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Jürgen Habermas's postconventional constractarianism as cosmopolitan constitutionalism[1]

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In the course of this paper article I shall depict in what way Jürgen Habermas's application of the discourse theory to the democratic polity transforms the contractarian theoretical framework, presuming, however, that the reader is familiar with the general theoretical framework and the basic concepts characteristic for this political tradition. Moreover, I will also show that the relevance of this transformation consists in delivering a justification of a kind of cosmopolitan constitutionalism.

Keywords: communicative action, discourse, public justifications, reflexive learning, self-constitutionalisation

1. Exposition of presuppositions and of the basic tool kit

Cormac Mac Amhlaigh develops a conception of "constitutionalism as legitimacy", understood "as a form of reason-giving for the legitimacy of authority" (Mac Amhlaigh 2016: 177-178). Further, he distinguishes three major accounts of this issue: sociological legitimacy, normative legitimacy and "mixed accounts" (2016: 182), and indicates Jürgen Habermas as the most prominent proponent of the third account (2016: 184). What characterises the "mixed account" is a link between an external (ideal) yardstick for the evaluation of political and legal actions ("creating or sustaining a 'right to rule'" (2016: 184)) and the actual beliefs and opinions of addressees of law (the ruled) on values, interests and norms (2016: 183). In other words, Mac Amlaigh argues that Habermas develops a kind of approach to legitimacy which takes into account both a normative

[1] In the following paper I make use of some arguments worked out in Chapter III in Karolina M. Cern, *The Counterfactual Yardstick. Normativity, Self-Constitutionalisation and the Public Sphere*, Frankfurt am Main 2014.

yardstick for political and legal decision-making and the actual opinions of their addressees. I do agree with Mac Amlaigh on this point, however, in addition I would like to stress the understanding of legitimacy at the post-conventional level where, as Habermas states, the main moral and legal concern is the justification of modern law, according to "*the idea that legal norms are in principle open to criticism and in need of justification* […] based on rational consensus" (Habermas 1984: 260-261). This rational consensus enables such a transformation of modern law that makes it possible to meet the requirement of the conformity of legal and moral principles and to recognise modern law as worthy of observance. Both sorts of principles meet one another in the concept of human rights. This concept, as Habermas argues, articulates modern individual liberties, and the kind of validity specific to human rights reaches beyond the nation states (2002: 190). This inner link between the validity of moral and legal principles, focused on the concept of human rights, renders the Habermasian "mixed-account" of the legitimacy of political and legal institutions open to interpretation in terms of cosmopolitan constitutionalism. Characteristically, in the cosmopolitan approach, as Seyla Benhabib states, "each individual as a legal person [is] entitled to the protection of basic human rights in virtue of their moral personality and not on account of their citizenship or other membership status" (Benhabib 2016: 113). Cosmopolitanism as both a moral and legal stance deliberately operates beyond the nation-state, nevertheless, the nation-state cannot necessarily be ignored, as the case below will show. Cosmopolitan constitutionalism, it may be stated, searches for a justification of the specific "beyond the state" validity of human rights that remain in compliance with the moral principles for which "each individual [is] entitled to moral respect and concern" (Benhabin 2016: 113). The structure and presuppositions of the "mixed account of legitimacy" may serve as a perfect means for exploring this issue.

In order to render the idea of rational consensus viable in the legal and political domains, Habermas works out the theory of communicative action and afterwards – during several exchanges with Robert Alexy, Karl-Otto Appel and Robert Brandon – the discourse theory. The latter serves as a necessary reflexive "device" for justifying legal norms through processes of reaching rational consensus (Habermas 1999b: 100). I would like to note that in this paper, I am basically concerned with analyses based on the theory of discourse, and with their application to a democratic polity. The concept of discourse, as proposed by Habermas, is explicable in terms of the discourse principles (D) and the complementary "principle of universalization (U) as a bridging principle that makes agreement in moral argumentation possible" (1999b: 57), because it is oriented towards the impartiality of normative claims. Discourse rules are reflectively reconstructed from the structures of communicative actions and, in this sense, they are universally valid, yet non-provable. The discursive argumentation presumes an "ideal speech situation" as a critical yardstick for filtering any real discursive circumstances in order to enable the exchange and transformation of arguments in use and – crucially – reaching an agreement on the issue in question (Habermas 1998: 418).

