

NEW EUROPE COLLEGE



*Cosmopolitanism and Philosophy  
in a Cosmopolitan Sense*

Proceedings of the International Workshop,  
organized at  
the New Europe College, Bucharest  
on 21- 22 October, 2011

Edited by  
Áron Telegdi-Csetri and Viorela Ducu

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ISBN 978-973-88304-5-5

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# A COSMOPOLITAN DEFENSE OF STATE SOVEREIGNTY

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Cosmopolitan normative commitments are often considered incompatible with the recognition of state sovereignty as a basic principle of international law. Although cosmopolitans do not necessarily reject the normative importance of sovereignty completely, there is a tendency among contemporary cosmopolitans to ascribe to it a mere derivative significance, dependent on its instrumental value for protecting human rights. Based on the idea that every person is an equal unit of concern generating obligations on every other person, they advocate international legal reform in a decisively individualistic direction: away from an order based on the sovereign equality of states toward an order where respect for basic human rights serves as the exclusive criterion for the legitimacy of political and legal institutions.

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In this paper, I argue that there is a stronger connection between the rights of individuals and state sovereignty. Taking a conception of justice informed by Kant's philosophy of right as a point of departure, I claim that state sovereignty is intrinsic to the recognition of individuals as units of ultimate concern. Justice among persons, understood as each person's right to be independent from subjection to other person's arbitrary choices, presupposes that interaction is regulated by coercive public institutions (i.e., state authorities). Accordingly, sovereignty, entailing norms such as non-intervention and self-determination, should be seen as a necessary correlate to respect for the rights of persons.

## I

By cosmopolitan normative commitments, I understand the implications of the core normative idea of so-called moral cosmopolitanism<sup>1</sup> – the idea that each person is to be recognized as an equal unit of concern generating obligations on every other person. Thomas Pogge has spelled out this idea by identifying three features uniting diverging strands of moral cosmopolitanism: *individualism*: the ultimate units of concern are individual human beings rather than human groups; *universality*: the status of ultimate unit of concern attaches to every living human being equally; *generality*: persons are ultimate units of concern for everyone.<sup>2</sup>

There is no necessary conflict between cosmopolitanism thus conceived and an international legal order of sovereign states. The latter, sometimes dubbed a "statist" order, is an order where all states have legal standing and are recognized as equals, so that they are formally subject to the same general rights and duties, most importantly the right to self-determination and the correlative duty of non-intervention. In a statist order, sovereignty implies that a state has legal personality, and thereby

can be a subject of international legal process and a party entering into international treaties. It also implies the entitlement to organize domestic legislative, executive, and adjudicative institutions as it sees fit as well as the obligation to respect the territorial integrity of other sovereigns.

Despite the compatibility of moral cosmopolitanism and a statist international order in principle, an influential strand of contemporary cosmopolitanism advocates global reforms in a decisively individualistic direction: away from an order based on the sovereign equality of states toward an order where respect for basic human rights serves as the exclusive criterion for judging the legitimacy of political and legal institutions. Proponents of this anti-statist cosmopolitan view – which include philosophers like Brian Barry, Charles Beitz, Allen Buchanan, Simon Caney, Darrel Moellendorf, and Fernando Tesón – argue that there should be congruence between domestic and international or global principles of justice. Whatever principles of justice apply internal to states should also apply in the international realm. And since justice is usually conceptualized in terms of human rights, so “the core of justice, protection of human rights, should be a primary goal of the international legal system”,<sup>3</sup> much in the same way that protection of human rights should be the standard by which we judge domestic political systems. State sovereignty is thereby reduced to an instrumental value whose importance is relative to its effectiveness in promoting and protecting basic human rights.<sup>4</sup> Individuals, not states, should be recognized as the ultimate subjects of international law, whereas the international legal standing of states should depend on the legitimacy of their domestic orders.

