

Cosmopolitan Sovereigns

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ABSTRACT

This research intends to help developing and refining cosmopolitan lenses to assess the legitimacy of domestic policies. Such task ultimately consists in diagnosing whether and how domestic democratic procedures disregard outer stakeholders that are affected by the externalities of domestic collective decisions. On the theoretical level, I intend to develop the notion of ‘cosmopolitan sovereigns’ as a regulative ideal to structure how the articulation between the national and the transnational levels of law and governance should be addressed. It departs from the premise that both spheres are co-original and mutually imbricated. The ‘cosmopolitan sovereign’ is meant to be a meaningful normative placeholder not only for conceiving the legitimacy between and beyond sovereign constitutional democracies, but also within. Constructing an integrated framework that does not take the state as the primary or foundational source of legitimacy demands a deep investigation and recalibration of the concept of sovereignty, but not its abandonment. To that extent, the research project remains state-centric. This conceptual framework, as I conceive it, can be well captured by the tension between ‘constitutionalism beyond the state’ and ‘cosmopolitanism within the state’.

This proposal chooses three intersectoral public policies to be screened and checked through cosmopolitan eyes: health, migration and climate. The two general research focus, one theoretical and one based on comparative policy analysis, can be summarised by the following research questions: 1) Can cosmopolitanism help to pinpoint and to handle the legitimacy anxiety that cuts across contemporary politics? Can it be reconciled with state sovereignty? 2) What does it mean to construct public policies that pass the cosmopolitan muster?

1. Introduction

“The Amazon is ours. After all, it is situated in our territory. We are prepared for cooperation, but we will never be prepared to accept restrictions upon our sovereignty.”¹

The Amazon corresponds to the largest tropical rainforest on the planet and encompasses one fifth of its fresh water. The stability of global climate depends, to a significant extent, on this huge reservoir of carbon dioxide. Tropical rainforests do have a chief role in helping to contain climate change. Continuing deforestation and unsustainable exploitation, in turn, account for visible alterations of climate patterns across the region. The lack of effective policies to tackle deforestation, scientists predict, is leading towards a tragic tipping point, a “point of no return”.² There is scant evidence of any retrenchment of this process yet.

The statement “The Amazon is ours”, uttered by a defiant Brazilian President at the UN General Assembly in 1989, is a succinct way to spot the overall object of this research: under a certain frame of mind, the articulation of state sovereignty, self-determination, domestic jurisdiction, legitimacy and inter-state horizontal cooperation leads the world to an unsolvable conundrum. In other words, domestic policies that produce transboundary effects still benefit from a protective shield that prevents external criticism and rational coordination, let alone the institutional channeling of all arguably legitimate stakeholders on those issues. An uncaring attitude towards the Amazon remains unaccounted for, and the hegemonic way of thinking and acting does not help.

The leap from ‘territory’ to ‘our territory’ is a generally modern political operation and, as it happens, has an extensive history. One of the tasks that constitutional theory and international law have recently undertaken is to rethink the validity conditions of statements of that sort, to probe the limits of its soundness under contemporary circumstances. Despite widespread disagreement about what those conditions might be, one hardly denies that they stray from the ‘Westphalian model’ of international relations.³

All sub-global political units will oftentimes produce external (transboundary) impact through its internal decisions and actions. * The depth and scope of potential and

¹ José Sarney, former Brazilian President, in his speech at the XLIV Session of the General Assembly of the United Nations, 1989 (see Corrêa, 2013, p. 623)

² See “World Development Report: the science of climate change”, World Bank, 2010.

³ See MacCormick (1999), Walker (2010b), Fraser (2005).

actual externalities in the contemporary world is unprecedented. In the age of globalization and ever growing interdependence,⁴ national democracies face multi-faceted pressure, both internal and external, to reinvent themselves in order to handle the hurdles of collective action with respect to global public goods.⁵ As part of this reinvention, there is room for a claim according to which sovereign states need to pass the muster of cosmopolitan legitimacy, not only because of the pressing need to get more deeply enmeshed in transnational decision-making structures (which themselves, as they currently stand, have been raising serious legitimacy anxieties), but also because their internal processes are not held accountable to all relevant stakeholders, non-members of the polity.

This research intends to follow that path, namely, to help developing, maturing and refining cosmopolitan lenses to assess the legitimacy of domestic policies. Alongside this theoretical endeavour, which is already being pursued by some, I choose three intersectoral public policies to be screened and checked through cosmopolitan eyes: health, migration and climate.⁶ The research, thus, has two parallel dimensions: the theoretical and the comparative policy analysis.

This proposal has four additional sections. The next section briefly maps out the current state of research in the area, and will proceed in four consecutive steps: first, it will describe how the political ideal of constitutionalism has been borrowed to orient the understanding, design and assessment of transnational institutions; second, it will describe in what ways the ideal of cosmopolitanism can be fruitful to inspire alternative ways to think about state sovereignty; third, it briefly explains the relevance and intersectoral character of the three selected policies; fourth, it elaborates the main research questions of this research. Constitutionalism and cosmopolitanism, therefore, are presented in two counter-intuitive habitats: *beyond the state*, an unfamiliar locus for the former; and *within the state* instead of within an unbounded cosmopolis, a more traditional background of the latter.

