

LEGAL PHILOSOPHY AND COSMOPOLITAN CONSTITUTIONALISM. DEBATES ON MORALITY, UNITY, AND POWER¹

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Abstract: Cosmopolitan Constitutionalism is a specific proposal in the international legal debate, the goal of which is the application of constitutional principles at the global level to achieve the universal guarantee of human rights. The author proposes that if we want to respond to the question of whether this project is possible and desirable, we need to analyse whether this is a plausible proposal, considering the distinctive features of law in the transnational sphere. In this light, the principal aim of this work is to show the principal challenges that Cosmopolitan Constitutionalism presents for the classic debates of legal philosophy, considering the current conditions of the international sphere. In this paper, the three topics that are considered are the debates between morality and law, law and power, and law and unity. The topics are problematized from the perspective of two contemporary scholars of Cosmopolitan Constitutionalism: Luigi Ferrajoli and Jürgen Habermas.

Keywords: Cosmopolitan Constitutionalism, philosophy of international law, global constitutionalism, transnational law.

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1. INTRODUCTION

Cosmopolitan Constitutionalism is a specific proposal in the international legal debate, the goal of which is the application of constitutional principles at the global level to achieve the universal guarantee of human rights. The academic discussion regarding this concept has been focus on the analysis of its practical possibilities of implementation considering the characteristics of the global landscape. I propose that a productive path that could be followed to debate the possibilities would be to study the impact of Cosmopolitan Constitutionalism in critical debates of legal philosophy.

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Traditionally, legal philosophy and constitutionalism were thought of and built through the lens of the state. However, if we want to develop a project such as Cosmopolitan Constitutionalism, we need to analyse whether it is necessary to change our comprehension of the main topics of legal philosophy by analysing the features of the law beyond the state. Considering this problem, the principal objective of this work will be to show the principal challenges that Cosmopolitan Constitutionalism presents for the classic debates of legal philosophy in the light of the current conditions of the international sphere. The key topics are the relationship between morality and law, unity and law, and law and power.

To carry out this task, firstly, a conceptual framework of Cosmopolitan Constitutionalism will be presented. This is a necessary analytical exercise because, in the relevant literature, there are many approaches regarding the idea. So, the first step in the research is to explain what Cosmopolitan Constitutionalism is and its foundations. In the second part of the research the three main debates of legal philosophy will be presented from the perspective of two contemporary scholars: Luigi Ferrajoli and Jürgen Habermas. I have chosen these scholars because they have developed a normative proposal of law and democracy that culminates with a cosmopolitan aspiration as part of a broader reflection in the context of a general theory.

By examining these questions, I will be able to respond to the question of whether it is possible to construct the project of Cosmopolitan Constitutionalism through a new comprehension of legal philosophy in transnational and cosmopolitan terms.

2. COSMOPOLITAN CONSTITUTIONALISM: CONCEPT AND CHARACTERISTICS

2.1. The uses of constitutional language in the international legal debate

The language of constitutionalism is often referred to in several ways in academic debates related to the global scenario.³ A variety of different expressions are used, such as “global constitutionalism”,⁴ “transnational constitutionalism” (Neves, 2013), “world constitutionalism” (MacDonald & Johnston, 2005), “multilevel constitutionalism”⁵ and “cosmopolitan constitutionalism” (Kumm, 2013). These expressions are sometimes used synonymously, but at other times they are used to represent different approaches to the question of whether it is possible to use constitutional language beyond state margins. As

³ A broader perspective on the uses of constitutional language can be found in (Schwöbel, 2011; Lang & Wiener, 2017; and Diggelmann & Altwicker, 2008).

⁴ This is the most common expression, and it is defined by Peters as “an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order” (Peters, 2009: 397). This expression encompasses many different approaches to this matter and has been presented as an interdisciplinary approach. See in this respect the first editorial of the journal “Global constitutionalism”. The concept is also used in a critical perspective by Schwöbel (2011).

⁵ The expression “multilevel constitutionalism” is often used to refer to the relations between autonomous legal systems that belong to a broader legal system, such as the European Union. See Pernice (2012).

Rodrigo points out, all that is a signal that “world constitutionalism” is a controversial concept that does not have only one version (Rodrigo, 2014: 13).

The distinction that is proposed here between descriptive and normative approaches is based on the analysis of the main purpose of each perspective when they use the constitutional language beyond the state. The descriptive approaches seek to find constitutional traits in structures and in international norms. They either highlight the existence of a “Constitutionalization” process in the international scenario, or show the existence of a “World Constitution”⁶ using the analogy as a strategy. The normative perspective uses the “Constitutionalization” perspective but goes beyond it, because it looks forward and tries to study the aspects we have to develop to transform constitutionalism into a reality beyond the state. The main purpose of this approach is to propose or suggest criteria to resolve the problems related to the creation and legitimacy of law.⁷ So, if we use the distinction between the concepts⁸ “Constitution”,⁹ “Constitutionalization”¹⁰ and “Constitutionalism”,¹¹ we can argue that the first two concepts are more involved with descriptive approaches, and the normative perspectives are more centered on developing “Constitutionalism” as a project. In these distinctions, Cosmopolitan Constitutionalism is characterized as a normative project,¹² although it uses descriptive elements to argue about the possibilities of the project.

Why did we use the expression “Cosmopolitan Constitutionalism” and not “Global Constitutionalism)? Even though “Global Constitutionalism” is more often used within the context of these debates, I use the expression Cosmopolitan Constitutionalism for conceptual and pragmatic reasons. For conceptual reasons, I use it because, as will be

⁶ Verdross has been considered as the “founding father” of the World Constitution discourse (Kleinlein, 2012a) because his concepts related to the international community and *ius cogens* norms were important in the development of a constitutional frame of analysis of public international law (Verdross, 1964). Currently, these ideas are sustained concerning the United Nations Charter (Fassbender, 1998) and in relation to *ius cogens* norms (De Wet, 2006).

⁷ The distinction between the normative and descriptive approaches used to analyse the debate on global constitutionalism is used by Klabbers to define the objectives of his book (2009a: 1-44).

⁸ These three concepts are used by Peters & Armigeon (2009); Peters (2008: 386-387); and Bodansky (2009: 565-584). These three concepts are also relevant to characterize the debates in the Global Constitutionalism journal, see Wiener, Lang & Tully (2012: 4-6).

⁹ In the international field the use of the word “Constitution” has been helped by the distinction between written and non-written Constitutions, and even when we consider that in the scholarly field we do not have a common comprehension of the content of the Constitution, it is an approach that pretends to be different to the international legalization approach because the Constitution is a creative and constitutive statute of public authority. A study about the different approaches to the “Constitution” concept at the international level can be found in Diggelmann & Altwicker (2008).

¹⁰ In regard to constitutionalization, it is possible to establish that this concept refers to the process inspired in constitutionalism, which is the “catchword for the continuing process of the emergence, creation, and identification of constitution-like elements in the international legal order” (Peters, 2006: 582).

¹¹ Constitutionalism, as a political philosophy applied in the international field, can be described, as it is by many scholars, as a “frame of mind” (Klabbers, 2009a; Koskenniemi, 2007a), that is to say, a structure or frame of thought that involves three ideas: power limit, guarantee of rights, and legitimate authority.