Moreover, Habermas mentions that his proposal may be regarded as a contractarian reflection provided at the post-conventional level. He does not develop the idea, but merely states that "consequently, a discursive or deliberative model replaces the contract

model: the legal community constitutes itself not by way of a social contract but on the basis of a discursively achieved agreement" (1996: 137). He also redefines the concept of a contract so as to include a moral attitude. That is a fundamental step, to which I will return in the course of this paper.

2. Discourse Theory as a sort of contractarian thought at a post-conventional level

The application of discourse rules to a democratic polity generates the co-originality thesis, that is, the co-originality of *the rule of law* and *the principium of popular sovereignty*, from which follows that "in normative terms, there is no such thing as a constitutional state without democracy" (Habermas 2002: 215). In short, the thesis states that the laws of law-making, obtained subsequent to the institutionalisation of discourse rules in the medium of law, do justice to the principle of democracy, and then, in the subsequent procedural steps, become saturated in the normative matter with regard to the principle of argumentation (U). The latter comes into action afterwards, that is, in the procedures of saturating the legal code in normative content (Habermas 1996: 144).

In other words, the institutionalisation of discourse rules results in a code of law that may be understood as both the laws of law-making as well as basic rights. Here basic rights mean constitutional interpretations of universalisable normative claims. The latter are called human rights. For this very reason Habermas concludes that "human rights institutionalize the communicative conditions for a reasonable will-formation" (2001b: 117). The presumption is that only those rights that always *also* protect the democratic conditions for the saturation of these rights in the normative content may be appropriately called human rights. From this it follows that, firstly, these rights institutionalise the conditions for self-government. Secondly, however, these rights are supposed to express norms whereby the impartiality of the judgments and decisions based on such rights is never overruled by the collective self-understanding or collective interests, from which stems the requirement to protect each citizen as free and equal to any other. Thirdly, it may be stated that "moral principles, such as respect for human dignity and equality, do not *dictate* a specific constitutional content, but *constrain* the range of possible variations that would be compatible with the principles of respect for persons, their equality and dignity" (Benhabib 2016: 119[2]) In this sense, application of discourse rules to a democratic polity maybe regarded as delivering a justification of *cosmopolitan* constitutionalism. Because Habermas is equally concerned with the rule of law, the principle of pop-

[2] In this article Benhabib draws on the above presented relationship among universalisable normative claims – human-rights – basic rights, despite the fact she builds her argumentation on ideas from John Rawls and Robert Alexy. Thus, employing a different template, she admits that she argues in a similar vein to Habermas, putting an emphasis on the right to self-government (that is, the principium of popular sovereignty) as the "*condition for the possibility of the realisation of a democratic schedule of rights.* Just as without the actualisation of human rights themselves, self-government cannot be meaningfully exercised, so too, without the right to self-government, human rights cannot be contextualised as justiciable entitlements. They are coeval"; ibidem, p. 120.

ular sovereignty and human rights, it maybe stated that he operates within the framework that Mattias Kumm called "*the trinitarian grammar of the constitutionalist project*" (Kumm 2015: 777). This Trinitarian grammar is regarded as typical for the "liberal constitutionalist nations" which, in very general terms, are viewed as opposite to "authoritarian nations" (Tushnet 2016: 2).