An important implication of this view is rejection of non-intervention as a basic international norm. Given the normative primacy of individuals, protecting basic human rights is considered a just cause for intervention, including military

intervention. This is not to say that human rights violations taking place on the territory of a state either complicit in or incapable of preventing these violations provide sufficient justification for military interventions. The scope of cases where interventions are justified is limited by standard *jus ad bellum* constraints: the use of military force must have a reasonable prospect of success, be a means of last resort, stand in proportion to the injustice it is meant to rectify, etc. Yet, the norm of non-intervention is not recognized as a self-standing norm governing international relations. As Charles Beitz puts it, “there is a right against intervention, but ... it does not apply with equal force to all states”.<sup>5</sup> Sovereignty is derived from the more basic concern with justice to persons, and “only just states deserve to be fully protected by the shield of sovereignty”.<sup>6</sup>

By the same token, the weight of claims to self-determination, as raised by former colonies in the 20<sup>th</sup> century, depends on whether or not liberation would be favorable with regard to reducing injustice. People living under foreign rule can invoke no intrinsic right to govern themselves against colonial powers. Self-determination, like non-intervention, is no self-standing principle. It is just “a means to the end of social justice”.<sup>7</sup> Only if there is reason to believe that decolonization will lead to a less unjust society is there a right to self-determination.

It seems reasonable to say that anti-statist cosmopolitans belong to what Gerry Simpson has called a tradition of “liberal anti-pluralism” characterized by “lack of tolerance for non-liberal regimes”.<sup>8</sup> Transforming sovereignty into a function of a state’s human rights record in effect implies discrimination between states on the basis of their internal features. Concretely, such discrimination comes to expression in various ways. It is reflected in proposals that representation in the UN should be restricted to democratic states that respect human rights,<sup>9</sup> or that there should be established a coalition of democratic states that

can trump the UN Security Council with regard to authorization of preventive use of force.<sup>10</sup> It is also reflected in claims that regime change, or advancing justice in the basic structure of states, is a just cause for military intervention.<sup>11</sup>

In line with Jean Cohen, I consider this anti-statist trend among contemporary cosmopolitans to be “normatively flawed and politically dangerous”.<sup>12</sup> In practice, it risks becoming an imperial ideology of powerful states in need of an excuse for going to war and, more generally, seeking an exceptional status for themselves. According to Cohen, the mistake of the anti-statist cosmopolitans is that they seek cosmopolitan reforms without acknowledging the legitimacy of the sovereign state. They fall into a conceptual trap where sovereignty and human rights are construed as components of two mutually exclusive legal regimes.<sup>13</sup> With this, I agree. In the following, I will therefore suggest a way in which we can get around this trap.

## II

How is it possible to square human rights with state sovereignty? That is, how can the normative tenets of moral cosmopolitanism be reconciled with recognition of self-determination and non-intervention as fundamental principles of international law? An important first step, I believe, is to question what can be termed a distributive conception of justice implicit in, but not exclusive to, the anti-statist cosmopolitan view.<sup>14</sup> If I am not mistaken, it is precisely because they think of justice primarily in distributive terms that the anti-statist cosmopolitans cannot attribute more than an instrumental value to sovereignty.

Characteristic of distributive conceptions is that justice is defined in terms of fair allocation of certain “outputs”. Precisely what is regarded as relevant outputs does of course vary. For some, the output to be distributed is happiness. For some, it is benefits and burdens. Others again, consider rights belonging

intrinsically to every person *qua* human being to be the output that matters. As far as anti-statist cosmopolitans are concerned, the output is conceptualized as basic human rights grounded in human needs or interests. The idea seems to be that there are certain needs that must be fulfilled in order for any person to live a decent life. These needs are translated into the language of human rights in such a way that respect for these rights makes it possible to live a good life, whereas their violation makes it impossible.<sup>15</sup> Accordingly, requirements of justice are requirements referring to the conditions for living a decent life, as articulated by basic human rights, such as rights to life, security of the person, means of subsistence, freedom of movement and action, freedom of expression, freedom of association, religious freedom, etc. And whoever is committed to justice must seek to establish conditions that secure the non-violation of these rights.

This way of conceptualizing justice has impact on what role one ascribes to legal and political institutions, not least the institutions that make up a state. Insofar as one thinks of justice in terms of allocating morally desirable outputs, institutions can only serve as more or less useful means with which we approximate these outputs. Legal and political institutions are mechanisms or “tools for the indirect pursuit of something that can be fully specified without reference to them”.<sup>16</sup> The reason for establishing institutions exercising the powers of making, applying, and implementing laws is to make it more likely that the right results are realized, and the legitimacy of institutions depends on their effectiveness in this regard.

