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Back to Kant?

The Democratic Deficits in Habermas' Global Constitutionalism

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In 2006, Jürgen Habermas raised the question, 'Does the constitutionalization of international law still have a chance?' With this, he presupposes that a constitutionalized framework of global public law, enabling the global 'normative taming of political power through law' (Habermas 2006: 116), is required to enact cosmopolitan norms and to ensure international peace and security. His question also indicates his fear that the process of such normatively desirable cosmopolitan constitutionalization is under threat, not only because governments bend existing rules to national interests, but also because global constitutionalism and the universal juridification of international relations themselves face a legitimation crisis.

In the light of this concern, this chapter seeks to offer a critical reappraisal of two different models of global constitutionalism proposed by Habermas that respond to Immanuel Kant's cosmopolitanism and seek to move beyond it. In particular, I will argue that although Habermas' models absorb Kant's cosmopolitan intuitions and contribute important resources for critiquing resilient nationalist fictions and sovereigntist shortcomings, cultural relativism and arbitrary justice, they also risk fetishizing what he presupposes *a priori* to be universally consensual, rational and binding formal constitutional principles. Without pretending to offer an exhaustive treatment of his cosmopolitan writings, I will show how far Habermas' rationalist conception of cosmopolitan law thus departs from his discursive theory of deliberative democracy and its emphasis on politically, culturally and communicatively grounded democratic legitimation. In effect, I will argue, Habermas replaces the latter with the classical liberal priority of transcendentally-grounded formal human rights

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and gestures towards standardized procedures to determine if and when global law enforcement is justified. Habermas' conception of cosmopolitan law thereby sidelines the effective conditions of public autonomy, which his own theory of deliberative democracy identifies as necessary to regulate the implementation of rights and any other legitimate legal principles.

I will further argue that, in this, Habermas' global constitutionalism is more 'Kantian', or rigorously formalistic, than Kant himself. For, unlike Habermas and despite his own formalism, Kant also recognizes the practical limitations of coercive cosmopolitan law without the proper public conditions, revealing tensions in the cosmopolitan project that cannot be resolved philosophically, but only through *political* 'translations', mediations and appropriations. Thus, while Habermas offers some important new conceptual insights into the changing conditions of human rights, democracy and constitutionalism, reflecting post-Westphalian developments that Kant could not foresee, his 'fundamental conceptual revision' (Habermas 1998b: 179) tends to suffocate the crucial political space in Kant's cosmopolitanism and gloss over constitutive tensions of which Kant remains acutely aware. As a corrective to the democratic deficit and top-down elements of Habermas' models, then, it is worth reconsidering his own earlier accounts of democratic deliberation, which embrace the potentially unsettling power of diverse (trans)national democratic publics and allocate a central place to self-legislating and deliberating subjects (Scheuerman 2008). I will suggest that such an approach reflects Kant's political moment and conception of public right more faithfully and ultimately provides for a more robust sense of human rights politics and of cosmopolitanism 'from below'.

Kant's Cosmopolitanism and Habermas' Critique

In his theoretical reflections on the 'cosmopolitan question', Habermas consistently takes Kant as his point of departure. He recognizes that Kant not only develops several groundbreaking modern political-philosophical conceptions of the cosmopolitan condition and cosmopolitan public right, but also, by suggesting that 'the peoples of the earth' have started to evolve into a 'universal community' in which 'the violation of rights in *one* part of the world is felt *everywhere*' (Kant 1795: 107), is the first to conceive of the global public interconnectedness that now informs global politics. Such a global public not only serves a critical function in Kant's envisioned cosmopolitan condition — it is also the latter's very precondition. For in Kant's