2.1. Transformation of the laws of nature

In Habermasian thought, the principles of discourse complemented by the principium of universalisation (U) reveal themselves to be a very peculiar but essential tool kit, notably, as "the rules necessary for any argumentation game to work; if one is to argue at all, there are no substitutes. […] There are *no alternatives* to these rules of argumentation […] [and] the participants must have accepted them as a 'fact of reason' in setting out to argue" (Habermas 1999b: 95). I consider, therefore, that the rules of discourse, together with the principle of universalization, replace the role previously played by the concept of the laws of nature or, more currently discussed in the contractarian approach, the rules of rational choice (Hampton 2007). They are deemed commonly valid – as the higher-order rules that provide a template for the saturation of norms in normative content – and thus, they always also refer to the universal normative framework (they are commonly valid and the most profound).

Habermas presumes that the abstract laws of law-making should embrace not solely fundamental political rights but also the rights shaping horizontal relations, and I understand these to be rights that socialise citizens-consonants in this contractarian-discursive project. This entails that two moments – leaving the pre-political state and leaving the pre-social state (of nature) – must go hand-in-hand, and this seems to be the second reading of the co-originality thesis expressed in the code of law-making. Political individualisation, in other words, may proceed only by way of socialisation, which seems to be a lesson from Hegel, or, in my opinion, from as far back as Hobbes.

Further, as the processes of saturating the legal code in normative substance proceed, so the interpretations of universalisable normative claims (in the sense of human rights) always come into play. At the level of the constitution of a certain democratic polity, to reiterate, these interpretations are called basic rights. As Benhabib righty states, the process of saturating may also mean "*suffus*[*ing*] constitutional rights [basic rights] with *new* content" (2016: 123). She calls this process "democratic iterations" (2016: 122) and emphasises that there may be "a variety of instantiations as concrete constitutional norms" (2016: 120). That entails a kind of pluralism in the constitutional reading of basic rights. The processes of suffusing constitutional rights and more generally, saturating the legal code with normative content, when founded on the co-originality thesis, form the essence of the idea of self-constitutionalisation in general terms.

Habermas takes the demand made by Jean-Jacques Rousseau seriously, that in the consideration dedicated to the normative foundation of a given polity, "men" should be "taken as they are and laws as they might be" (Rousseau 1762). Therefore he gives up delivering a necessary characteristic of a rational or reasonable citizen, presuming instead

that realising the rationality potentials in discourses is of paramount importance. In other words, Habermas, as a contemporary post-metaphysical contractarian thinker, does not presume any concept of a rational agent (here, citizen); rather, he introduces incremental processes of rationalisation that proceed in the public spheres. Men taken as they are, are supposed to be changing – transforming – their opinions and beliefs.

The concept of public spheres, proposed in *Between Facts and Norms*, differentiates two moments that are diverse in nature and which, however, remain complementary: opinion-formation and will-formation. The communicative action refers to processes of opinion-formation in the social-civil peripheries, which then run through diverse kinds of intensity in their institutionalisation – upward will-formation processes that remain at the centre of the (open) political system. These specific places or moments, where opinion- and will-formation meet one another, I propose naming "institutional intersections". They constitute the very essence of the transformation from pure communicative action into its more reflexive form, namely discourse, and, in reverse, where the abstract discursive formulations of norms, general values and interests are translated into terms of communicative action. Behind the opinion- and will-formation, there is the "idea of 'subjectless' communication in the informal public sphere. Habermas ultimately interprets public opinion as 'anonymous' (since it is not located in any particular group of individuals) and as 'decentred' within the network of communication itself" (Nanz 2006: 35).