Such a view on institutions is easily traceable in the writings of the anti-statist cosmopolitans. It seems to be implied in the reduction of state sovereignty to an instrumental value, and is clearly expressed by Brian Barry: “the value of any political structure ... is entirely derivative from whatever it contributes to the advancement of human rights, human well-being, and

the like".<sup>17</sup> In a similar vein, Allan Buchanan emphasizes the "teleological" nature of moral reasoning about institutions. Even if it need not be guided by the goal of maximizing welfare or happiness, and even if all efforts at achieving morally worthy goals should be subject to deontological constraints, such reasoning is nevertheless fundamentally goal guided, in the sense that assessments of institutions takes the form of evaluating the institutions' effectiveness in achieving the pre-institutionally defined end they were made to achieve.<sup>18</sup>

There are at least three reasons why I think distributive conceptions of justice should be questioned. First, they tend to lose out of sight that justice is a concept that only applies to *relations* between persons. Whatever the requirements of justice are, they do not apply to persons living isolated from other persons. Yet this relational nature of justice is played down insofar as justice is conceptualized in distributive terms. If justice is understood primarily as a question regarding proper allocation of outputs, persons are first and foremost seen as *recipients* of justice. What persons have a right to is specified independently of their relations to other persons. Only in a second step do other people come into the picture as those against whom claims of justice can be raised. It therefore seems fair to say that distributive conceptions implicitly assume "a social atomism" where "individuals ... lie as nodes, points in the social field, among whom ... bundles of social goods are assigned".<sup>19</sup> This is to misrepresent what justice is really about.

The second reason we should question distributive conceptions of justice is that they blur important distinctions in a way that severs the link between demands for justice and actual injustice. A primary focus on outputs does not allow for distinguishing adequately between cases where people suffer as a result of natural events and cases where people suffer as a result of what other people do to them. Nor does it allow for

distinguishing adequately between cases of rights violations due to exploitation by other people and cases of rights violations implicating us. This is not to say that these distinctions cannot be recognized and assessed differently by adherents of a distributive conception. Yet inasmuch as justice is identified with a specific output it seems to follow that all of the cases raise justice-based demands on the 'supply-side'. Since what matters is the realization of a certain pattern of distribution, it is in each case a duty of justice to remedy the bad situation of those who suffer.<sup>20</sup> This is to confuse acts of solidarity with what we owe to others as a matter of justice.<sup>21</sup>

The third reason for questioning distributive conceptions of justice, at least in the specific form of ant-statist cosmopolitanism, is their insufficient attention to the issue of who can legitimately decide how abstract principles of justice should be specified, applied, and implemented in particular cases. Characteristic is a primary focus on what are appropriate principles of justice. What matters is that justice is done. The questions 'who is to determine what are justified claims?' and 'who is entitled to ensure that justice is done?' is either neglected or thought to rely on the extent to which the relevant agent meets objective standards of justice.<sup>22</sup> This is particularly unsatisfactory insofar as the demand for justice is linked to the use of coercive means, as in the case of military intervention. For the anti-statist cosmopolitan it becomes hard to identify any normatively significant difference between coercion by domestic political authorities and coercion by foreign governments.<sup>23</sup> Yet this is to ignore domestic context as the most important arena for specifying and concretizing what should count as each person's legitimate rights. With Raymond Geuss, one could describe distributive conceptions as "ethics first" approaches that "complete the work of ethics first, attaining an ideal theory of how we should act, and then in a second step ... apply that ideal theory to the action of political

agents".<sup>24</sup> This implies a problematic form of expert rule where political process and decision-making involving the rights holders themselves is replaced by normative reflection carried out by the moral philosopher.

### III

In view of the considerations brought forward above, it is worthwhile to consider whether there are better ways of conceptualizing justice. To my mind, a promising alternative is to think of justice in terms of what Kant calls a "right to freedom", defined as a right to independence from being subject to other people's arbitrary choices.<sup>25</sup> This idea squares well with the basic features of moral cosmopolitanism. It is individualistic in the sense that it recognizes individual human beings as ultimate units of concern. It is universalistic in the sense that the status of ultimate unit of concern attaches to every human being equally. And it is general in the sense that all persons are ultimate units of concern for everyone.

At the same time, conceptualizing justice in this way differs remarkably from conceptions articulating justice in terms of human rights protecting basic human needs. For one thing, it means holding the capacity for rational agency, and not human well-being, to be the ultimate ground for claims of justice. Although this does not rule out that public institutions should somehow be responsive to human needs, it implies that needs as such are insufficient for justifying claims against other persons. That someone is bad off is neither sufficient nor necessary for them being victims of injustice, and can therefore not give rise to duties of justice in other people. The normative baseline is that everyone should have the right to make choices of their own provided their exercise of this right does not encroach on anyone else's right to make free choices. Every claim of justice must somehow be founded in this right to equal freedom which

is an unconditional constraint on any effort at promoting other normatively valuable goals.