account, the mere rational and moral validity of cosmopolitan principles is insufficient to necessitate their realization in cosmopolitan law. In order to yield moral and political authority to cosmopolitan principles, he claims, they must also be grounded in critical debate over what the law ought to be (Burgett 1998: 42). What Kant calls the 'affirmative and transcendental principle of public right', namely, that 'all maxims relating to the right of other men are unjust if they are not consistent with conditions of publicity', thus establishes 'harmony between right and politics' (1795: 130) by synthesizing and mediating between them. Consequently, any lawful global condition must meet the robust standards of global publicity as its prerequisite. Furthermore, Kant does not philosophically specify the global public sphere's political qualities and boundaries, or indeed illustrate how the transcendental formula will actually work in global politics, but rather emphasizes the role of particulars that 'stand in need of publicity' (ibid.). As Dick Howard has shown, this points to the place of the political in Kant's system: its founding morality needs a political complement which cannot be defined from within the critical method (see Howard 1987: 266ff.). Without a transparent and robust global public capable of engendering global public will-formation, in Kant's view, cosmopolitan law must remain primarily a regulative ideal and cosmopolitan right be limited to universal hospitality (itself a far-reaching requirement, unrealized in the existing global political order).

Another aspect of Kant's political cosmopolitanism is significant for the critique and revisions that Habermas suggests. Insofar as Kant sets out a politico-legal architecture of cosmopolitan conditions, there is a remarkable tension between his 'Idea for a Universal History with a Cosmopolitan Purpose' (1784) and his 'Toward Perpetual Peace' (1795). The former delineates the 'inevitable outcome' or *telos* of a 'world federation' conceived as a 'cosmopolitan system of general political security' that subordinates states to external, binding coercive public law. Replicating the social contract model of a republic on a global level, such *ius cosmopoliticum* is anchored in 'law-governed external relations' among political communities. It 'derives its security and rights not from its own power or its own legal judgement, but solely from . . . a united power and the law- governed decisions of a united will' (Kant 1784: 49, 47).

In contrast, in 'Toward Perpetual Peace' Kant condemns the idea of a world federation as that of a 'soulless despotism'. Here, he departs from a globalized social contract model and distinguishes between the union of a unitary 'world government', on the one hand, and the

voluntary 'pacific federation' or confederated 'league of nations' that he proposes, on the other (Kant 1795; see Habermas 1998b: 168ff.). Although Kant now conceives of cosmopolitan right in terms of a universal hospitality that imposes on states an important political obligation to individual human beings, irrespective of their belonging to a particular territory (see Fine 2003), the voluntary 'universal association' or 'permanent congress of states' that he envisions (Kant 1797: 119) hardly transcends the weak binding force of conventional international law. Indeed, Kant argues that such a federation could be 'dissolved at any time' (ibid.: 120). In contrast to a union based on a constitution like that of the American states, such a federation evolves among autonomous political communities and upholds their political autonomy: 'This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the *freedom* of each state itself, along with that of the other confederated states' (Kant 1795: 104). In this cosmopolitan conception, a pluralistic federation *without* the universal rule of 'public coercive laws' (ibid.: 105) may gradually extend to encompass all states, and thus is practicable and has 'objective reality'. While Kant suggests that external public coercive laws — 'an *international state (civitas gentium)*1 that embraces 'all peoples of the earth' — remains the rational telos of world society, he turns to a politically pragmatic cosmopolitan model that reflects the actual democratic 'will of nations' (ibid.; see Kleingeld 2006: 477).[1] Rather than insisting on a constitutionalized world republic based on coercive public laws that require demanding republican standards of will-formation, legitimacy and publicity, then, the league of nations that Kant proposes in 'Toward Perpetual Peace' points to a 'lawful co-existence' in the realm of international right, according to which 'cosmopolitan citizens still need their individual republics to be citizens at all' (Benhabib 2004: 39).

Still, in both of his models, Kant views global publicity as the condition for the actualization of cosmopolitan law. Recognizing public autonomy as a prerequisite for the advancement of cosmopolitan principles and responsibilities, such as respect for human rights, hospitality and global peace, he suggests that the federation of states can

[1] To be sure, Kant also insists that the 'rights of man must be held sacred, however great a sacrifice the ruling power may have to make. There can be no half measures here; it is no use devising hybrid solutions such as a pragmatically conditioned right halfway between right and utility' (1795: 125).

be bolstered by an emerging global public. This points beyond a mere collection of sovereign states and collective wills. But it is too weak to legitimate supranational coercive law and it does not necessitate a world republic. The lawful relations among independent subjects and republics are therefore, in Dick Howard's words, 'neither the result of the subsumption of particularity under an *a priori* universal, nor are they the result of the empirical deduction from pregiven facts' (1987: 266).