In other words, the subjectless public spheres may be regarded as a constituent power which is never ceased, even when the constitutional form (the highest law of the land, that is, the constitution) is established. Benhabib, however, rightly notes that this thesis applies to the post-Westphalian democracies, but the point is that, from the global perspective, the pre-Westphalian polities still exist (2016: 125-126). At first sight it seems that Habermas perfectly realises Hannah Arendt's idea of "revolutionary constitutionalism", which stresses the continuous role of the constituent power as the ultimate origin of political and legal arrangements. This irremovable role of the constituent power is founded on the dualist understanding of constitutionalism that differentiates a "higher law-making process", meaning an amendment and/or interpretation of the constitution, and an "ordinary law-making process", which means the enactment of new laws within the scope and competences stipulated in the constitution (Muldoon 2016). I am inclined to admit that Habermas incorporates the transformative power of Arendtian "revolutionary constitutionalism", however, in his proposal constitutionalism has three dimensions, rather than two: horizontal (social), institutional and legal (Cern 2014a). The first one proceeds in the lifeworlds, the second proceeds within institutions, and the third within the normative space of the constitution, be it written or unwritten. Importantly, however, drawing on the idea of revolutionary constitutionalism in the sense of stipulating the constituent power in the subjectless public spheres, opens the concept of this power to interpretation in terms of cosmopolitan constitutionalism because, among other issues, it enables the constant redefinition of the addressees of law by the authors of law (understood as individuals and states), and also enables the processes of their emancipation connected with reflexive learning. It is based on the following argumentation.

Discourse rules are universally valid, that is, they must be "accepted […] as a 'fact of reason' in setting out to argue" (Habermas 1999b: 95). That means they apply at least

to each human being as a participant in communicative structures. Horizontal (social) constitutionalisation proceeds as the process of acknowledging other participants in communicative structures as deserving equal respect and concern. Since in subjectless communicative structures the constituent power is vested, they are the origin of questioning the addressees of the constitution (taken in legal terms) from the angle of equal respect and concern. It transpires that, in general terms, the legal constitution is not the ultimate source of the determination of its addressees, but the impartial formulation of arguments meeting the requirement of equal respect and concern for its addressees. That makes room for a distinction to be made between the concepts of the citizen as determined solely by the constitution, and that of the individual addressing their concerns as a participant who is free and equal to any other participant in communicative structures, and realising in this way "the rationality potentials built into communicative action" (Habermas 1999a: 98), because it is the latter that triggers the processes of legitimising the constitution. Therefore, at least one restriction shall be made, namely that the aforementioned distinction proceed as far as the communicative structures transform, according to the rules of discourse, and the transformations continue within the framework of institutional intersections and reach the justificatory discourses. At this point, deeper reflection should be devoted to the big picture of institutional intersections beyond the (nation) state and the embodiment of communication in the moral attitude.

2.2. Transformation of the state of nature

I assert that Habermas redefines the understanding of the state of nature in the following way. He replaces a hypothetical state of nature with the hypothetical attitude of the participants in actual discourses that take place in the real world. In his view

> participants who thus far were engaged in inward reflection, focused on a kind of philosophical clarification, must step out from behind the veil of empirical ignorance and perceive what in general must be regulated under the given historical circumstances and which rights are necessary for dealing with these matters in need of regulations. (2001a: 777-778)

This postulate of stepping out from the (Rawlsian) veil of ignorance transforms the hypothetical momentum comprised of, as Joan Hampton indicates (1995), (a) the descriptive element which discerns what people are like before they engage in social and political relations and settings, and (b) the prescriptive element that questions what may be comprehended as the best laws and the best order of society for people taken as they are. These two moments are replaced by real discussions held in public spheres by citizens facing actual problems with regard to moral dilemmas, conflicts of interest and diversity of preferences. The state of nature as the hypothetical situation gives way, in fact, to communicative structures, within which public debates that shape public opinions run – till the flows of these debates reach a strong political public, where will-formation and decision-making take place.

Instead of compiling the abstract characteristic of those who are supposed to enter into a social contract, one deals with the practices of those who are supposed to partic-

ipate in the (public) processes of reaching an understanding. Therefore, what matters most is not the question about the nature of people but rather the questions *who* may participate – and how – in public deliberations in which real concerns are being addressed.

