a public legal constitution. Only the transition from the natural condition to a civil or public legal constitution is able to secure the external mine and thine (Doctrine of Law, §§ 8, 15, 41).

Secondly, let me explain my concept of international law. Not all nations of the world are subjects of it. I see no way how savage nations like the Tartars, the Hottentots or the American tribes, who do not form a state and even eat their enemies, could be part of a functioning international legal order. How could those peoples, who do not submit to a common authority and law internally, possibly ever enter into a federation with others? In order to stress this point I proposed – similar to, but less successful than Mr. Bentham's concept of international law – the new term Staatenrecht, ius publicum civitatum instead of the old Völkerrecht, ius gentium (ibid., § 53).

Moreover, when discussing the idea of international organisation we obviously have to think about how to put it into practice. In the 2nd definitive article of Towards Perpetual Peace I remarked that the federation of states – which back then I thought could possibly start with enlightened republican France at its centre – would gradually expand and finally comprise of all states. However, I had first and foremost the states of Europe in mind. For now, the encounter between our continent and the civilised nations in distant parts of the world – for example, China, Japan, and the states of Hindustan – can only fall under the 3rd definitive article on cosmopolitan law, not under the 2nd definitive article on international law. To be sure, I am

convinced that one day we will have a legal union of all the civilised nations of the earth. For the time being, however, we must start with our own continent. The nations in other regions, for example in Asia, are encouraged to do the same. If only the Brits would let them in peace!

Consider, finally, my argument why a world republic, and thus perpetual peace, is in the end unfeasible: with the excessive enlargement of a state of nations over vast stretches of land the government as well as the protection of every single part of it would eventually become impossible. A multitude of such entities would, on the other hand, once more confront each other like in the unfortunate state of nature (ibid., §§ 54, 61).

Coming back to the question "Why cosmopolitan law?" I hope the answer is clear by now. My concept of international law, based on the idea of a federation of states, is limited. The relations between states and non-state peoples, as well as the relations between nations of different continents – who have all been irrevocably drawn together into a community particularly by European colonialism – are nonetheless in need of a public law restricting their external freedom, thus cosmopolitan law with its general principle of hospitality due to all humankind. – I apologise for the monologue, but I see that cosmopolitan law is a mystery to many people. Unfortunately, I fear my remarks in 'Toward Perpetual Peace' and the 'Doctrine of Law' have only managed to outline the concept in a fragmented way. I was running out of time, you know.

(End of part I. The conversation will continue on Monday, 3 August 2015 with part II.)

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[1] The German notion of Recht can be translated as either law or right. *Rechtslehre* is commonly translated as *Doctrine of Right* and, consequently, *Völkerrecht* and *Weltbürgerrecht* as *international right* and *cosmopolitan right*. However, I find this unconvincing and, therefore, translate *Recht* here as *law* insofar as it describes a legal order rather than a subjective legal entitlement.

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