At the same time, Kant also qualifies the concept of sovereignty by introducing the cosmopolitan right to hospitality, linking peace among states to their internal constitution and giving cross-border relationships a significant role in delineating cosmopolitan right (Benhabib 2004: 42). In so doing, he marks the transition from the Westphalian model of sovereignty to a conception of 'liberal international sovereignty' that makes the formal equality of states increasingly dependent upon their subscribing to cosmopolitan principles of human rights and peaceful conduct (ibid.: 41).

Habermas' discussion of the 'cosmopolitan condition' takes this 'post-sovereign' element as its starting point. Habermas credits Kant with taking a 'decisive step beyond international law centred exclusively on states' (2006: 115). But he criticizes Kant's framework for being historically outdated and for its 'readily apparent' contradictory character — that is, the 'inconsistencies' (Habermas 1998b: 169) in both Kant's idealist and unfeasible model of world republicanism, which he never actually renounced as an idea, and Kant's later, weaker conception of a voluntary cosmopolitan federation, which functions as the negative 'surrogate' (Habermas 2006: 124, 129) for coercive public laws. While the first model offers an 'overhasty concretization of the general idea of a "cosmopolitan condition"' (ibid.: 123) that smacks of idealistic utopianism, Habermas argues that Kant's second model is doomed to failure: 'Just how the permanence of this union . . . can be guaranteed without the legally binding character of an institution analogous to a state constitution Kant never explains' (Habermas 1998b: 169). We are left, Habermas claims, with an unstable constellation: cosmopolitan principles could not endure politically and be effective without an element of binding legal obligation. A voluntary association of sovereign states based only on each government's moral commitments would easily fall apart under pressure, just as the League of Nations did (ibid.).

For Habermas, the reasons that Kant gives for thinking that such a federation could persist are implausible. An appeal to a hidden cosmopolitan 'purpose of nature' is unsatisfactory, he claims. And he

deems Kant's appeal to nation-states' reason insufficient and inadequate, rejecting the three 'quasi-natural tendencies' with which Kant attempts to explain 'why a federation of nations could be in the enlightened self-interest of each state' (Habermas 1998b: 171): first, the presumed ability of free sovereign republics to generate lawful conditions, cosmopolitan norms and peaceful relations; second, the power of international commerce to foster peaceful associations; and, third, the evolution of critical public spheres that ultimately engender enlightened universal 'agreement over principles' (Kant 1795: 114; Habermas 1998b: 176). According to Habermas, these three assumed tendencies have been 'falsified' by developments in the 20th and 21st centuries, invalidating the historical premises on which Kant's theory is based (1998b: 171ff.). Regarding the first tendency, Habermas argues that although constitutional republics, or 'liberal democracies', indeed tend to engender non-belligerent conduct in relations with one another, Kant did not fully grasp the 'janus-faced' (2001) character of nation-states — that is, the force of aggressive nationalism that is also inscribed in the very idea of sovereign nation-states and that has motivated modern mass atrocities. Regarding the second tendency, Habermas points out that international capitalism and the emergence of the world market have not only led to new levels of global economic interdependence that might have pacifying effects, but have also fostered imperialism and new social conflicts. Finally, regarding the third tendency, Habermas claims that Kant relied on the transparency of a 'surveyable public sphere' among educated citizens and did not anticipate its evolution into a complex system 'dominated by deception, (non)verbal indoctrination, digital media and pervaded by images and virtual realities' (Habermas 1998b: 176).

Besides arguing that history has shown Kant's non-binding and nation-centric model to be based on outdated premises and to be too optimistic and weak to enable a stable cosmopolitan condition, Habermas also claims that today's postnational constellation displays progressive historical developments that Kant could not have anticipated. In particular, he claims that this constellation reflects altered international and transnational relations in which states are no longer the only actors, a new scope of normative and legal limitations to national sovereignty and public autonomy and the self-reflective globalization of issues and risks that humans and citizens face (ibid.: 179). Shaped by globalization's cumulative worldwide interdependencies and an increasing 'blurring of boundaries between domestic and foreign policy', Habermas claims, this post-national constellation

thus already meets 'the constitutionalization of international law ... halfway' (2006: 177).