⁴ This is another common-sense factual premise of this multi-disciplinary body of literature. For a prestigious overview, see Held (1995), Weiler (2004) or Benvenisti (2013).

⁵ Bodansky (2012).

⁶ On intersectoral policies, see Rudolph et al (2013).

2. The current state of the literature

2.1 Constitutionalism beyond the state: taking stock

Modern constitutionalism emerged as an institutional endeavour to promote individual emancipation vis-à-vis political power, that is, to empower free and equal individuals to pursue autonomous life plans in a polity. That is supposedly achieved through qualified membership in a sovereign state, the core political unit of self-identification.⁷ In order to further that plan, constitutionalism has historically furnished a variety of values and institutional techniques to domesticate the threat of arbitrariness. Its minimal package, according to wide agreement, includes a foundational volitional moment (constituent power) that expresses the ‘will of the people’ through a written document that intends to endure.⁸ Such document is meant to stay over and above ordinary politics and law, and defines a distinctly hierarchical operational mode of the rule of law. It also comprises a dispersion of mutually controlling authorities encapsulated under the principle of the separation of powers. And, finally, it enshrines more or less generous declarations of rights, which provide both defensive (and militant) language and institutional tools for individuals to demand state action (or inaction).

Coupled with democracy, which carves a space for electoral representation and popular participation through the principle of universal suffrage, constitutionalism helped to cash the quasi-universal benchmark of ultimate legitimacy under the term “constitutional democracy”.

So far so good for the sake of inward-looking legitimacy, that is, legitimacy *towards citizens*. The narrative of liberal constitutionalism, framed by a general statist approach, offers an additional ingredient to define the legitimacy of states vis-à-vis the international community and outer stakeholders: state sovereignty, even if later mitigated by universal standards of human rights, is an corollary of self-determination and a shield against external interferences. An inbuilt and outward-looking legitimacy discourse lurks behind a state sovereignty claim. International law, through such prism, is legitimate to the extent it is a product of state’s consent, a way to safeguard and instantiate state’s sovereignty (the flip-side, in democratic times, of popular sovereignty).

⁷ For an overview on the concept, paradoxes and achievements of constitutionalism, see, for example: Grimm (2010), Kumm (2009), Walker (2008 and 2010c), Loughlin (2010), Sartori (1962).

⁸ No matter whether endurance ended up historically being a relative achievement. See Elkins, Ginsburg and Melton (2009).

In a nutshell, these are the conceptual and institutional backbones of the ‘Westphalian epoch’:⁹ internally, equal individuals shape the legitimacy of collective decision-making by some version of an allegedly democratic majority rule; externally, the collective unit of the state constitutes a polity that should engage horizontally, through mutual agreement, with other states.

The Westphalian sovereigntist scheme is inherently deficient to provide for non-voluntary international coordination. The level of compliance that the handling of global public goods may require is hardly delivered by such a scheme. Globalization, and its intense densification during the last half-century, inflicted a serious crisis in that mainstream scheme.¹⁰ With the gradual shift of centers of power and decision-making to transnational fora and institutions, and with the emergence of thicker layers of multilateral international law, to use Weiler’s instructive geological metaphor,¹¹ that narrative became relatively futile and innocuous, if not mystifying. Dealing with the novel and ‘less-than-democratic’ transnational institutions that stray from the principal-agent transmission-belt mechanisms, supposedly embodied in state’s consent, calls for a new narrative, if not a renovated institutional edifice.

That crisis, therefore, is a product of both functional and dignitarian pathologies. It is product, to put it differently, of the “Westphalian governance failures”¹² and of the legitimacy deficits which that narrative is not apt to unravel. In the face of deeper interdependence, states remain unfit to transform that traditional edifice in light of stronger demands of efficient and legitimate transnational coordination and governance.

This perceived crisis has sparked different sorts of responses. Reactions include, on the one hand, the emergence of a range of intellectual initiatives to disentangle those puzzles and, on the other, incremental innovations that try to adjust the procedures of transnational institutions. Among other things, the idea of sovereignty, and its remaining legitimating value, is at stake. The intellectual enterprises are numerous and with multiple points of departure, often inspired by the same old political ideals. To name but a few examples of this burgeoning production of concepts and labels: global democracy,

⁹ Walker (2010a)

¹⁰ German political and constitutional thought has been providing stark contributions to this debate: Bogdandy (2004 and 2012); Brunkhorst (2005 and 2014); Grimm (2010); Kumm (2009 and 2013); Möllers (2011); Forst (2012); Neyer (2011); Teubner (2012).

¹¹ Weiler (2004).