The *hypothetical element* of the contractarian paradigm is shifted from the pre-political or pre-social momentum, that is, from the concept of the state of nature or the original position, to the *hypothetical attitude* (Habermas 1999b: 125, 165) of participants in institutionalised public spheres. This hypothetical attitude is definitional for moral reflection (Cern 2014b), when one adopts a generalised perspective of everyone and all others (Habermas 2002: 33, 42-43). It implies a decentred understanding of the world (Habermas 1984: 69; Habermas 1999b: 8), which enables abstract considerations of the norm-candidates in question as they become, due to this procedure, decontextualized (Habermas 1999b: 179). In discourse, the participants adopt a hypothetical attitude and therefore no "state of nature" nor "veil of ignorance" is needed to transform a subject from a participant in the lifeworld into a rational and distanced observer characterised by the "fully decentred understanding of the world" (Habermas 1999b: 161), from within which the social currency of norms, as well as institutional settings, are put in question and subjected to public argumentation. This means that the idea of a post-conventional level of law development exists "in reference to the social world, [of] a moralization of existing norms" (Habermas 1999b: 156, 177).

In previous contractarian approaches, the hypothetical situation of the state of nature – or the original position – used to establish those kinds of reasons that would support a social contract as well as the legal-political design implied by those reasons. This theoretical tool presumed no transformation of reasons. Moreover, it is only the arguments of rational egoists that have always been at stake (from interests and/or private conceptions of the good) determining "the *generalized* notion of the contract derived from private law" (Habermas 2002: 15). Accordingly, those egoists would act with one another, albeit always on uncertain grounds, easily confused with compromise. Habermas, therefore, rejects the generalised notion of the social contract that is derived from private law, and he insists on presuming the concept of "reasonable citizens" who are able to "jointly adopt […] a moral point of view independent of, and prior to, the various perspectives they individually adopt from within each of their comprehensive doctrines" (2002: 77).

He also seems to presume that adopting a moral point of view is a kind of bedrock of a reflexive culture – the community of justification and reason-givers (2002: 35, 68). It entails learning processes in terms of transformations of opinions also in the moral domain. These processes form a basis for the possibility of reaching an understanding that would motivate action-taking, because "the participants [in discourse] can only draw on those features of a common practice they already currently share" (2002: 41). Therefore, an understanding – in the sense of an agreement – must be formulated in the processes of constructing public justifications in discursively designed public debates. On the other hand, in these processes of reaching an understanding that lead from opinion-formation through constructing public justifications, and then to will-formation, all the problems raised in relation to *lifeworlds*, as well as all the problems raised in relation to basic rights, are put under the fire of argumentative debates. This is a kind of embod-

iment of the communication in moral attitude that I was looking for in the previous subsection.

2.3. Transformation of the social contract

The conception of public spheres, based on subjectless communicative structures and supported by discourses, largely determines the idea of the social contract. Specifically, it transforms the concept of the act of entering into the political state into the concept of the ongoing processes of democratic self-reflexive constitutionalisation, which is supposed to proceed at three levels at the same time: at the level of the legal system and at the institutional and horizontal levels. Here, the leading idea is that citizens are involved in these processes as people taken as they actually are, here and now, in their historical and social embeddings (Alexander 2006: 6). Therefore, the social contract is no longer understood as a hypothetical nor a historic act, but quite the contrary, it unveils itself as a historic *future-oriented project of constitutionalisation*. Importantly, however, the participants in the discourse.

> cannot produce basic rights in abstracto but only particular basic rights with a concrete content […] and perceive what in general must be regulated under the given historical circumstances and which rights are necessary for dealing with these matters in need of regulations. (Habermas 2001a: 777-778)

In other words, this future-oriented project is embedded in the given historical circumstances. It nevertheless excludes the possibility of directly taking into account any "substantive background consensus" (Habermas 2002: 39) from the processes of forming the "best interpretations" of the universalisable normative claims, as this consensus is, in post-metaphysical times – to put it simply – shattered.