Habermas' Models of Global Constitutionalism and Their Democratic Deficits

Building on these developments, Habermas proposes a constitu-tionalization of international law as an alternative to both Kant's earlier notion of a legally constituted world state and his later conception of a voluntary global federation of sovereign states, which Habermas considers merely morally grounded and thus unstable, if not unsustainable. Habermas' cosmopolitan reconceptualiza-tion, framed as global constitutionalism, is supposed to reflect the aforementioned empirical developments and enable a global legal framework as well as a 'global domestic politics' without appealing to idealistic conceptions of world government (ibid.: 135). Indeed, as noted above, Habermas claims that global constitutionalism has already evolved to some extent, and needs only to be strengthened by more robust principles and institutions. In legal terms, this process of constitutionalization builds on innovations in international law since 1945, including internationally binding conventions, treaties and charters, and significant provisions in the UN context that already grant supranational legal authority. For instance, the international legal principle of non-intervention does not hold for members who violate the general prohibition of the use of violence; Article 42 of the UN Charter allows for coercive measures by the Security Council; and Article 43, although inoperative until this day, already authorizes the UN Security Council to take supreme command of military forces (Habermas 2006: 163). Habermas also suggests that objective functional pressures caused by global crises will motivate the evolution of a supranational authority. On the grounds that the global community is increasingly a community of shared risks but is organizationally disintegrated and socially stratified, that human rights claims can no longer be exclusively addressed on a national level and that there is already an emergent global public sphere that could provide weak democratic legitimation, Habermas suggests that the time is ripe to move towards an overarching, binding cosmopolitan public law: 'Cosmopolitan law must be institutionalized in such a way that it is binding on the individual governments' (1998b: 179).

In all of his constitutionalist models, Habermas proposes a multilevel system that appeals particularly to the concept of 'divided sovereignty'. Epitomized in Kant's time by the American constitution,

the concept refers to forms of constitutionalism that involve not only republican checks and balances, but also corresponding chains of legitimation that unfold in parallel (Habermas 2006: 128). On a global level, Habermas claims, the concept of divided sovereignty allows us to transcend the classical antinomy between territorial public autonomy and democratic legitimation by circumscribed popular sovereignty, on the one hand, and legitimate global public law, on the other, and thus to elude Kant's 'false choice' between a potentially despotic world state and the thin 'negative substitute' of a voluntary association of states without proper legal force and authority.

Over the span of almost two decades, Habermas has offered two slightly different models, as well as justifications and specifications, of global constitutionalism. In the essay 'Kant's Idea of Perpetual Peace', originally published in 1996, he develops an ambitious model of global public law to accommodate democracy's changing conditions and new global challenges, which is anchored in the democratization of central global institutions. Cosmopolitan law, then, would treat human beings both as citizens of a state and as world citizens in the full juridical sense, directly realizing a universal legal status as individual subjects 'by granting them unmediated membership in the association of free and equal world citizens' (Habermas 1998b: 181). Habermas hereby seeks to resolve the structural conflict between state sovereignty and the cosmopolitan law of a powerful world state by pointing to new forms of divided sovereignty that reflect such dual membership, and thus envisions a superior supranational constitutionalized authority that would be capable of dealing with global problems without necessarily creating a despotic world government.