Moreover, the idea of equal freedom, as we find it in Kant, is not a distributive idea. It does not refer to the equal distribution of a pre-politically defined set of liberties or of an equal range of equivalent opportunities. Nor does it refer to freedom as one good among others that have to be promoted, possibly in competition with other goods, in order to secure human well-being. The idea is strictly relational, in the sense that it concerns the standing of persons vis-à-vis other persons. This standing should be one of mutual independence. Everyone should be free to decide for themselves what ends to pursue, and no one should be in position to impose their arbitrarily chosen ends on others. Justified restrictions on the right to pursue ends of one's own choice must be reciprocal and non-contingent. They must restrict everyone equally, and they must not merely represent the particular view of one person or group. Enabling relations of mutual independence is the rationale for establishing legal and political institutions, and the idea of such relations is the standard by which these institutions are assessed.

Since this conception of justice is relational from the outset, it avoids the social atomism of distributive approaches. Freedom is not a predicate that applies to persons considered individually. Rather than an output that can be specified without reference to one's relations to other people, it is a claim of each person against all other persons that they do not subject him or her to their arbitrary choice.

Importantly, the right to freedom is not only a principle for assessing the legitimacy of legal norms and institutions, but also an idea that requires a state authority. Understood as a system of reciprocal and non-arbitrary constraints, freedom is not possible to sustain in the absence of a public authority that organizes legislative, executive, and adjudicative public institutions. On this

conception, we can only interact in a fully rightful way in a civil condition, of which the state is constitutive. If one accepts that justice should be thought of in terms of a right to freedom, one should therefore reject the view that legal and political institutions are mere tools for promoting desirable outputs. They should rather be seen as constitutive of justice. For the same reason we should avoid thinking of state sovereignty as an instrumental value. If the state is a necessary condition for mutual independence, then recognizing the equal sovereignty of states is part and parcel of respecting each person's right to freedom.

#### IV

The reason why a coercive state authority is a necessary condition for interaction on just terms is that there are certain irresolvable problems of assurance and indeterminacy in a hypothetical state of nature. Although the problems are different, they refer to deficiencies that are parallel in their structure. In both cases the problem is that we unavoidably subject each other to arbitrary choice as long as there is not established a public institutional framework governing our interaction.<sup>26</sup>

The assurance problem is a problem regarding property right. In contrast to the right to freedom, which is innate, rights to property are acquired. Any legitimate legal system must permit such acquisition, because a general prohibition against it would be an arbitrary restriction of freedom.<sup>27</sup> Acquired rights must further be enforceable. Yet in a state of nature there is no one that can enforce these rights in a rightful way. Absent public authorities any coercive act is necessarily performed by a private agent, and such an agent cannot serve as a legitimate enforcer of justice. A private enforcer is what Kant calls a "unilateral will",<sup>28</sup> and is necessarily insufficient for establishing a system of reciprocal and non-arbitrary constraints. Rightful assurance is therefore not possible outside civil society.

The indeterminacy problem concerns how each person's sphere of freedom is to be demarcated from every other person's sphere of freedom. In part, this is a problem of specifying what abstract principles of justice prescribe generally. In part, it is a problem of applying general rules to particular cases. Since general rules and principles are always indeterminate, there can be a plurality of equally reasonable, yet incompatible interpretations of them. Although some cases are easy, many cases leave room for reasonable disagreement concerning the proper limits between mine and your freedom. As in the case of the assurance problem, the problem is that there is no rightful way in which we could resolve such disagreement in a state of nature, because any judgment about how to draw the distinction would be a private judgment. Whoever decides where the line should be drawn subjects others to one-sided restrictions, and this is incompatible with each person's right to freedom.

According to Kant, the only way to overcome the systematic dependencies that exist in a state of nature is to establish a state – that is, a public authority organizing legislative, executive, and adjudicative bodies. Inasmuch as one thinks that any justified restriction on freedom must be for the sake of freedom itself, I think one should agree with him on this point. The only way to create a system of reciprocal and non-arbitrary constraints is to create a public authority that represents the will of all citizens united. And if the state can reasonably be seen as the condition for possible realization of freedom, it seems mistaken to contrast human rights with state sovereignty, or to reduce sovereignty to an instrumental value. Sovereignty in the international realm should rather be seen as a correlate to each person's freedom as guaranteed by the state. To recognize the principle of non-intervention as a basic principle of international law is to approve of the state's role as an enabling condition for mutual independence among persons. By contrast, a right to military

intervention is the same as a right to jeopardize the freedom-enabling institutional framework of the state. It is a right to wage war, which in turn is to put the state sanctioned public order at risk. Hence, it is at odds with each person's right to freedom. Whoever is concerned with individual freedom should therefore be equally concerned with state sovereignty.