¹² As Petermann contends: “The prevailing ‘constitutional nationalism’ and ‘Westphalian intergovernmentalism’ do not effectively protect international public goods demanded by citizens. Westphalian prioritization of rights of states (...) undermines international public goods.” (2013, 113)

cosmopolitan democracy, deliberative polyarchy, global administrative law, international accountability, global constitutionalism, and constitutionalism beyond the state.¹³

The constitutionalist response, whatever qualifications or nuances it has received, basically attempts to export to the sphere *beyond the state* its traditional set of critical values and the institutional toolbox, tentatively calibrated to fit in the new environment.¹⁴

The task of building governance structures beyond the state that are both efficient and legitimate is overwhelming. The perplexity is both intellectual and political: intellectual because of the enormity of the cognitive challenge, which triggers a sense of humility in the face of empirical and normative uncertainty; political because of the seeming incapacity or unwillingness of the members of the international community to converge and forge such a massive political will for an institutional overhaul at the transnational sphere that is far from uncontroversial or risk-free. That, in turn, prompts a sense of paralysis.

Regardless of how likely, how feasible or how desirable such transformations are in the foreseeable future, and no matter what intellectual strands will prove to be more successful in driving hearts and minds (and material power) to deliver institutional change, this angle remains incomplete for diagnosing and rectifying legitimacy deficits in contemporary politics. We do certainly need deep thinking and wide institutional experimentation beyond and between the states so that, whenever a strong enough political will emerges, whenever the historical time comes, attractive and justifiable changes are implemented. However, that is certainly not the whole story of contemporary legitimacy drama, and there is a complementary dimension that needs to be jointly approached. Looking at the legitimacy questions that arise *within the state* and *beyond the state* in a disintegrated way may lead to an equivocal comprehension of the questions themselves. More often than not, partial solutions, in the age of globalization, miss the target.

2.2 Cosmopolitanism within the state: turning inwards

Decoupling the national and the transnational in the way just described is problematic. That approach sees, on the one hand, the internal legitimacy of the state on

¹³ Rached (2014) and Krisch (2010) offer a competent map of those approaches.

¹⁴ For an account on the erosion of statehood and the desirable retainment of the constitutional language to understand and assess the process of transnationalization of law, see Walker (2010b). For a sceptic view, see Grimm (2010) and Krisch (2010). For a response, see Kumm (2013)

the basis of how popular sovereignty is instantiated through democratic procedures; and, on the other, its external legitimacy on the grounds of self-determination. The latter is derivative of the former, a mere corollary. That constitutes a seriously misleading departing point. In a world of multiple and increasingly interconnected political communities, yet divided by territorial boundaries, taking domestic collective decisions and adopting policies imply bringing about all sorts of transboundary effects*. Externalities, either positive or negative, are a fact for which one can give countless examples. Health, migration and climate, the three clusters chosen by this research, are good examples.

Globalization helped to highlight a legitimacy drawback that remains under-diagnosed and misperceived. And the defensive mantle of a traditional idea of sovereignty has a double distorting effect: externally, it conduces towards the pathology already pointed above; internally, popular sovereignty, translated through procedures of majoritarian decision-making and functional delegation along bureaucratic chains, keep domestic decisions unresponsive and unaccountable to the interests and stakes of non-members of the political communities that are affected by those decisions. To begin with, this phenomenon infringes the elementary principle of the affected interest, which normatively organizes representational mechanisms.

The match between governmental legitimacy and affected interests has been constructed through an ingenious articulation of a bounded community within a territory. That arrangement does not fit, and has most probably never adequately responded to the transboundary effects of national collective decisions. Deeper and wider globalization has simply magnified the prominence and largeness of these effects. The current institutional paraphernalia of the state, though, remains the same, and the mismatch has never been so pronounced. The high currency that parochial democracies¹⁵ acquired in political science and international law is, or turned out to be, unwarranted.

“Turning inwards”, thus, is a conceptual step that by no means excludes or underestimates the transnational sphere. It rather conceives of both dimensions as mutually imbricated. But “turning inwards”, this time, should avoid taking popular sovereignty, or the sovereignty of the union of citizens, exclusively into account. “Turning inwards”, from a cosmopolitan perspective, means to charge the state with the burden of including outer stakeholders into its legitimacy conception and decision-making structures.

¹⁵ See Sellers (2012)

Towards whom should the state be legitimate? In the constitutionalist narrative depicted above, towards two addressees: the citizens and the international community. In that conception, moreover, by invoking sovereignty, the state is entitled to exclude itself from the network of international agreements and institutions. International law has a merely derivative nature, rather than a self-standing and co-original one, on a par with the latter.¹⁶

Cosmopolitanism opens up another window and sheds light on a third addressee: the outer stakeholders, those who are interested or affected by a domestic policy. Investigating how to legitimate national policies through cosmopolitan lenses is part of what this research is about. It focuses on this additional layer, which is as urgent as the other. It seeks to square sovereignty with the burdens of globalization, of deliberate and irrevocable interconnectedness. It does that not by devising one more alternative arrangement for global governance. Without discarding the importance of that path, but leaving it partially suspended, it is more interested on what happens within the state.

The essence of the cosmopolitan insight – be it moral, political or legal, be it ancient or modern, be it liberal or republican – is to conceive of a world of citizens unimpeded by excluding borders, a world in which borders are neither determinant of the moral or legal status of individuals, nor a condition for their equal recognition.¹⁷

The institutional translation of the cosmopolitan claim, and how it articulates the national and the transnational levels in one unified and mutually imbricated narrative, will be a matter of controversy – again, both theoretical and political. But an emerging literature has been pointing to this direction. What Kumm has called the “cosmopolitan turn in constitutionalism”¹⁸ is an incipient collective work-in-progress. Let me quickly pick a few meticulous remarks of some of the most sophisticated approaches to the problem.