Habermas frames this new authority and regulatory capacity in terms of both 'global public law' and 'global governance' (1998b, 2001, 2006; Scheuerman 2008). To be politically effective, Habermas argues, cosmopolitan law and global domestic politics require that constitutionalized powers be supported by transparent democratic procedures beyond 'soft power' (Bohman 2007), so that global institutions are democratized in a multilevel system without rendering national citizenship and robust national democratic institutions and publics superfluous (Habermas 1998c). In institutional terms, in 'Kant's Idea of Perpetual Peace' Habermas proposes that the existing weak links between international law and its enforcement be replaced by a binding and democratized power — that is, a global executive backed by a world parliament and checked by a powerful world court. Specifically, he suggests that the UN Security Council, the General Assembly and international criminal courts be strengthened and

become part of an integrated global system of divided authority. First, regarding the Security Council, he proposes that it be transformed into an executive branch capable of deploying 'military forces under its own command', exercising global police functions and implementing policies and laws. In particular, the Security Council would 'enforce the General Declaration of Human Rights, if necessary by curtailing the sovereign power of nation-states' (Habermas 1998b: 187ff.). Hereby, human rights violations are not just judged morally, but prosecuted in accordance with institutionalized legal procedures *'like* criminal actions' within a state (ibid.: 193). Given the emergence of the concept of humanitarian interventionism in the aftermath of the Rwanda genocide and the NATO intervention in the Kosovo crisis, Habermas claims that 'international law's prohibition of intervention is in need of revision' (ibid.: 182). Currently, if condoned by the UN Security Council, such interventions tend to appeal to a broadened interpretation of Chapter VII of the UN Charter, which refers to measures 'to maintain or restore international peace and security', rather than being based in a clear legal definition that can be effectively operationalized (UN Charter, 1973: art. 39).

Second, in order to ensure the democratic legitimation of such a reinforced executive branch and its actions, Habermas proposes the democratization of the UN parliament and the expansion of its authority. He criticizes the present world organization for disregarding whether member states 'have republican constitutions and respect human rights' — in fact, he claims, it 'abstracts not only from the differences in legitimacy among its members within the community of *states*, but also from difference in their status within a stratified world *society*' (Habermas 1998b: 183). In response, he proposes the establishment of two chambers to replicate the divided sovereignty of federal state organizations: the General Assembly, today an assembly of government delegations, would divide its competencies with a democratic world parliament that would represent 'the totality of world citizens not by their governments but by directly elected representatives'. Countries that refused such direct democratic elections 'could be represented in the interim by nongovernmental organizations appointed by the World Parliament itself as the representatives of oppressed populations' (ibid.: 187). This democratic clause and its procedural requirements would make universal democratic rights the prerequisite of cosmopolitan law and global domestic politics, and thus address the UN's current democratic deficit.

Habermas' third proposal in 'Kant's Idea of Perpetual Peace' is that international criminal courts be institutionalized as a 'World

Court' and given supreme as well as binding capacities to initiate prosecution and exercise judicial review in areas of global public law, particularly those concerning basic human rights. For Habermas, the current International Criminal Court has negligible significance in terms of its scope, judgements and formal complaint procedures, including the individual right to appeal. While its existence points in the right direction and demonstrates the shortcomings of Kant's notion of international law as a non-binding agreement among sovereign entities, the court's central authority requires reinforcement (ibid.: 189).

This cosmopolitan model raises significant problems, however. Habermas claims to differentiate between politics, law and morality, and thus opposes the moralization of politics not bound by the 'real abstraction' of general legal rules. In particular, he concedes that global public law and human rights enforcement can be legitimated only by a 'normative agreement concerning human rights' and a 'shared conception of the desirable state of peace' (Habermas 1998b: 185). He acknowledges in passing that such conceptions are still disputed. But in contradiction to this, he simultaneously suggests that we need not await the outcome of global public deliberation, since we can presuppose a general agreement about human rights norms and universal support for their global implementation by force (ibid.: 191). Moreover, he ultimately attributes a prepolitical quality to these norms. While recognizing that the existing Security Council uses its discretion in a 'highly selective manner' (ibid.: 180), he ultimately doubts that the content of human rights and their universal application can be subjected to political contestation. Human rights, he argues, regulate matters of such generality that they can be sufficiently justified and constitutionally *legitimated* by rational moral arguments, which show that they are 'equally good for *everybody* (ibid.: 191ff.). Despite this moral content, Habermas also understands human rights as an essentially 'juridical concept' because they are reflective of the modern concept of individual liberties and he presupposes that their content forms the constitutive general norm for any legal order. For him, they only *appear* as moral rights, rather than legal rights, because of their validity beyond the legal orders of nation-states and their special justificatory status (ibid.: 190).