¹² Another approach that can be identified as normative in these terms is “organic global constitutionalism”, which is sustained by Schwöbel (2011).

presented, there exists a conceptual, historical, and empirical connection between these two ideas. Additionally, it is important to use the “cosmopolitan” adjective because the use of “global” as a concept carries the risk of missing out the prescriptive content of cosmopolitanism (Cortés & Piedrahita, 2011: 226). The “global” denomination has also been used to describe the effects of globalization within the Law or to talk about neoliberal policies; globalism has hidden under an apparent neutrality a certain ideology that implies deregulation and liberalization (Fariñas, 2012) and it is not necessarily linked with cosmopolitan principles.

2.2. Concept and characteristics

The following characterization of Cosmopolitan Constitutionalism as a project is a reconstruction of its arguments, departing from the relevant literature regarding the concept. Within this project, there are two main approaches. We find that scholars have arrived at this concept by reflecting on law and democracy (in the context of a general reflection on the political philosophy and legal philosophy); and other scholars have developed this concept through specific reflections on the constitutional character of the international arena. In the first group we found scholars like Habermas (1997; 1998; 2006; 2008; 2012; 2013a; 2014; 2015) and Ferrajoli (1998; 2004; 2008; 2011; 2018a). Both develop a normative proposal as part of a broader theory of law and democracy that culminates with a cosmopolitan aspiration. In the second group, we find scholars such as Kumm (2004; 2009; 2013; 2016), Peters (2006; 2009a; 2009b), Brown (2012; 2013), Bryde (2005), Petersmann (2013a; 2013b; 2017), Corradetti (2016, 2017), Stone-Sweet & Ryan (2018) and Benhabib (2006, 2011, 2016), whose work emphasizes the reconstruction of a specific hermeneutic frame to comprehend the relation between international and national relationships in constitutional and cosmopolitan terms.

Even though the starting point is different in these approaches and also considering their different denominations (post-national, beyond the state, global and cosmopolitan), Cosmopolitan Constitutionalism as a normative approach has minimal characteristics: (i) it is presented as a transformative and critical project, (ii) it puts rights, democracy and the rule of law in a central role, (iii) it uses conceptual and pragmatic arguments, and (iv) it is an heir of legal pacificism.

(i) Cosmopolitan Constitutionalism: a transformative and critical project. The characterization of Cosmopolitan Constitutionalism as a project is described by Peters in the following terms: “I employ the term ‘global [cosmopolitan] (or inter-national) constitutionalism’ in order to characterize a strand of thought (an outlook or perspective) and a political agenda which advocate the application of constitutional principles, such as the rule of law, checks and balances, human rights protection, and democracy, in the international legal sphere in order to improve the effectivity and the fairness of the international legal order” (Peters, 2006: 583).¹³

¹³ Kumm also defines it as “a normatively ambitious project of establishing legitimate authority among free and equals” (Kumm, 2013: 609).

It is a transformative project because, contrary to the traditional prejudice against this concept (Zolo, 2005), it does not use the “domestic analogy” as a strategy. Instead, it seeks to develop new criteria to comprehend the creation and legitimacy of law in the international field (Peters & Armigeon, 2009: 389). None of the proposals have a commitment to a global state, because the idea is not to create a global government, although constitutionalizing global governance (Peters, 2009a: 404). Moreover, it seeks to transcend the differentiation between national constitutional law and international law by proposing new criteria: the cosmopolitan. One example of the transformative element is the comprehension of democracy. It is sustained within this approach that “We the people” have to be understood as involving the international community (Kumm, 2013) and sovereignty must be comprehended as relational rather than national and state based (Benhabib, 2011).

The critical dimension can be understood in two ways: in one sense, in relation to constitutionalization, and in the other sense, concerning the critical character of the constitutional project. It is a critical perspective of the constitutionalization language because it does not rely on constitutional language without considering other special conditions within the international field. It is not a constitutionalism that creates self-evident hierarchies, nor is it a constitutionalism that seeks to unify diversity because of the anxiety caused by the lack of unity.¹⁴ Cosmopolitan Constitutionalism sustains that a complete Constitution in the deepest and most legitimate sense does not exist in the international order, because it lacks legitimacy. Cosmopolitan Constitutionalism attempts to offer a response to the empty spaces within the constitutionalization discourse.

Considering these reflections, the critical potential of Cosmopolitan Constitutionalism is shown in its efforts to identify constitutional tendencies, but above all, through demonstrating anti-constitutional trends to remedy them (Peters, 2006: 602). Furthermore, the language is critical because constitutionalism has an internal perspective that demands that the arguments used to sustain legitimate authority be constantly revised, and that is why it does not have a necessary commitment to the *status quo*. Therefore, the constitutional language is an appropriate tool for critiquing the structures of international law, which are sustained in domination, and therefore it demands that these structures be reshaped in order to be considered legitimate.

(ii) Human rights, democracy and rule of law. Cosmopolitan Constitutionalism is a composite concept, at the centre of which are prescriptions related to the central role of human rights, democracy and rule of law to argue about legitimate authority. These three elements are the foundation of the project and are named the “trinity” of global constitutionalism (Kumm, Lang, Tully, & Wiener, 2014). In regard to that matter, it is not a concept that we can describe as “formal” or “neutral”. Even when we consider that the concept and the foundations of human rights can be different (as we will examine in the Law/Morality debate), and that the conceptions about democracy can change (for example, deliberative or substantial), as well as the institutionalization of the relation

¹⁴ This is the criticism that Schwöbel raises about many aspects of the global constitutionalism discourse (Schwöbel, 2011: 147).

between these elements (regarding the different proposal about institutional architecture), it can be sustained that the main goal of the project is to achieve the application of these elements at the global level and this is the fundamental basis to comprehend the legitimacy of the model.

This implies that there is a connection between these three elements. However, it is not the same as the traditional constitutional design, because there are new elements or changes in the comprehension of the legitimacy of the model (regarding, for example, the comprehension of the *demos* or human rights understood as cosmopolitan norms). In a broader approximation, it is possible to establish that the relationship operates in this way:

Concerning human rights, because the cosmopolitan dimension is the foundation of the project, it is necessary to achieve the universal guarantee of human rights. Human rights are a goal and, at the same time, a requirement of the international and national debates. Democracy is not only a requirement and objective inside states at the national level, but also constitutes a goal at the global level because of the necessity of developing a legitimate authority. It also provides more complex demands regarding legitimacy at the national level (the cosmopolitan perspective adds new demands in terms of legitimacy to the “traditional model”). Finally, the rule of law element stresses that the strategy of limitation of power to achieve these objectives is legal and constitutional.

(iii) Conceptual and pragmatic arguments. Another aspect that is common in Cosmopolitan Constitutionalism is the use of conceptual and pragmatic arguments to justify the project. Following the line developed by Kant, whose arguments were pragmatic (related to cosmopolitan tendencies), and conceptual (reason-based), these approaches intend to develop an argument that connects these two perspectives.¹⁵ In regard to that matter, the practical foundations allow us to sustain that it is not a philosophical utopia: “It is no mere deduction from wishful thinking, but induced by manifold general developments in international law” (Peters, 2006: 605). From a conceptual perspective, it is sustained that there exists a conceptual connection between constitutionalism and cosmopolitanism considering the expansive force of constitutionalism, its historical character, and the current cosmopolitan turn of constitutional legitimacy.