¹⁶ Walker hints at the distinction: “On the one hand, international law may be sponsored as a deracinated and derivative law between particular constitutional sovereigns with little self-standing legitimacy, as has been the case for much of its modern history (...) On the other hand, international law may be sponsored as a kind of self-standing *ius gentium* – a law of peoples trading under the banner of a broader transnational morality and tending towards the assertion of a natural law pedigree.” (2010, 25) Kumm (2013) and Brunkhorst (2014) also make crucial contributions to it. Brunkhorst explains: “This then leads to the thesis that modern state formation must be explained by the co-evolution of cosmopolitan and national statehood. The pluriversum of modern Leviathans does not precede international law and cosmopolitan statehood. In truth, evolution goes the other way round: Cosmopolitan statehood precedes national statehood. The pluriversum of modern Leviathans does not precede international law and cosmopolitan statehood. In truth, evolution goes the other way round: Cosmopolitan statehood precedes national statehood.” (2014, 81)

¹⁷ Brock and Brighouse (2005), Pierik and Wouter (2010). For a legal approach, see Bogdandy, 2012.

¹⁸ Kumm (2009)

Somek, despite having a more sociological take in comparison to the normative and conceptual here envisaged, manages to summarize the cosmopolitan insight:

“The cosmopolitan constitution perceives national constitutions through the eyes of those who are not citizens. (...) It suggests that any bounded democracy is inherently undemocratic since it denies outsiders adequate representation. (...) It can be shown that bounded democratic units are legitimate if they facilitate the virtual representation of foreign outsiders.”¹⁹

Kumm pushes the problem further, to delimit state’s authority within those policies that do not generate justice-sensitive externalities:

“The range of questions over which a state can plausibly claim legitimate authority is limited to questions that do not raise issues of justice-sensitive externalities. A state would overstretch its claim to legitimate authority and, in effect, insist on a relationship of domination with regard to those who are externally affected, if it does not accept the restriction of its authority and help support an international legal system of international law that is adequately equipped to address these issues.”²⁰

Benvenisti, in turn, proposes an enlightening concept of “sovereigns as trustees of humanity”, defined as follows:

“As trustees of humanity, national decision makers have an obligation to take into account the interests of others when devising policies (or when reviewing them, in the case of national courts). Although sovereigns are entitled to prioritize their citizens’ needs, they must weigh the interests of other stakeholders and consider internalizing them into their balancing calculus.”²¹

Forst’s “fundamental right to justification”, which fosters freedom from domination, also undergirds his “critical theory of transnational justice”. A domestic project of justice hinges upon a conception of transnational justice. He carves a context of justice in-between the global and the international – a “third way”. He contends: “in a given context of justice, all social relations to which one is subject and that can be changed by political action are to be justified reciprocally and generally to all those affected in a relevant way.”²²

Kumm, Benvenisti and Forst are leading the way in normative theorizing about the “turning inwards” move. They provide slightly convergent conceptions, in different levels of abstraction. There is a space to be carved, these theorists agree, in between two

¹⁹ Kumm, 2013, 11. For a sceptical view on the line-drawing between justice-sensitive and justice insensitive externalities, see Somek, 2014, 245.

²⁰ Somek: “Kumm does not specify the conception of justice underpinning this view.” (2014, 255)

²¹ Benvenisti, 2013, 314.

²² Forst argues: “in a given context of justice, all social relations to which one is subject and that can be changed by political action are to be justified reciprocally and generally to all those affected in a relevant way” (2012, 258)

purist approaches – the globalist and the statist.²³ That space was left generally uncovered. This intermediary realm or middle-ground unveils the actual interdependence of both dimensions. For a cosmopolitan, one cannot ponder over the legitimacy of a constitutional democracy by taking only fellow citizens into account. Neither without checking how states get integrated into the constitutive and procedural backbones of transnational institutions.

A cosmopolitan take on the matter enables one to claim that legitimate state government requires both the integration into a network of institutions at the transnational level, and the diligent regard for outer stakeholders in the making of domestic policies.²⁴ Constitutional theory still fails to clearly pin down the illegitimacy of domestic policies even when they allegedly respect citizens' rights and comply with all the conventional procedural standards. States should not be conceived as instruments for realising the cosmopolitan good. Still, in pursuing self-government, states need to become sensitive to cosmopolitan concerns.

On the basis of such considerations, I intend to develop the concept of 'cosmopolitan sovereign' as a regulative ideal to guide this theoretical and analytical enterprise. The notion of a cosmopolitan sovereign may be a meaningful normative placeholder not only for conceiving the legitimacy between and beyond sovereign constitutional democracies, but also within.²⁵ Cosmopolitan sovereigns should not only display an awareness of their responsibility towards humanity, but translate this commitment institutionally. And this commitment has repercussions for both the national and the transnational levels. The primary concern of this research, which might become its distinctive contribution to a burgeoning literature, is the former level.