Thus, Habermas ultimately prioritizes classical prepolitical, foundationalist liberal rights — philosophically grounded in 'rational' moral claims — over public autonomy, suspending his deliberative-democratic co-originality claim that 'private and public autonomy presuppose each other in such a way that neither human rights nor

popular sovereignty can claim primacy over its counterpart' (1998a: 261). Moral universalism hereby regains its metaphysical foundation, as it escapes the sphere of political contestation and enters a prepolitically justified, universally juridified and allegedly neutrally applicable form of law above politics. By presupposing what he considers to be the rational outcome of reasonable public will-formation, namely, the standards, procedures and enforcement of human rights, Habermas thus envisions a rational universal standard to be executed by centralized global authorities that bypasses decentred democratic control, robust global public accountability and political responsibility for the consequences of military interventions.

It is not clear how his transfer of power and competencies to centralized global agencies can be sufficiently legitimized in light of Habermas' own theory, his innovative conception of a democratized world parliament notwithstanding. On the one hand, he insists that a more robust global public sphere is 'urgently needed' to legitimize global domestic politics and law, recognizing the current structural weaknesses of global publics. On the other hand, he declares that a weak global public sphere is sufficient for global institutions and public law to be legitimate, as long as their functions are circumscribed to issues of global concern. But according to Habermas' own discursive theory of deliberative democracy, those affected by a norm or decision should be able to participate in deliberation over it, and this requires sufficiently robust communicative communities. Even on the national level, these are often dysfunctional and shaped by vast inequalities and exclusions. At the global level, issues of distance, access and language, as well as of complexity and transparency, complicate even minimum conditions of public will-formation, while participation among formally equal world citizens and attention to global issues remains largely filtered through national publics.

In 'Does the Constitutionalization of International Law Still Have a Chance?', originally published in 2004, and subsequent work on the subject, Habermas seeks to revise and specify his model of cosmopolitan constitutionalism, partly in response to some of the problems of his earlier, more ambitious global democracy model. Again, rejecting both a world constitutional state on the one hand and a voluntary confederation of independent states on the other, Habermas' revised model sharpens the distinction between an undesirable constitutional world state and a 'politically constituted world society' (2006: 118), a distinction he claims that Kant did not appreciate. The constitutionalized international law and reformed world organization that Habermas proposes do not have the self-legislating political competencies of a

democratic constitutional state and their state-like qualities are supposed to be restricted to a few 'clearly circumscribed functions' (ibid.: 136). The political constitution of a decentred world society is conceived as a multilevel system in which nation-states remain prominent political actors in the global legal order, and which 'for good reason lacks the character of a state *as a whole*' (Habermas 2006: 136). However, Habermas continues to endorse the binding constitutional authority of supranational institutions, while also limiting their scope more strictly to matters of gross human rights violations and securing global peace. His proposal now relegates other global concerns, such as global economic justice or global environmental policy, to non-binding forums, rather than considering them subject to the policy-making of a democratized global parliament, and he also lowers the democracy requirements of global institutions. Thus, as David Ingram points out, Habermas' defence of a cosmopolitan constitutional regime hinges on two assumptions: the functional assumption that global crises will motivate the evolution of supranational competencies to deal with them, and the normative assumption that 'a world security and human rights regime can be legitimated prepolitically, by direct appeal to universally acknowledged human rights principles, and politically, by indirect appeal to a "weak" global public opinion' (Ingram 2010: 301).

In the self-understanding of a constitutional state, the horizontal association of citizens who, as subjects and authors of the law, mutually grant each other rights lawfully, domesticates hierarchical state organizations in which political power is exercised and policies implemented (Habermas 2006: 131). By contrast, Haber- mas argues, the process of constitutionalization and juridification of global politics that promote peace and guarantee human rights points in an opposite genealogical direction: it proceeds from the 'non-hierarchical association of collective actors to the supra- and transnational organizations of a cosmopolitan order' (ibid.: 133). This process has a fundamentally different starting point, namely, classical international law's recognition of sovereign states. While classical international law already recognizes a kind of fragmentary proto-constitution by upholding a quasi-legal community with formally equal rights, its actors are collective and its self-obligations lack 'the binding force of reciprocal legal obligations' (ibid.). What is missing, then, is not a constitution that founds an association of free and equal citizens under law, but stronger supranational mandates for governance that domesticate non-hierarchical actors from above without adopting comprehensive state functions. In Habermas' words, there is a need for regulating authorities 'above competing states that would equip

the international community with the executive and sanctioning powers required to implement and enforce its rules and decisions' (Habermas 2006: 132).