The first element highlights that constitutionalism has an expansive force because it is founded on universal rights. This implies that constitutionalism must be transformed in order to fulfil its promises by adapting its features, considering the historical conditions. If constitutionalism wants to be effective, stay in time, and be coherent with its pretensions of universality, it must be a cosmopolitan project (Ansuátegui, 2008: 74). From a historical perspective, the scholarship argues that the connection between these approaches allows for recovering the inspiration of the French and American revolutions (Kumm, 2013: 611; Kumm, 2009: 315; Benhabib, 2016: 134-137). Finally, it is sustained that the idea of “We the people” involves an egalitarian promise of self-government that,

¹⁵ Following Diggelman and Altwicker’s reflections on their classifications of the justification strategies of global constitutionalism, here we are discussing the strategies that they called “ethic-pragmatic” (Diggelman & Altwicker, 2008: 639).

in the current globalization conditions, needs to have a cosmopolitan turn (Kumm, 2013; 2009). By connecting these two concepts, it is sustained that “the constitutional legitimacy of national law depends, in part, on being adequately integrated into an appropriately structured international legal system. And the legitimacy of the international legal system depends, in part, on states having an adequate constitutional structure” (Kumm, 2013, p. 612).

(iv) Heir of legal pacificism. Finally, as a characteristic, it is important to highlight the connection between Cosmopolitan Constitutionalism and legal pacificism (scholars as Kant, Bobbio, Kelsen) (Habermas, 2006; Ferrajoli, 2011). Despite the differences regarding the objective of the project (not only peace but also human rights), the philosophical foundations of Cosmopolitan Constitutionalism lead us to Kant and his reflections on cosmopolitan law, and through the path that was then developed by Kelsen and Bobbio. This is an important characteristic because it allows us to situate this project far away from sociological or moral perspectives. Cosmopolitan Constitutionalism is, above all, a legal project.

3. LEGAL PHILOSOPHY AND CHALLENGES FROM THE PERSPECTIVE OF COSMOPOLITAN CONSTITUTIONALISM

When we analyse the practical possibilities of the project, we are confronted with a variety of problems regarding, among others, the characteristics of Law in globalization. To give an account of the possibilities of Cosmopolitan Constitutionalism, I propose analysing whether this is a plausible proposal considering the distinctive features of Law in the transnational sphere.

Constitutionalism, as a political project, was built having as a frame of reference a theory of Law and democracy based on the state as the central political unit. However, the characteristics of the transnational landscape require these concepts to be adapted or revisited. One of the major challenges that this kind of theory must confront is to be developed with a robust legal philosophical reflection. As Danilo Solo points out, these theories are arrived at without any substantial political or legal philosophical reflection, and are not comparable with the effort that was shown in the philosophical reflections in the development of the modern and liberal state (Zolo, 2005). So, a discourse such as Cosmopolitan Constitutionalism has to reflect on whether it theses has to be accompanied by re-formulations of the classic debates of legal philosophy.

A productive path to follow regarding these issues is to analyse three major debates of legal philosophy:

i) **Law and Morality.** The tension between morality and Law is critical in this context because Cosmopolitan Constitutionalism is a concept based on the universality of human rights, which is an affirmation in which its content has a robust axiological commitment. So, the question raised is whether it is possible to have a legal cosmopolitanism divorced from morality in the context of the reflections on legal philosophy.

ii) Law and Power. The traditional debate about the relation of Law and power in the international sphere has been represented by the dispute between realists and legal pacifists. This debate has to be updated, since the power that has to be regulated by the cosmopolitan project is wild and diffuse and is no longer held by sovereign states. So, we can ask whether it possible within the cosmopolitan project to design a model that is able to coordinate and regulate power with these characteristics.

iii) Law and Unity. In recent years, pluralism has arisen as a third alternative in the traditional debate between monism and dualism. In the light of Cosmopolitan Constitutionalism, it is necessary to revisit the terms of this debate to ask which perspective is adequate for developing a cosmopolitan comprehension of Law. A relevant question is: Is it possible to develop a cosmopolitan understanding of the rule of recognition?

The analysis of all of these elements leads us to ask ourselves whether what we need is to develop a legal philosophy built from a transnational perspective; a philosophy of law that transcends the dichotomy between the international and national orders and that comprehends the law as a phenomenon that also occurs in the interaction between the different legal systems (Turégano, 2017: 226). A perspective such as this one, as a first approximation, is an interesting approach that provides Cosmopolitan Constitutionalism with a solid foundation from the perspective of the philosophy of law.

3.1. Law and Morality

From the perspective of Cosmopolitan Constitutionalism, if we want to enter into the law and morality debate, we must first determine which aspects or dimensions of the discussion have an impact on, or are relevant to Cosmopolitan Constitutionalism. It is a political project based on rights, which are norms with a strong axiological commitment (values such as liberty, equality, and solidarity), and considering this content and the language that is used to talk about rights, this leads us to pay attention to their moral characteristics (Mazzarese, 2004: 664-665). Also, in Cosmopolitan Constitutionalism, the universality of human rights norms is central. This is the idea that values associated with rights belong to all of humanity as a minimum and without exception.

Therefore, the axiological commitment and universality put the law and morality debate within the field of human rights. As a result, this debate in the context of Cosmopolitan Constitutionalism is not so much related to the classic debates of the philosophy of law (natural law and positivism) or moral philosophy (theories of justice). This is because the legal norms evidence moral values, which are the foundation of human rights, and this is one of the fields where the intersection between law and morality is produced (Ansuátegui, 2013: 256-257).

So, to talk about the influence of this debate in our field leads us to highlight that the dimensions of these two normative orders (law and morality) are related to the foundations of human rights. In this context, there are difficult questions that Cosmopolitan Constitutionalism must respond to in order to be a coherent project. For example, in the

context of Cosmopolitan Constitutionalism, we must ask whether we need to have either a commitment to moral universalism (and if we do, in which way are we to understand it?), or on the contrary, a commitment in which it is only possible to talk about universality in legal terms (and again, if so, in which way are we to understand legal universality?). Putting these perspectives in dialogue highlights that there has to be a comprehension of human rights and universality, framing the Cosmopolitan Constitutionalism discourse.

(a) Habermas and the Janus face of human rights

To Habermas, law is a mediation platform (hinge) between the pretensions of validity within the morality discourse and the facticity of the political discourse (Habermas, 1996). There does not exist any relation of superiority between the political, legal, and moral planes. The three are related and connected through the law, and share as a basis the communicative reason which operates through the discourse principle. From this perspective, when Habermas analyses the relations between law and morality, we must be aware that they have a complementary relationship. He sustains that law and morality have a relationship that does not imply an assumption of the natural law, because morality is not above the law (as the natural law suggests); instead it migrates inside the law.¹⁶

Within this comprehension, it is possible to have a better understating of his concept of human rights and the ideas about law and morality related to his understanding of universality. Even though Habermas develops the majority of his reflections having as a frame of reference constitutional democracies, in recent years his reflections have been oriented towards the analysis of rights beyond the state.

Habermas' concept of human rights makes it clear that within the concept, the relation between law and morality is present because, as he says, human rights are like "the face of Janus", because they look at the same time to law and morality. For that matter, human rights have two dimensions. The hinge between law and morality within the human rights concept is human dignity: "The idea of human dignity is the conceptual hinge that connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights" (Habermas, 2010: 269).