The analysis remains state-centric, as any sensible analysis should still be. The state is a standpoint from which claims of legitimacy, rights and duties should still be made.²⁶ These are ideas in the making and occupy a relatively underpopulated branch of the 'globalisation studies' literature. No matter whether one calls it a cosmopolitan state, a cosmopolitan constitution or, as adopted here, a 'cosmopolitan sovereign', and despite the particular nuances of each approach (which are not just semantic, but conceptual),

²³ The reconceptualisation of sovereignty by way of searching a middle-ground between statist and globalist approaches is common among a few contemporary authors. Kumm, Benvenisti and Forst, for example, have put a large effort on that exercise.

²⁴ This is what Richard Stewart (2008) has called "the problem of disregard", but addressing accountability deficits of global governance institutions.

²⁵ Brunkhorst, 2005, 151.

²⁶ Somek contends: "No emancipation is possible without political action. To this end, the nation state appears today more indispensable than ever before." (2014, 283)

they share a common concern: the sovereign state is part and parcel of whatever expectation one can have for engendering political legitimacy in globalisation processes.

This requires a reformulation or recalibration of the very idea of sovereignty, which does not have to be at odds with globalization. A superior governmental arrangement for handling the global common goods might emerge from this historical process, and it cannot dispense with the states. And this arrangement might be better named a “cosmopolitanism of nations”²⁷ or a “cosmopolitanism of sovereigns”.

So much for the theoretical elucidation of an integrated and cosmopolitan frame to articulate the relationship between the domestic and the transnational. In the next section, I will briefly sketch the character of the policies to be studied in light of that analytical point of departure.

2.3 Policy intersections

Health, migration and climate are intimately enmeshed areas of transboundary concern, with mutually interfering causal chains. These policies, in other words, are functionally intersectoral in the domain of global public goods. The project shies away from any attempt to propose a conception of the right policy in any area, or devise a proposal for best intersectoral policy that would be demanded on the basis of some ideal of justice. Applying the cosmopolitan lenses to some of the most pressing policies in the age of globalisation is vital goal of this research. Let me outline some basic tenets of these three policy clusters.

Health

Health as a policy concern emerged as a purely domestic issue. Governments were responsible for protecting its own citizens from diseases and other health threats. Internationally, such responsibility would imply protecting the country from alien epidemics and, eventually, helping poorer countries plagued with health disasters.²⁸ This straightforward picture starts to change when countries lose their ability to tackle, individually, the health problems affecting its own population, regardless of its level of wealth. The increasing level of political and economic interdependence among states has

²⁷ Urbinati rescues the cosmopolitanism of Mazzini to show how his political thought serves the contemporary political challenge by defending a “cosmopolitanism of nations” rather than an “individualistic cosmopolitanism”. By that, Urbinati examines how democracy at home should be a premise of democracy abroad (1996, 214).

²⁸ See Frenk et al., p. 94.

a hand in such process. People travel and migrate more, consume the same type of products and are subject to similar daily routines. In addition, modern environmental problems, such as climate change and lack of a sustainable development, also pose immediate health threats.

The consequence is that the line that once separated the diseases that affected richer societies (cancer, diabetes, cardiovascular problems, mental illness, tobacco related diseases) and poorer ones (malnutrition, maternal deaths, pandemic influenza) have become blurred at the edges, and poorer countries struggle to handle the extra burden on its health systems.²⁹ Such threats, which have domestic and transnational origins, have the capacity to influence the health of population from several countries, but cannot be dealt with by one country alone. It is a global problem that needs cooperative efforts among states.³⁰

The World Health Organization was formally established in 1948, at the International Health Conference. WHO's general objective is to promote the highest possible level of health to the world's population. To this end, it has a wide range of powers, from functioning as a coordinating authority on international health work to furnishing technical assistance and providing epidemiological and statistical services.

The 2014 Ebola outbreak is just one example on how global health needs to be structured around two pillars: a strong international organization, which should be empowered with well thought decision-making processes and effective tools to influence domestic policies; and a robust national health systems, which should be able to provide an ongoing well-being to individuals, as well as being capable to respond to health emergencies.

Migration

The relocation of people across borders (or international migration) ignites some of the most heated debates of the day. International migrants, who leave their countries behind in order to start a new life abroad, are sometimes unjustly depicted as an extra, and generally, unwanted, burden for their receiving states. They would allegedly imbalance the welfare system of the hosting state, stole the 'residents' jobs and interfere with the social fabric of the hosting country with their different culture and language. The more recent public and media outcry over international security are additional

²⁹ Frenk et al., 2014, p. 95.