The crux of this idea consists in this, that the normative idea of the future-oriented project of constitutionalisation works as a counterfactual yardstick enabling the improvement of the current status quo. Placing the emphasis on the open-ended processes of public justifications of political decisions seems to be the crucial idea for this contractarian proposal of constitutional democracy. Meeting the normative expectations means that these processes should "always [be] open to the democratic freedom of calling into question and presenting reasons for the renegotiation of the prevailing rules of law, principles of justice and practices of deliberation" (Tully 2002: 218). The concept of constitutional democracy, conceived as above, allows Habermas, as Jan-Werner Müller succinctly points out, to avoid a twofold fallacy: the foundationalist fallacy and rationalist-voluntarist fallacy (Müller 2007: 70).

The foundationalist fallacy refers to the descriptive moment of the state of nature, that is, to formulating a response to the question, "What are the people who are supposed to enter into a social contract actually like?" As opponents of the contractarian paradigm tend to highlight, the answers to this question were in fact conjured *ex nihilo*. As the nature of an un-socialised human being remains unknown, taking further theoretical steps seems to be unjustified. Additionally, even if such a concept of human nature could be-

come acknowledged, it would still remain useless in the face of real conflicts arising among differently socialised citizens, who are embedded in diverse cultures and thus hold onto different beliefs in contemporary pluralistic societies. Hence, the foundationalist fallacy of the previous contractarian thinkers lies in the fact that the premises of general human nature are simply imposed on real citizens, and the best solutions, understood in terms of a decent society and just legal-political order, are tailored for others, rather than the actual addressees of those philosophical investigations – that is, they are not tailored for citizens taken as they really are.

On the other hand, the rationalist-voluntarist fallacy, as Müller neatly describes, relies on the "claim [that] the attachment has to be purely rational and voluntary" (2007: 70). I interpret this as the attachment to the constitution viewed as an utterance of the social contract. The very idea of this fallacy relies, then, on underestimating the complexity of the social contract. The latter should be characterised, as Habermas puts it, (i) by reference to historical changes (ii) proceeding on three levels of constitutionalisation processes, (iii) and should refer, with regard to the three possible formulations of arguments in publics: from norms, values and interests.

The rationalist aspect of this fallacy oversimplifies human beings as rational egoists. The claim to pure rationality, as a backdrop against which a social contract may be founded, assumes the pursuit of individual interests as the dominant premise – the premise that the best reason for people to bring the state of nature to its end is to protect their property, or more broadly, to acquire a warranty of private autonomy over all. Indeed, Habermas discerns in the previous contractarian theories, including the Rawlsian one (from *The Theory of Justice*), a fallacy that results in denying the possibility of reaching – in the public use of reason – an understanding in terms of (moral) consensus and in adopting "the *generalized* notion of the contract derived from private law" (Habermas 2002: 15). But such rational egoists seem to be caught in endless presence, in which they make unilateral decisions that are meaningful, but always only for a solitary individual. Interestingly, the voluntarist aspect of this fallacy, on the contrary, seems to overestimate the arbitrary will of those who are supposed to join the social contract. The voluntarist aspect catches people in their beliefs concerning the concept of the good and the good life, in the particularity of lifeworlds or reasonable comprehensive doctrines holding them tightly in the past, and leaves no room for the transformation of their opinions and will.

As Habermas adds, his conception is also oriented to avoid a third kind of fallacy, namely, "an abstractive fallacy" (2001b: 120) taking for granted both Western culture and that its discourse is universally valid. Habermas' defence against a possible charge of this sort stresses "provid[ing] every voice with a hearing" (2001b: 120) and the role of democratic right to self-government, namely, discursive constructions of the best interpretations of human rights for each polity, instead of an imposition on any polity of the best interpretations of basic rights, as they would be comprehended from the external perspective as "the only right ones". It demonstrates that the cosmopolitan constitutionalism adhering to the observance of human rights does not necessarily entail the claim to forming a global super-state, and neither does it diminish the role of historically formed states. Habermas seems to escape those three fallacies characteristic of the previous con-

tractarian thinkers, by introducing ongoing public debates as learning processes, which are in themselves *transformative*. This presumption of the moral equality of human beings, which is Kantian in spirit, entails that not merely the conformity of human actions with human rights may be expected (as threatened by sanctions), but educational processes that lead to moral maturity and the mutual recognition of moral equality may be expected as well (Hutchings 2011: 193-194). Thus, taking citizens as they really are means here taking into account the communicative power that transforms human motives and reasons – the power that is realised in discourses.