Human dignity has a revealing function because historical experience continually shows us different violations of human dignity, and that allows us to see new traits emerging that actualize our comprehension of human dignity. This leads us to the construction of new fundamental rights or new interpretations of their content. These references to human dignity, however, differ from the rationalistic-natural law tradition (in which the foundations of human dignity are a pre-political conception of human nature), because they do not present human dignity as an immanent reality.

¹⁶ Law has a certain amount of autonomy because the pretensions of validity within discourse theory are not exclusively related to morality, because within the law there are also pragmatic reasons. Also, we can see these differences from a functional perspective because law complements morality in respect to personal conflicts, but also has a dimension that is related to the organization of political power (Velasco, 2000: 99).

The moral character of human rights allows us to justify their expansive force, and that is why their validity transcends the national legal orders. The expansive force of human rights is founded neither on their legal form, nor from a justificatory strategy based on the reality of the codependence of global society (as the pragmatic or political strategies would do, such as, for example, Ferrajoli). Instead, Habermas bases the expansion on morality (human dignity): “Finally, the origin of human rights in the moral notion of human dignity explains the explosive political force of a concrete utopia” (Habermas, 2010: 466).

However, the universality is not only justified because of the expansive force of the morality discourse based on human dignity, it is also justified because of the basis of Habermas’ concept of human rights: the discourse principle. This is a principle that can operate in any political community that has as an aspiration legitimacy under the law, and it can be national, regional or global (Flynn, 2003: 454).

If human rights are conditional upon the exercise of communicative freedom and participation in self-determination discourses, considerations such as nationality, religion, ethnicity and race are not valid reasons to deny participation in these discourses. The rational-impartial reasoning principle which is the basis of moral cosmopolitanism, in Habermas’ case, is shown in the requirement for the participation of all people in the public sphere and in the development of a cosmopolitan order that allows that kind of dialogue.

(b) Ferrajoli and legal positivist relativism

Unlike Habermas, for Ferrajoli universality in the context of Cosmopolitan Constitutionalism can only be understood in legal terms. This is explained by his concept of fundamental rights and his ethical positions. Ferrajoli has a formal definition of fundamental rights. It means that he considers fundamental rights as the rights that belong to all people, understanding “right” as a “subjective right” (an expectation attached to a legal norm) (Ferrajoli, 2009: 19). The characterization of this concept as a “formal” concept means that the concept does not describe the content of rights or prescribe their content; instead, it seeks only to describe what fundamental rights are (Ferrajoli, 2011: 685).

Even though Ferrajoli has a formal concept of fundamental rights, that does not imply that he ignores the fact that fundamental rights are a product of political and moral developments. It only means that he recognizes that the transformation of political and moral demands into legal norms does not indicate that they are accepted by all and does not impose their moral acceptance or the sharing of their values (Ferrajoli, 2011: 14). That is why he provides a fundamental rights concept that allows us to understand it with no moral reference to identify it.

Considering these reflections, for Ferrajoli to say that the human rights doctrine should be assumed universally in moral terms is an anti-liberal thesis. It is precisely because not everyone morally shares human rights that they are stipulated as guaranteed to all. This is the true sense in which we have to understand universality. The foundations

of fundamental rights can be found in the equality that they prescribe; not because they are shared by all, but instead because they are guaranteed to all (Ferrajoli, 2011: 549). Another element that allows us to understand the universality concept in Ferrajoli's ideas is his relativist position regarding morality. Ferrajoli raises the idea that this is a meta-ethics and epistemology question, which is at the base of the debate regarding law and morality. His position implies that the truth or falsehood of moral affirmations cannot be established with absolute certainty, and that is why he states that his position is the only one that is compatible with tolerance.

(c) Legal cosmopolitanism and moral cosmopolitanism, separate paths?

When Walker analyses Habermas's cosmopolitan proposal, he sustains that cosmopolitans are often confronted by serious tensions that are illustrated by the difficulty in reconciling the relationships between the institutional, moral, and social dimensions of cosmopolitanism (Walker, 2005: 5). These tensions are manifested by the difficulty in defending universal moral aspirations considering cultural diversity, and how to institutionalize universality through legal structures that have as an objective to be efficient in regard to the cosmopolitan aspirations. Through the analysis of these cosmopolitan proposals and how they propose to articulate the different dimensions, it is possible to see the roots of the problems.

Considering the struggle of reconciling the different dimensions, we have in the contemporary debate different options. Some have renounced the efforts of reconciliation and justification and only use the cosmopolitan language to impose their values unilaterally (the false cosmopolitanism of the US "Pax Americana"). Others do not attempt ambitious projects from the justificatory point of view. Instead, they offer limited conceptions about human rights (the pragmatics, such as (Ignatieff, 2001)). Finally, others have as an option disregarded the morality in the justificatory discourse to present alternatives that are compatible with the neutrality demanded by cultural diversity (like Ferrajoli). So the tensions that all cosmopolitans have to face are present in the answers that Ferrajoli and Habermas provide.

Concerning Ferrajoli's arguments, it is possible to sustain that the construction of a model so exigent as Cosmopolitan Constitutionalism is, it cannot be separated from moral universalism (Benhabib, 2011:64). If we do not recognize at least the communicative freedom of the other, the justificatory mission has no meaning. That is why the utilitarianism of Ferrajoli is insufficient as a basis for a cosmopolitan proposal. To be coherent, these proposals require a kind of minimal objectivism. This means that it has to assume a comprehension of equality and reciprocity, which allows us to design a model based on rights. Even if we assume the utilitarian strategy as a basis for Cosmopolitan Constitutionalism it is because, as a minimum, we consider that there is something valuable to preserve under certain prescriptions.¹⁷ The discourse cannot escape from the difficulties raised when we interpret the basis of universality in moral terms.

¹⁷ As Ansuátegui points out, the rights discourse is a discourse that has the individual as a central protagonist. His value is presupposed not because of his belonging to a specific group, ethnic group, ideology or

For that reason, Habermas' perspective is more adequate. The way that these arguments are presented in justificatory terms in his comprehension of Cosmopolitan Constitutionalism highlights that moral universalism is required and implies, as a minimum, the recognition of communicative freedom (that in Habermas's perspective historically is assumed to be dignity). This concept is also developed by authors such as Benhabib and Forst, under different titles such as "the right to have rights"¹⁸ and the "basic right of justification".¹⁹

We can characterize the nucleus of these conceptions as constructivist (based on the discourse ethics), which sustains as a basic principle that there is a right to accept or reject the reasons presented by the speaker, and implies respect for communicative freedom.²⁰ Whether by the "right to have rights" or by the "basic right of justification" formula, they are both expressions of minimal moral objectivism. It is objective because it presupposes the existence of criteria that allow us to debate by using reasons and determine the correctness of the arguments. It is minimally objectivist when it is applied to our debate because the shape that the rights might take is determined discursively by the affected; it is not implied that it is the better or superior version of a concrete moral theory (Baynes, 2009: 18).

This minimal objectivism does not imply moral absolutism (as Ferrajoli sustains); it only entails that "any legal and political justification of human rights, that is, the project of legal universalism, presupposes recourse to justificatory universalism. The task of justification, in turn, cannot proceed without the acknowledgment of the communicative freedom of the other" (Benhabib, 2011: 64).