³⁰ "The global in global health refers to the scope of problems, not their location" (See Koplan, Jeffrey P. et al, 2009, p. 1994)

reasons in favour for demanding more restrictive immigrant policies. This is a pattern that has been solidifying since 1945, when developed states have turned out to be the desired destiny for people coming from poorer states.³¹

International migrants are not all of the same kind, entitled to the same rights and duties. To use a basic typology, there is the *economic migrant*, who leaves her natal country in order to have a better life in wealthier countries, and there is the *political refugee*, who is forced to leave her own country due to persecution.³² The definition provided by the 1951 United Nations Convention relating to the Status of Refugees makes it clear that refugee is a person who is unable to return to her own country “owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”.³³ To this list we can add a third type, the *environmental or climate refugees*, people who flee their original land because of the dire consequences caused by climate change, or other environmental disasters.

Asylum seekers (or political refugees) have a clearer international protection, although not necessarily sufficient.³⁴ They cannot be penalised for entering illegally in the country and, most importantly, asylum seekers cannot be expelled to her natal country, or wherever she fears being persecuted, which is known as the *non-refoulement* principle. Invisible to the international system, the economic and environmental migrants are at the mercy of domestic policies concerning immigration and, without doubt, the current state of affairs is not sympathetic to them.

Climate

Climate change emerged as a scientific concern in the early 60s, when scientists firstly accepted that the emissions of greenhouse gases were capable of trapping the heat in the atmosphere. It only turned into a political subject when a group of scientists, associated with the World Meteorological Organization (WMO), were successful in publicising the growing scientific body of evidence around climate change and its alarming consequences, such as unusual warming trends of global temperatures. The creation of the Intergovernmental Panel on Climate Change (IPCC), in 1988, by a joint

³¹ Spellman, 2008, p. 12.

³² Spellman, 2008, p. 8-9.

³³ Art. 1. Article 14 of the 1948 Universal Declaration of Human Rights, which is the basis for the refugee convention states: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

³⁴ The term environmental refugee is perceived as misplaced since it stretches the original concept of refugee. “Environmental migrants” is the chosen label for the International Organization for Migration (IOM). Migration and Climate Change, IOM International Organization for Migration Research Series n. 31, 2008, at 15.

resolution of the United Nations Environmental Programme (UNEP) and the WMO, to assess the scientific aspects of climate change, signalled the intention of governments to finally engage with the scientific community and strive for concerted action.³⁵

International cooperation gained a momentum with the adoption of the Kyoto Protocol, in 1997. The Kyoto Protocol was meant to fill in for the deficiencies of the FCCC by defining clear targets and a timetable for developed countries only (the “Annex I countries”) to reduce its emissions. The Kyoto Protocol is usually referred to as a landmark in international law for engendering the creation: (i) of market mechanisms to facilitate developed countries’ compliance with its emissions commitments; and (ii) of a comprehensive compliance mechanism.

In the long run, however, the support around the Kyoto Protocol, which was never unanimous in view of the absence of the United States from the deal, started to wane. The division of obligations between developed, which have emissions’ constraints, and developing countries, which do not, is described as the main culprit. Developed countries argue that the world’s emissions chart has changed substantially since the FCCC was adopted and the emissions from emerging economies, such as China, India, and Brazil, have been on the rise and are not expected to de-escalate in the near future.

A new strand of the Climate Change Regime was set in Paris in 2015 (COP-21). The framework that distinguished the Kyoto Protocol (binding, “top-down”, developed countries’ circumscribed emissions targets) will be replaced by a more flexible architecture with voluntary, ‘bottom-up’ emissions targets for developed and developing countries alike – the intended nationally-determined contributions (INDC). The puzzle for the international community at the moment is how to push states to increase the level of ambition of its INDCs and how to devise a framework that will be able to compare efforts among countries and to verify compliance. The question of whether the international regime has had any impact in reducing global emissions was answered with a resound no. However, since the inception of the regime, the parties have been discussing practices, exchanging information on science, and gathering data on climate change. If anything, the topic has come to the spotlight.

At the domestic level, climate policies are shaped as the outcome of international commitments or independently from them. These policies vary greatly among individual nations as each state has a different set of political, institutional and economic constraints to be considered.

³⁵ See Bodansky and Rajamani, 2013, 6.

Intersections

The intense cross-fertilization and mutual causalities between these three policies is beyond doubt. It is not a hard task to show their intersectoral aspects. Climate change may turn certain parts of the world harder to live. Floods storms and droughts make people run away.³⁶ Climate change forced migration may turn the Millennium Development Goals (MDGs) virtually unachievable. It obstructs development in many different ways: by increasing pressure on urban infrastructure, by undermining economic growth and leading to worse health, educational and social indicators, and so on.³⁷ The displacement of populations impairs the provision of medical care and vaccination programs, which in turn makes infectious diseases harder to tackle.

The causal chains are numerous. Dependent and independent variables are hard to isolate. These features highlight the enlightening potential of a set of domestic policies that have an evident transboundary dimension. Thinking and planning these policies together, thus, is a condition for intelligently handling them.

2.4 The public law of cosmopolitan sovereigns: research questions

How should the public law, or the institutional infrastructure and underpinning constitutional principles and norms of cosmopolitan sovereigns look like? The public philosophy of constitutional democracies still tends to conceive state constitutional legitimacy in a parochial and myopic way. The cosmopolitan stance, I contend, creates internal legitimacy pressures (let alone external ones) that must be coped with.