The idea of the interpretations of basic rights, grounded in discourse ethics, as always – here and now – the best interpretations of universalisable normative claims (that is, human rights), necessarily exceeds (though do not diminish) the concept of a national polity. This is the next great change introduced into the contractarian paradigm, and is Kantian in spirit. It is about apprehending the current global-international situation in terms of the state of nature, without limiting the application of the term to any state-national situation. This postulate makes sense and may be comprehended as a useful theoretical device suitable for changing the global political and legal situation only, and only if adopting a moral point of view – transgressing broadly the lifeworlds' particular perspectives – is possible, however, on the grounds of discourse ethics and learning processes tailored for the global scale.

3. Conclusions

Developing contractarian thought at the post-conventional level entailed the introduction of key changes into the theoretical scheme of contractarian thought. Instead of laws of nature, Habermas employs two principles: the principle of discourse (D) and the argumentative principle of universalisation (U). Due to the claim that 'the logic of justice questions becomes dynamic' (Habermas 1998: 388), the social contract is understood in terms of the ongoing processes of self-constitutionalisation that also socialise citizens and, as such, exceed national borders (proceed beyond the nation-state) and take over the role of a pure act (of a constitution enactment whereby the state of nature is left) undertaken by the citizens of a particular polity. In its essence, the consent uttered in a constitution unveils itself to be built upon several ongoing agreements made in subjectless public spheres as a constituent revolutionary power. The "consent", viewed as a process, is to be legitimised in the public procedures of the ongoing legitimation of the law, that is, in the ongoing practice of "constitution-founding" (Habermas 1996: 140-141). It may be stated that it is not particular citizens but rather subjectless public spheres that are the "subjects" of the ongoing utterance of consent. In other words, as Massimo La Torre claims, "constitution in short is the bedrock of legal order, not of the State" (2007: 33), so constitutionalism refers basically to the legal and institutional order, and to the political processes of their justification which are, nevertheless, being launched in lifeworlds and reach beyond the nation-state.

Further, this leads to the idea of "cosmopolitan law [which] is a logical consequence of the idea of the constitutive rule of law. It establishes for the first time a symmetry

between the juridification of social and political relations both within and beyond the state's borders" (Habermas 2002: 199). The participants in the project of self-constitutionalisation are supposed to engage in public justifications of legal norms and ensure that they stay in conformity with moral principles (Habermas 2002: 95) in order to override a "second state of nature" (Habermas 2008: 449) existing from the global-international point of view, to override unguarded *ius gentium* and to establish *ius cosmopoliticum*, because "whereas international law, like all law in the state of nature, is only provisionally valid, cosmopolitan law would resemble state-sanctioned civil law in definitely bringing the state of nature to an end" (Habermas 2002: 168).

One final remark shall be added. A threefold constitutionalisation, as proposed by Habermas, makes his position, as regards constitutional cosmopolitanism, much closer to the stance of the mature Immanuel Kant, as Pauline Kleingeld claims. Firstly, the addressees of *ius cosmopoliticum* would be states as well as citizens (Kleingeld 2012: 192). Secondly, therefore, this sort of constitutional cosmopolitanism does not stick to the idea of the world republic resembling a nation-state, but rather takes historic circumstances into account and offers integration "into a global federative constitutional framework involving a reformed United Nations" (Kleingeld 2012: 191; Habermas 2008). Thirdly, it presumes that realising the rationality potentials built into communicative action triggers the processes of reflexive learning that are necessary if the obedience to *ius cosmopoliticum* is not to solely be founded on the exercise of sanctions but instead in the principle of democracy. Habermasian interpretation of the 'right to rule' presumes the transformation of both elements: authors of the law who reflexively learn, and the constitution which is being established in the processes of self-constitutionalisation.

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