A perspective such as this one has different advantages:

(i) It is based on minimal objectivism, so moral development and the recognition of the historical dimension of human dignity are central ideas. Therefore, universalism is not based on the deep structure of the psyche or mind; instead, it is based on historical and moral experiences. There is a deep normative perspective in the history of the struggle for rights and such a normative perspective is related to the basic idea that people have the right to give and demand reasons (Forst, 2010: 719). The existence of this normative account allows us to sustain that rights cannot be used to defend indiscriminate pretensions.

religion, but instead because of his moral value and his demand to be recognized by others (Ansuátegui, 2013b: 112).

¹⁸ The author actualizes Arendt's (1973) concept, but here it has a different meaning (not statist) (Benhabib, 2011).

¹⁹ In Forst's version, this right is not associated with any specific metaphysical conception of human nature; instead it is a fundamental moral demand that no culture or society can deny. It is the unconditioned demand to be respected as someone to whom reasons about actions, rules, or structures should be provided (Forst, 2010).

²⁰ Habermas' and also Forst and Benhabib's perspectives are similar but present some subtle differences. However, they all have related and common aspects that allow us to characterize these positions as a shared view. A comparison between these three authors can be found in Baynes (2009).

(ii) A conception like this one does not have a detailed list of what rights should be listed to protect communicative freedom. It is “justificatory minimalism”, not a minimalism of contents (Cohen: 2004, 192). A justificatory minimalism allows us to sustain that, within the context of Cosmopolitan Constitutionalism, there are certain decisions that cannot be justified or some limits that we cannot cross. However, this is not an excuse to state that we cannot arrive at greater agreements in the international plane through democratic dialogue, social demands and contextualization.

(iii) This perspective does not imply the use of positivism or natural law as explicative paradigms. The universality of human rights as the basis for the cosmopolitan perspective incorporates the inherent tension between law and morality, and that is why it transcends this division (Forst, 1999, 49). This minimal objectivism does not indicate a commitment to natural law because there does not exist a commitment to transcendental truth that is above the law. It only recognizes that there are certain matters that we can discuss rationally and regarding which we can argue about their correctness (or not) if the conditions of the discourse are fulfilled. It admits that, within this debate, there is a tension with human rights produced by their pretensions of validity, which transcend the context and their specificities. However, it is a tension that can be relieved when we sustain that there is a relation of codependence between the human rights concept and democracy.

(iv) Finally, this perspective is compatible with the demands of cultural integrity because no culture can deny this minimum as an external imposition. As Forst sustains, the demands of cultural integrity presuppose the affirmation of the existence of the right to justification (Forst, 1999: 39).

So, if we return to the questions raised in this debate, it is possible to sustain that legal cosmopolitanism cannot be separated from a cosmopolitan moral perspective, even though it is minimal. This affirmation concerning the classic debates of legal philosophy suggests that we have to rethink the division between law and morality in absolute terms, because if we recognize that human rights are at the centre of the cosmopolitan proposal, then this indicates an assumption that there is an inherent tension within the project. Therefore, the objective of legal philosophy should not be to deny the tension or to overlap one dimension with the other. Instead, it must recognize the tension, value it, and above all, try to negotiate the interdependence between these two dimensions through the application of the universal in concrete cultural contexts.

3.2. Law and Power

Another aspect that is relevant to the debates about the philosophy of law, and particularly constitutionalism, is the relations between law and power. This is a central aspect of Cosmopolitan Constitutionalism because this is a proposal about how to articulate this relationship beyond the state.

This debate applied to the international field was framed for many years by the dispute between legal pacifists and realists, and today it is concerned with the criticism of

the capacity of treaties to bind and guide state conduct regarding human rights obligations.²¹ However, from the constitutional and cosmopolitan perspective there emerges an additional debate. The power that is supposed to be regulated and coordinated with the law differs from the power that was the subject of study by traditional theory. It is no longer a power centred on the state, and it is not only political power. It is a diffuse power and it is also concentrated in big corporations and characterized as a “wild” power.²²

So, in this context, it is important to ask ourselves how this power configuration affects the philosophy of law (in general) and constitutionalism (in particular). If constitutionalism is a legal strategy to put limits on power, it is necessary to determine which power we are referring to when the debate is situated beyond state margins, and how we identify such power and limit it. As we will see in the following part, even though there are a variety of answers, there is a standard or shared view regarding the characterization of power and the problems related to it in the context of globalization. These characteristics are: 1) it is shared power, 2) it is diffuse and wild, and 3) it is affected by an inverse hierarchy.

(i) Our first topic highlights the existence of a transfer or loss of power from the states to supra-national spheres. The states are no longer the centre of normative productions, nor are they the centre of political decisions (Twining, 2005). Sometimes, this process is produced in an ordered way (such as the assignment of sovereignty by the state, which is produced by the political organization in supra-national spheres through treaties), and in other cases, it is part of a non-regulated or non-systematic process of sovereignty loss (for example, the movement of political and governmental functions to the market).

(ii) The second topic emphasizes the diffuse character of power. In contrast to the classic constitutional model, which identifies power with political power, in the globalization context, there is a mixture of public and private power that is not easily recognizable and is also not susceptible to accountability. Habermas also points out that we can see the power blurred in a variety of communication and negotiation channels in spaces such as the G-20 or the G-8 (Habermas, 2015: 51). It is also a wild power because it has an absolute sovereignty, and it is impersonal, anonymous, invisible, and not responsible (Ferrajoli, 2018a: 18).

(iii) Finally, the last element that describes power beyond the state is predominantly its economic shape. As Ferrajoli points out, we are in front of an inverse hierarchy of power, because now it is no longer the governmental institutions that order the economy and financial capital; instead, it is the economic and financial power that imposes on governments the defence of their interests and their rules (Ferrajoli, 2018a: 19)

²¹ In the contemporary debate, the positions of Posner (2014) and Simmons (2009; 2012) are relevant. The principal topic is based on how effective the system is at limiting power and the law’s capacity to be coercive beyond the state. Regarding coercion, it is interesting to see the “outcasting” proposal developed by Hathaway and Shapiro (2011).

²² The expression “wild power” refers to the unrestricted liberty and lawlessness that Kant describes, a power that is not subject to limits and rules, a power that is characteristic of the natural state because of the lack of legal limits. This expression is used in the context of our debate by Ferrajoli (2011:45).

Koskenniemi describes the effects of this shape of power on law, by indicating that it has three main consequences: “deformalization” (the law is developed functionally following experts directives), “fragmentation” (it is no longer unified, and there is normative dispersion), and “empire” (the law is developed in relation to the dominant interest, which is now economics). When these characteristics of law are expressed in the language of power, we can see that we are abandoning the language of law by “regulation”, the government by “governance”, and responsibility by “compliance” (Koskenniemi, 2007a: 13-14).²³

From the constitutional perspective, we are alerted to the necessity to discard the view that the state is the only agent respect of which the constitutional project can fulfill its promises. In fact, the constitutional project can no longer keep its goals if it does not change its comprehension of power. To use the territoriality principle to determine its frame would now be unjust. To divide the political space along territorial lines would indicate that we renounce to the necessity for accountability from extra-territorial powers (Fraser, 2008: 12-47). To abandon the constitutional limits is not only a danger to law, it is also a threat to freedom and the survival of democracy.

Considering this analysis, the cosmopolitan perspective proposes that, within the globalization context, it is necessary to transform the concept of power towards a comprehension that allows for talking about control. That is why we have to work it in a broader sense. We need to understand power as the expression of domination, which implies a danger to freedom, and also that power can operate under, beyond and parallel to the state.