The cosmopolitan sting that this research advances may cut both ways and pose legitimacy conditions for international and domestic law. This research does not take a stand on what is precisely the most desirable arrangement of global governance, a question that can hardly be responded in the abstract. It attempts, however, to diagnose *parochial blind-spots*, *cosmopolitan deficits*, or legitimacy deficiencies of the public policies under scrutiny.

Developing a sensitive enough framework for detection, description and comparison of those blind-spots is a task that is crying out to be undertaken. That conceptual framework needs to have, on the one hand, adequate normative grip for

³⁶ "Migration and Climate Change", IOM International Organization for Migration Research Series 31, 2008, p.16

³⁷ Migration and Climate Change, 2008, p. 31-32

clarifying the values at stake and, on the other, descriptive acuteness and versatility to allow for comparative exercises. The translation of such general goals into operational research questions will need to be further spelled out by the research itself. For now, however, some departing questions are worth mentioning.

On the theoretical strand, the ultimate question is a classical one: what makes state power legitimate? The age-old stabilised answer by the constitutionalist Westphalian persuasion is probably, if not entirely, defunct. The validity conditions for a sovereignty claim are already being transformed not only by political theory, but by thicker models of international law (and international human rights is probably the best example). This research proceeds by bringing the neglected cosmopolitan angle to the fore and using it to assess internal legitimacy. The ideal of a cosmopolitan sovereign – a state that perceives itself and acts from a cosmopolitan perspective – is the guiding north.

On the policy-study strand, the driving question is: what does it mean to construct public policies that pass the cosmopolitan muster (in all its multiple complexion, comprising laws, administrative regulations, bureaucratic operationalisation etc.)? What is that test made of? How does one gauge the extent to which these policies pass the test? To what extent do policies express, both in terms of their justificatory grounding and concrete procedural structure, the cosmopolitan sensitivity? Domestic policies that fail to grasp and give effect to that dimension have a legitimacy deficit of a kind that constitutional theory has not been willing to conceptualise.

The cosmopolitan lenses, therefore, do not only provide conceptual pathways for thinking about the legitimacy of transnational institutions or even world government. They offer a probing angle to reconceptualize the legitimacy of state institutions and decision-making processes.

Conceptions of “cosmopolitan democracy”³⁸ may be complementary to this approach. Again, I do not intend to embark in the discussion about what are the most attractive arrangements beyond the state. It is true, for the sake of coherence, that a complete justification for a cosmopolitan sovereign partly hinges upon how the state gets inserted into channels of transnational decision-making.³⁹ There are inherent democratic

³⁸ Unsurprisingly, there are various versions versions of “cosmopolitan democracy”, but Held (2004) and Archibugi (2008) are among the exponents thereof.

³⁹ As Venzke contends: “international action is also a mechanism for overcoming the democratic deficit that results from the projection of one state’s power onto the people of another domestic polity”. Entering transnational schemes, for him, is a way of “strengthening its democratic justification from the vantage point of cosmopolitanism”. (2012, 10)

deficits in, so to say, parochial democracies. Concededly, these deficits cannot be entirely solved by incorporating into these policies cosmopolitan values and procedures.

However, this project puts emphasis on the dimension ‘within the state’ and leaves that complementary question suspended. This suspension does not mean, thus, that the conception of cosmopolitan sovereigns fails to grasp that as an indispensable task. But it understands that investigating internal policies through cosmopolitan lenses is a labourious enough task for this distinct enterprise.

Spotting the domestic sphere as the main standpoint of this research (the “turning inwards”) may run the risk of falling in the very same methodological mistake – or parochialism – diagnosed above. I believe, though, that this enterprise is methodologically possible and valid as long as it is sincere about its own incompleteness and leaves open the complementary space to be fulfilled by further theorization.