On Kant's view, the ideal constitution for the state authority constitutive of civil society is the republican constitution that binds executive power to the legislative will of the people. Yet there is nothing in the argument that I have put forward that makes a perfect republican constitution a criterion for recognizing the sovereignty of a state. The claim is that states are institutional frameworks that *enable* freedom, not that they guarantee the equal freedom of citizens as a matter of fact. *Qua* enabling frameworks they are structures where freedom can (but need not) take on concrete shape. Freedom is not a gift or something that can be imposed on a people from the outside, but a common practice, something which co-citizens must continuously strive for themselves. Such common practice further needs an arena where reciprocal ascription of rights can take place. States are such arenas. And these arenas, even when they are less than perfect, should be protected by the principle of non-intervention. Only to the extent that states are recognized as entities with legitimate claims to independence from foreign interference can there be talk of politically autonomous learning-processes toward what Kant calls a republican constitution. As Michael Walzer has put it, "the recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won".<sup>29</sup> There is in other words no direct relation between the domestic and the international standing of states, which is to say that sovereignty cannot be graded in accordance with the internal features of a state.<sup>30</sup>

## NOTES

- <sup>1</sup> Moral cosmopolitanism is commonly distinguished from institutional or legal cosmopolitanism. To my knowledge, the distinction is due to Beitz 1994, who distinguishes between institutional and moral cosmopolitanism. Pogge 2002 speaks of legal rather than institutional cosmopolitanism in order to draw a further distinction between interactional and institutional *moral* cosmopolitanism.
- <sup>2</sup> Pogge 2002, p. 169. See also Barry 1999, pp. 35 f.
- <sup>3</sup> Buchanan 2004, p. 81. See also Caney 2005, pp. 265 ff.
- <sup>4</sup> Beitz 1999, pp. 69 and 83, and Tesón 1997, p. 40.
- <sup>5</sup> Beitz 1999, p. 191.
- <sup>6</sup> Tesón 1997, p. 40.
- <sup>7</sup> Beitz 1999, p. 104.
- <sup>8</sup> Simpson 2001, p. 539.
- <sup>9</sup> Tesón 1997, p. 25.
- <sup>10</sup> Buchanan and Keohane 2005, pp. 274 ff.
- <sup>11</sup> Moellendorf 2002, pp. 104, 118, and 159 f.; Tesón 2005.
- <sup>12</sup> Cohen 2006, p. 486.
- <sup>13</sup> *Ibid.*, p. 497.
- <sup>14</sup> Young 1990, p. 16 ff., criticizes current philosophical discourse on justice for being dominated by a “distributive paradigm” that “defines social justice as the morally proper distribution of social benefits and burdens among society’s members.”
- <sup>15</sup> Buchanan 2004, pp. 128 ff., Tesón 1997, pp. 4 f., and Caney 2005, pp. 72 ff.
- <sup>16</sup> Ripstein 2009, p. 9.
- <sup>17</sup> Barry 1999, p. 37.
- <sup>18</sup> Buchanan 2004, pp. 74 f.
- <sup>19</sup> Young 1990, p. 18.
- <sup>20</sup> Buchanan 2004, pp. 86 ff. argues that we have a “Natural Duty of Justice” to ensure that the basic rights of all other persons are protected irrespective of how we are related to them.
- <sup>21</sup> Cf. Forst 2011, p. 2.
- <sup>22</sup> The latter part of this disjunction is supposed to cover the view defended by Buchanan 2004, pp. 233 ff.
- <sup>23</sup> Beitz 1999, pp. 80 and 87.
- <sup>24</sup> Geuss 2008, p. 8.
- <sup>25</sup> Kant 1996, p. 393.
- <sup>26</sup> The next two paragraphs are highly condensed versions of accounts found in Hodgson 2010, Ripstein 2009, pp. 145-181, and Varden 2008.
- <sup>27</sup> See Ludwig 2002, p. 175 f. and Hodgson 2010, pp. 58 ff.
- <sup>28</sup> Kant 1996, p. 409.
- <sup>29</sup> Walzer 1977, p. 89.
- <sup>30</sup> On this point I fully agree with Walzer 1980, p. 212.

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