However, the underlying problem for the philosophy of law that this characterization of power implies is an abdication to globalization. The theory has incorporated globalization as a natural phenomenon. Legal theory has accepted globalization as prescriptive,²⁴ and from this perspective, the efforts have been focused on the comprehension of soft-law and the fragmentation phenomenon (Klabbers, 2009b:94). The problem is that this analysis does not criticize globalization from the philosophy of law perspective, and it does not ask whether these concepts and phenomena suppose a threat to the rule of law²⁵ and democracy.²⁶

This tension between the descriptive and the prescriptive elements can lead us to the classical division that Koskenniemi highlighted in his book, “*From apology to utopia*” (Koskenniemi, 2005). He analyses the structure of the legal arguments, stressing that

²³ This phenomenon is also characterized by Koskenniemi as an example of the “fate” of international law because of the relevance of other normative orders that are competing with and replacing the law: see Koskenniemi (2007b).

²⁴ As Fariñas points out, globalization is, above all, a descriptive concept about certain historical developments of social construction. As a prescriptive and normative concept, it refers to a certain political and economic strategy (Fariñas, 2012: 112-113).

²⁵ For problems related to soft law and rule of law, see the criticism of Laporta (2014: 41-82) and Klabbers (2009b).

²⁶ Peters raises issues about transparency and accountability that are related to soft-law (Peters, 2006: 593).

within the international debate, we can find two positions: an apology to power (which is descriptive of the various relations of power and politics), and prescriptive discourses that lack normative effectivity (utopia). Between these two arguments we can find a variety of academic positions.

Even though Cosmopolitan Constitutionalism is an heir of the second approach of this dualism (because it is an heir of legal pacifism), it also considers the reality of the international sphere, which incorporates international treaties, international courts and the complex normative structure that operates as a foundation of its arguments. That is why Cosmopolitan Constitutionalism defines itself as a “realistic utopia”. On this point Ferrajoli adds further detail. He highlights that the real opposition is not between realism and utopias, but between realism in the short and long terms. The truly unrealistic hypothesis is to think that reality, as it is now (without limits and wild), can be sustained. He argues that there are no alternatives to law (Ferrajoli, 2011: 585).

So, the constitutional perspective attempts to claim the critical dimension of the philosophy of law by studying the problems we have described with a critical approach. By confronting the surrender of the theory, scholars like Habermas and Ferrajoli propose different strategic attempts to put legal limits on this wild power.

For Ferrajoli, the strategy is based on expanding the concept of power as demanded by the constitutional project. It does this by proposing a “private law constitutionalism”. To argue for this concept, he presents two assertions: a) the formal character of the constitutional paradigm, and b) a critique of the traditional concepts of rights and power.

Ferrajoli can talk about the expansion of the constitutional paradigm for private power because he sustains that this paradigm is formal and has a logical syntax²⁷ that can be fulfilled with any content and expanded to any power: not only public but also private, and not only based on the state, but also beyond it (Ferrajoli, 2018a: 27).

The author also argues that it is possible to expand the paradigm of power if we demystify some concepts from classical liberalism that are guilty of lacking legal limits on private power. He argues that there has been confusion when we identify “rights-freedom” with “rights-power”. The first is related to the exercise of autonomy and the second relates to powers related to property. If “rights-power” is exercised by acts that produce effects on the legal sphere of others, then they are structurally different to “rights-freedom”. So, if “rights-power” is the exercise of power, then it has to be subjected to limits (Ferrajoli, 2018a: 35-36).

These two arguments allow Ferrajoli to propose a private law constitutionalism and also to sustain the importance of putting limits on financial and transnational corporate powers, which are a threat to rights and freedom.

²⁷ For more on the logical form of the constitutional paradigm in Ferrajoli’s approach, see Ferrajoli (2018b).

For Habermas, the rule of law has been a civilizing conquest in relation to power because it controls the arbitrariness and violence of political domination. A continuation of this process can be identified in the legal form of international relations. From the power perspective, this has produced a “dissolution of the decisionistic substance of the power involved in the exercise of political authority”, and from the perspective of law, it has produced a “transformation of the medium of law” (Habermas, 2015: 52). That is why, for Habermas, in contrast to Ferrajoli, we are not only facing a change in the relations between public and private power, we are also facing new ways of exercising public power. This has implied a change in the elements of modern law (Habermas, 2015: 52).

These elements are legitimacy and coercion. In the international field and in the European Union, it has been shown that power changing has generated an imbalance of these two elements. The law is applied even when states maintain a monopoly over the legitimate use of force. There has been a recognition of the validity of law without coercion. For Habermas, this phenomenon implies an admission of a flexible comprehension of law (Habermas, 2015: 54).

The centre of the problem has to be focused on analysing how the concept of law has changed due to changes to power. So, it is not sufficient to only reflect on the application of the constitutional paradigm and its expansion. For Habermas, these kinds of reflections cannot be separated from a deeper analysis of the legitimacy of norms that put limits on power.

In fact, if constitutionalism is above all a project about the legitimacy of power and we want to use the language of constitutionalism, we cannot dismiss within the analysis the questions regarding why the norms are followed and the legitimacy of the norms themselves (Habermas, 2015: 55). What we have seen in the international field is a rationalization of domination, but the rule of law, as a civilizing conquest, is also to act through the law, which implies that the law is democratic (Habermas, 2015: 55). These reflections put Habermas’ perspective within the context of the debates in political philosophy, where he proposes that the elements of the discourse theory have to be used to analyse the democratic deficit of international organizations (it is a discourse about transnational democracy)(Habermas, 2008).

Both perspectives are diverse; however they both make a strong defence regarding the significance of law in the international sphere, and they both develop a critical perspective towards globalization. They are not conflicting outlooks, and both highlight essential elements that allow us to redefine the relationship between law and power in cosmopolitan terms. Both perspectives also alert us about the necessity of extending our concept of power and analyse how the elements of law are being transformed. Considering these reflections, we can establish that the principal challenge to the philosophy of law is overcoming the divergence that exists when we analyse the expansion of global power, and compare that expansion with law (this reflection is still based on a state-level). The divergence causes a threat to the survival of law.

In fact, Cosmopolitan Constitutionalism is a project that attempts to recover the historical objective of constitutionalism as a legal project (realization of the autonomy

principle), by giving it particular significance in our historical context: the generation of spaces of freedom and equality for those that cannot enjoy freedom and equality, because currently their conditions of life are not dependent on the state that they live in, but instead they depend on the political and economic forces beyond the state. If we put our hope in other alternatives rather than the Cosmopolitan Constitutionalism model, we deprive individuals of the capacity of being autonomous citizens. If we renounce constitutionalism in the international sphere, we abandon individuals into an uncontrollable future of anonymous networks of power (Habermas, 1998: 124).

The important lesson that we learn is that overcoming the divergence cannot be unlinked (if we use the constitutional perspective) from answers about the “how”, the “who” and the “what” in the international sphere (Fraser, 2008:15). As La Torre²⁸ points out, Cosmopolitan Constitutionalism requires satisfying two demands: the generation of a global civil society with participation in the global public sphere, and the provision of elements that explain the practice of international organizations and law from the transnational perspective (La Torre, 2016: 10).