3. Bibliography

- Archibugi, Daniele. *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*. Princeton University Press, 2008.
- _____. "Cosmopolitan Democracy and its Critics: A Review." *European Journal of International Relations* 10, 3, 2004.
- Benvenisti, Eyal. "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders." *The American Journal of International Law* 107, 2, 2013.
- Bodansky, Daniel. "What's in a Concept? Global Public Goods, International Law, and Legitimacy." *The European Journal of International Law* 23, 3 (2012)
- Bogdandy, Armin. "Globalization and Europe: How to Square Democracy, Globalization, and International Law." *The European Journal of International Law* 15, 5, 2004.
- _____. "Parochialism, Cosmopolitanism, and the Paradigms of International Law." In Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law*. Cambridge University Press, 2012.
- Bogdandy, Armin von; Wolfrum, Rüdiger; Bernstorff, Jochen von; Dann, Philipp; Goldmann, Matthias (eds). *The Exercise of Public Authority by International Institutions Advancing International Institutional Law*. Springer, 2010.
- Bogdandy, Armin von; Goldmann, Matthias. "The Exercise of International Public Authority through National Policy Assessment." *International Organizations Law Review* 5, 2008.
- Brock, Gillian; Brighouse, Harry. *The Political Philosophy of Cosmopolitanism*. Cambridge University Press, 2005.
- Brunkhorst, Hauke. *Critical Theory of Legal Revolutions*. Bloomsbury, 2014.
- _____. *Solidarity: From Civil Friendship to a Global Legal Community*. MIT Press, 2005.
- Búrca, G de. "Developing Democracy Beyond the State." *Columbia Journal of Transnational Law* 46, 2008.
- Correa, Luiz Felipe de Seixas. *Brazil in the United Nations: 1946 – 2011*. Brasília: Fundação Alexandre Gusmão, 2013.
- Dunoff, Jeffrey; Trachtman, Joel. *Ruling the World? Constitutionalism, International Law, and Global Governance*. Cambridge University Press, 2009.
- Elkins, Z; Ginsburg, T. Melton, J. *The Endurance of National Constitutions*. Cambridge University Press, 2009.
- Forst, Rainer. *The Right to Justification: elements of a constructivist theory of justice*. Columbia University Press, 2012.
- Forst, Rainer; Schmalz-Bruns, Rainer (eds). *Political Legitimacy and Democracy in Transnational Perspective*. Recon Report 13, 2011.
- Fraser, Nancy. "Reframing Justice in a Globalizing World." *New Left Review* 36, 2005.
- Frenk, Julio et al. "From sovereignty to solidarity: a renewed concept of global health for an era of complex interdependence." *Lancet* 383, 2014.
- Glenn, Patrick. *The Cosmopolitan State*. Oxford University Press, 2013.
- _____. "The Cosmopolitan State." *Kansas Law Review*, 61, 2013.
- Grimm, Dieter. "The Achievement of Constitutionalism and its Prospects in a Changed World." In Loughlin and Dobner (eds). *The Twilight of Constitutionalism*. Oxford University Press, 2010.
- Held, David. *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance*. Stanford University Press, 1995.
- Krisch, Nico. *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*. Oxford University Press, 2010.
- Kumm, Matthias. "The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State." In Dunoff and Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, 2009.
- _____. "Global Constitutionalism and the Cosmopolitan State: An Integrated Conception of Public Law." *Indiana Journal of Global Legal Studies* 20, 2, 2013.

- Loughlin, Martin; Dobner, Petra (eds). *The Twilight of Constitutionalism*. Oxford University Press, 2010.
- MacCormick, Neil. *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*. Oxford University Press, 1999.
- Möllers, Christoph. “Multi-Level Democracy”, *Ratio Juris*, 3, 2011.
- Neyer, Jürgen. “Justice, not democracy: legitimacy in the European Union.” In Rainer Forst and Rainer Schmalz-Bruns, *Political Legitimacy and Democracy in Transnational Perspective*, Recon Report 13, 2011.
- Petersmann, Ernst-Ulrich. “Human Rights Require ‘Cosmopolitan Constitutionalism’ and Cosmopolitan Law for Democratic Governance of Public Goods.” *Contemporary Readings in Law and Social Justice* 5, 2, 2013.
- Pierik, Roland; Werner, Wouter. *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*. Cambridge University Press, 2010.
- Rached, Danielle. “Doomed aspiration of pure instrumentality: Global Administrative Law and accountability.” *Global Constitutionalism* 3, 3, 2014.
- Risse, Mathias. *On Global Justice*. Princeton University Press, 2012.
- Risse, Thomas. “Transnational Governance and Legitimacy.” Manuscript, 2004.
- Rudolph, Linda; et al. “Health in All Policies: Improving Health Through Intersectoral Collaboration.” Discussion Paper. *Institute of Medicine of the National Academies*, 2013.
- Sartori, Giovanni. “Constitutionalism: A Preliminary Discussion.” *The American Political Science Review* 56, 4, 1962.
- Sellers, Mortimer (ed). *Parochialism, Cosmopolitanism, and the Foundations of International Law*. Cambridge University Press, 2012.
- Somek, Alexander. *The Cosmopolitan Constitution*. Oxford University Press, 2014.
- Spellman, W.M. *Uncertain Identity: International Migration since 1945*. Reaktion Books, 2008.
- Stewart, Richard. “Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance.” Manuscript with the author, 2008.
- Tasioulas, John. “Parochialism and the Legitimacy of International Law.” In Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law*. Cambridge University Press, 2012.
- Teubner, Günther. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford University Press, 2012.
- Urbinati, “‘A common law of nations’: Giuseppe Mazzini's democratic nationality”, *Journal of Modern Italian Studies*, 1, 2, 1996.
- Venzke, Ingo. *How Interpretation Makes International Law: On Semantic Change and Normative Twists*. Oxford University Press, 2012.
- Walker, Neil. “Out of Place and Out of Time: Law’s Fading Co-ordinates.” *The Edinburgh Law Review* 14, 2010a.
- . “Beyond the Holistic Constitution.” In Loughlin and Dobner (eds). *The Twilight of Constitutionalism*. Oxford University Press, 2010b.
- . “Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship.” *Rechtsphilosophie & Rechtstheorie* 39, 3, 2010c.
- . “Taking Constitutionalism Beyond the State.” *Political Studies* 56, 2008.
- Weiler, Joseph. “The Geology of International Law – Governance, Democracy and Legitimacy.” *ZaoRV* 64, 2004.