3.3. Law and unity

Finally, there is a third debate that has occupied the philosophy of law, and that, within the context of our argument, has to be revisited. Traditionally it is sustained, concerning the legal order, its unity and coherence as characteristics. However, the transformations of power and law have as a consequence the co-existence of multiple legalities: national, supranational, international and cosmopolitan. That is why it has been sustained that the current scenario is characterized, among others, by fragmentation.²⁹ Within this context, it is critical to ask whether it is possible to still talk about the law in terms of unity. Is it compatible with a constitutional approach such as a fragmented scenario? Is Cosmopolitan Constitutionalism capable of explaining and incorporating this reality?

Over the past decades, two paradigms have emerged to explain the relationship between different legal orders within the philosophy of international law: monism and dualism.³⁰ Recently, considering the fragmentation scenario, a third approach has emerged: pluralism.³¹ Within this context, we will analyse whether monism, dualism or pluralism are sufficient to explain law dynamics beyond the state that have constitutional characteristics. A plausible answer to these problems would give the Cosmopolitan

²⁸ However it is important to highlight that he is sceptical about the possibility.

²⁹ For more on the fragmentation of international law see Koskenniemi's report for the International Law Commission in 2006 (Koskenniemi, 2006). For an analysis of the current changes in law due to globalization see Catá Backer (2012) and Twining (2005).

³⁰ Historically, monism has been associated with the positions of Kelsen, Verdross, Lauterpach and dualism with Triepel and Anzilotti.

³¹ Pluralism is associated with different concepts and scholars. A general picture about the different interpretations of this concept can be found in the research of Avbelj y Komárek (2012) and Schiff Berman (2016).

Constitutionalism project sufficient tools to be emancipated from strong pluralism and state-based perspectives regarding law (Turégano: 2017, 225).

A first matter is to dismiss dualism as a possibility because its theoretical basis is incompatible with the cosmopolitan paradigm, and also it is not an adequate description of the functioning of an international legal system. Contemporarily, dualism has incorporated the shape of democratic statism (Kumm, 2012: 47-54). For this approach only within the state can we find the conditions to generate valid norms and that is why only the state can determine the application of norms that belong to other legal orders (so, it can be sustained that within the democratic turn dualism has become statist monism).³² This affirmation is problematic for the cosmopolitan discourse because it does not recognize sovereignty as a shared enterprise that has as a basis the universality of human rights. Additionally, this perspective is not sufficient to explain the current interaction between international, national and cosmopolitan norms. These spheres of legality do not work in isolation; they interact with and complement each other. The recognition of the existence of different sources of legality does not mean that we can ignore the fact that these norms are related. So, from the perspective of Cosmopolitan Constitutionalism, we still have two possibilities: monism and pluralism. These positions are sustained by Habermas and Ferrajoli, respectively.

In Ferrajoli's approach, this explanation is based on a polycentric view of law. He emphasizes that considering the current legality, it is possible to establish the existence of a pluralism, understanding it as a complex and diverse network of different legalities and legal institutions within which there are different scales of integration (Ferrajoli, 2011: 475). It is not a radical pluralism (as, for example, (Krisch, 2011)), because in his approach the different legal orders are integrated in diverse kinds of federalism. That is why, for Ferrajoli, neither monism nor dualism has enough force to explain the current developments of international law. The figure that appropriately explains the shape of legality is a grid (Ferrajoli, 2011: 474).³³ Within this context the question emerges of how Ferrajoli tries to make this vision of law compatible and at the same time sustain a constitutional paradigm. He sustains that it is possible because we must reserve the constitution as an autonomous and supra ordered space, which implies, for example, the use of the better protection principle of human rights as an adequate principle to give coherence and unity to the system (Ferrajoli, 2011: 541).

In Habermas' perspective, we find an attempt to explain the functioning of norms through the analysis of the movement of the different elements of law. The movement is towards a recognition of the legitimacy of the authority in the supranational sphere, even when states maintain a monopoly over the legitimate use of force. Considering this

³² Kumm points out that "As liberal constitutional democracies were increasingly constrained perhaps not by a weberian iron cage but at least a strong web of transnational legal norms, statism took a democratic turn: now the divide between national law and international law was justified with reference to democratic constitutional theory" (Kumm, 2011: 48).

³³ It is common in the literature to find a description of the global landscape as a "net" or "grid" (Losano, 2005), which dismisses the traditional "pyramid" image of the legal world.

movement, Habermas argues that there is a tendency to equate the value of national and international law. This is an approach towards a monist conception of law (albeit at a snail's pace), as Kelsen has proposed (Habermas, 2015: 54).

Both perspectives generate doubts and have been questioned. These doubts must move us to reflect on which is the better description for the scenario and also, from a normative perspective, which approach provides clear criteria to resolve the problems of interaction.

There are scholars who argue that constitutionalism cannot be separated from a monist perspective. They sustain that it is not possible to defend constitutional supremacy and rigidity without defending the idea of a legal order that is unified and hierarchical (Somek, 2012; Puppo, 2015) and that is why Ferrajoli's pluralism is inconsistent with a constitutional approach. Additionally Ferrajoli's pluralism is limited to the factual verification of the diversity of legalities and does not provide normative criteria to resolve conflicts that allow us to decide what to do when we are faced with multiple "deciding spheres" (except for the vague idea of the better protection principle) (Bayón, 2013). For that matter, his perspective does not bring any new elements to the philosophy of law in this specific regard because his pluralism does not provide a legal and normative response to interconnection.

Also, monism does not explain the reality of interaction appropriately and offers a static view of the claims of legal authority. The transnational sphere is characterized as having within it a complex network of authority claims (Roughan, 2013; Turégano, 2017: 226). Additionally, a monist perspective does not allow for an effective dialogue between the different claims because it endorses a legal hegemony that is incompatible with a cosmopolitan perspective. Moreover, the static view based on hierarchy leaves out the fact that within the cosmopolitan constitutional perspective, other criteria should be considered, for example, the effectiveness of human rights protection. A good example of the problems involved in a response based solely on hierarchy as a criteria can be seen in the "Kadi Case".³⁴

Finally, both perspectives miss the importance of considering the way in which cosmopolitan norms are created. Cosmopolitan norms are norms produced by the interaction of a variety of legal authorities (norms that are framed by national and international contents). Their cosmopolitan nature emerges in the overlapping, in the complexity of the interaction. Truly cosmopolitan is what is produced by the relation between different authority claims, implying a construction of norms with a complex content that flows over the borders.³⁵ However, both Habermas and Ferrajoli are still

³⁴ ECJ. judgment of the Court (Grand Chamber) of 3 September 2008. Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities.

³⁵ A similar version of this proposal is sustained by Benhabib using the concept "democratic iterations" to describe the way that human rights norms are built in different cultural contexts. From her perspective, human rights norms have a nucleus that is being continuously fulfilled with different legal sources (national and supranational). In this way norms are emerging with complex content (Benhabib, 2011). Another account

focused on a vision of law where the national and international spheres are separated and, even when they describe the interaction, they do not explain the complexity of the legal reality (they still are in the “black box model” of legality),³⁶ which involves above all legal porosity understood as legal interaction (Brunnée, 2010). Therefore, from the perspective of the philosophy of law, it is necessary to have a normative perspective that explains the reality of cosmopolitan norms and, at the same time, provides criteria to recognize such norms³⁷ and for resolving conflicts between differing claims.

As Bayón points out (2013: 86-87), the real problem of constitutionalism in the global sphere is that there are relations between overlapping orders without a clear rule about how to achieve coordination between them. Using the terms of Hart, it is sustained that what we are missing is a theoretical construction of a rule of recognition in cosmopolitan terms. So, the question is how to build a complex rule of coherent and general principles about how to distribute the legitimate authority that is also based on the current legal practice.

This perspective assumes a constructivist vision of law that recognizes the existence of dialogues between legal actors in the transnational scene, which implies a common understanding regarding the features of law. This shared understanding is framed by constitutional principles (Kleinlein, 2012b). At this point, we can see that the normative theory and legal theory are connected because “the application and specification of valid law requires – especially in hard cases – normative reasoning, that is, a type of reasoning which is guided by those principles that confer legitimacy to the legal system as a whole” (Habermas, 2013b). Even though the construction of such a rule is beyond the objectives of this paper, we can enumerate theoretical tools that can be useful to move towards this objective.

Concerning the construction of cosmopolitan norms, perspectives such as “inter-legality” and “transnational law”³⁸ capture more completely the reality of cosmopolitan norms because they put value on the existence of a creative potential within the law that is given by the interaction between different spheres of legality that influence each other, that is, “the unavoidable interconnectedness of legalities” (Palombella, 2019: 366). This perspective, in contrast to some kinds of pluralism, does not miss the internal point of view because it puts value on the relevance of the normative criteria that are responsible for sustaining the notion of legal order and incorporates a minimal and shared concept of law that allows the dialogue (Günther, 2008; Taekema, 2019). Inter-legality is

of cosmopolitan norms understood as the result of interaction can be found in Neves (2017: 294), regarding the concept of “transversal network”, and in Walker (2008: 378), referring to “in-between places” norms.

³⁶ The “Black-box model” conceives different levels of law as self-contained regimes (Tuori, 2015: 37).

³⁷ Considering the “rule of law” element within the constitutional paradigm, it is important to develop criteria to distinguish law from non-law (Klabbers, 2009b). Also it is important regarding the internal point of view of legal officials (García Pascual, 2018).

³⁸ Even though inter-legality is a concept that emerges within sociological studies and with descriptive purposes (Nickel, 2005), recently it has been used in legal theory with normative applications; see for example Turégano (2017) and the most recent book coordinated by Palombella & Klabbers (2019). Moreover, it has to be considered that inter-legality does not necessarily endorse a constitutional perspective.

compatible with Cosmopolitan Constitutionalism because it includes the characteristics of cosmopolitan norms and it is not incompatible with developing substantive criteria regarding the legitimacy of law under a constitutional perspective. Moreover, it does not reduce complexity as monism does, but instead allows for the production of new institutions that will be able to include those interactions (Turégano, 2017: 236).

Although Habermas endorses monism, it is important to highlight that he claims that this is an initial approximation and he endorses it because he links pluralism with contextualism, which does not enable us to “explain how international courts with justices from different legal traditions ever come to agree on decisions for the same or similar reasons”(Habermas, 2013b). However, a possible path to follow is to make connections between his discourse theory and the inter-legality perspective. In fact, from Habermas’ perspective, it is possible to establish the conditions for participation in the discourse, which enables only models for the incorporation of diversity and, at the same time, remains open to a reflexive dialogue in relation to norms. Both elements allow for a continuous conversation within the law that is capable of overcoming the problems of fragmentation (Turégano: 2017, 258). From this point of view it is possible to design a research agenda with the objective of determining whether Habermas’ legal philosophy can contribute to the strength of the inter-legality approach.

In relation to developing and constructing criteria for a rule of recognition in cosmopolitan terms, the key within this context is determining which is the better interpretation of the relationship between the many orders, considering the demands of constitutionalism and legal practice (Kumm, 2005: 287; Klabbers, 2009b). At this point the normative perspective emerges and connects with the cosmopolitan discourse. Considering the elements we have described as a central part of the cosmopolitan discourse, it is possible to establish that -as a minimum- this complex rule implies the identification of procedural and substantive criteria about how legitimate authority should be distributed (Kumm, 2009: 272). From the procedural perspective, it will be important to consider the conditions of the discourse and the democratic demands, and from the substantive perspective it will be necessary to consider the better protection principle regarding human rights, among others.

If it is possible to sustain the existence of such criteria, it is possible to keep the promise of unity, but it must be understood as convergence within dispersion and not as “legal monarchy”. The existence of these criteria makes it possible to sustain coherence and a system as ideas within the transnational scenario. The difference is that these criteria are based not only on a formal hierarchy, although they are based on an interactional conception of the legal phenomena.

4. CONCLUSION

Cosmopolitan Constitutionalism is an especially demanding approach for legal philosophy. It requires us to redefine some traditional theses and to adapt them to the new features of the international scenario, without renouncing its basic commitment to human rights, democracy and rule of law. It calls for a substantial effort from those

who sustain this idea because it challenges our traditional comprehension of power, identification of law and its relations with morality. In the academic field, as we had seen, some perspectives are being developed to comprehend this reconfiguration of the global public sphere. However, we do not yet have a holistic answer to all of these challenges. That is why sometimes we do not see a coherent and profound discourse about the key questions that legal philosophy must achieve.

After analysing Habermas' and Ferrajoli's perspectives, it is possible to establish some elements that challenge the traditional discourse and provide us with some clues to reconstruct a legal philosophy from a transnational approach. Even though it is a complex, dynamic, and possibly inexorable task (considering the features of the legal sphere), the analysis highlights some minimal elements to establish the basis of a theory of this kind:

(i) Regarding the relations between law and morality it is possible to sustain that within Cosmopolitan Constitutionalism, considering that this is a discourse based on the universality of human rights, legal cosmopolitanism cannot be unlinked from moral cosmopolitanism reflections if we want a coherent and potentially universal project (although it is a minimal perspective based on human dignity). This supposes that we do not have to deny the existing tension between law and morality; instead it supposes that we have to recognize it and develop mechanisms to negotiate the interdependence between these two dimensions through the application of the universal in concrete cultural contexts.

(ii) Additionally, we require a broader concept of power to be able to recover the historical vocation of constitutionalism if this project is to be applied in other spaces (supranational and international) and to survive in the national space. This posits the civilizing capacity of law in relation to power. However, as Habermas makes clear, this cannot be unlinked from a profound reasoning about the legitimacy of law beyond the state. So, at this point, legal philosophy must be connected to normative commitments.

(iii) Finally, we must reframe the concepts of unity and the coherence of the legal system considering the current configuration of the global normative sphere. From the theory of law, we must explain how cosmopolitan norms are created and developed. This leaves us with some challenges: to develop a perspective that is able to describe the legal reality and also, from a normative point of view, to provide criteria to recognize such norms and resolve conflicts. Inter-legality as an approach and the construction of a rule of recognition with substantive and procedural criteria are adequate perspectives to confront the complexity of the legal scenario without renouncing the concepts of unity and coherence.

The points described are the minimal elements required to advance in the construction of a legal philosophy from the transnational perspective. It is an ambitious research agenda, but it is a challenge that legal science must be willing to face if it wants to argue about the possibilities of Cosmopolitan Constitutionalism as a political project. The political project cannot be unlinked from legal philosophy reflections. If that challenge

implies putting limits on other powers, incorporating the morality tension or reframing the terms in which, up until now, we have constructed the legal discourse in terms of unity, it is a necessary effort in regard to not abandoning the idea of constitutionalism.

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