While it seeks to protect the rights of human beings as world citizens — cosmopolitan law as the law of individuals is to trump sovereign state power — Habermas' revised model 'reserves institutions and procedures of global governance for states at both supra- and transnational levels', states thus being 'bound by consensual norm', but 'not relegated to mere parts of an overarching hierarchical superstate' (ibid.: 135). Global constitutionalism should neither entail the complete mediatization of law through a world republic nor ignore the particular trust and loyalty of citizens towards their nation-states. Indeed, Habermas claims that the juridification of world politics must take as its starting point 'individuals *and states* as the two categories of *founding subjects of a world constitution*' (2008: 449, emphasis in original). In particular, he specifies three levels of a global constitutional order, referring to different institutions, legal responsibilities and legitimization procedures. First, the constitutionalized world organization has the responsibility to ensure that basic human rights are respected worldwide 'in an effective and non-selective fashion' (Habermas 2006: 136) and that international peace is preserved. The universal validity and legitimacy of its laws is bolstered by the articulated solidarity of world citizens and their moral public outrage in the face of mass violence and gross human rights violations, although Habermas holds that such global law requires only weak democratic legitimation. Second, below the global authority's state-like functions of securing peace and human rights, Habermas reserves space for 'global domestic politics without world government'. Such governance involves policy-making at the intermediate, transnational level that facilitates conflict-mediating negotiation, domesticates major powers and includes forums for global dialogue about the meaning of UN principles and global problems. Global politics should not be restricted to mere coordination, he claims, but also actively rectify global disparities and address global problems, from the global economy to ecology. Yet he no longer envisions these policy arenas as being subjected to the binding global authority and to the legislative procedures advanced by an originally envisioned democratized global parliament, although he does suggest that transnational policy-making requires a higher level of legitimation than cosmopolitan law's universal human rights. As a transnational regime with representative mandates, he sees the EU as an institutional model for this intermediate level. Third, and finally, along with leverage in global

institutions, Habermas claims that sovereign states should retain much of their self-legislating authority.

The global constitutional order that Habermas envisions will most certainly not satisfy Kant's standards of publicity and 'republican standards of democratic legitimation' (2006: 139). To be sure, Habermas continues to insist that global public law should not be completely detached from democratic legitimation, however weak. If a global constitution is to be anything more than a legal facade of global hegemony, he argues, it must 'remain tied at least indirectly to processes of legitimation within constitutional states . . . and retains a derivative status because it depends on "advances" of legitimation from democratic constitutional states' (ibid.: 139-41). Yet this does not translate into robust democratic institutional prerequisites or procedures, while Habermas' revised model grants a significant transfer to central global authorities and also upholds significant powers for state governments, irrespective of their internal constitutions. For, ultimately, Habermas now considers human rights norms, equipped with 'supraposi- tive validity' (1998b: 189), and the weak, indirect legitimation of the Security Council and the General Assembly, provided by a 'well-informed' global public, sufficient to legitimize the activity of a powerful, centralized world organization, as long as the latter 'restricts itself to the most elementary tasks of securing peace and human rights on a global scale' (2006: 174). Habermas now renounces more robust democratic control mechanisms, such as reforming the UN's General Assembly and supplementing it with a democratically legitimized world parliament that excludes non-elected representatives and checks the small power elite of a reformed executive and world court. Instead, he insists that it is more 'realistic' and, indeed, a necessary precondition in order to 'channel conflicts into civilized procedures' and 'transform international conflicts into domestic conflicts' that all regimes be admitted as equal members into the legislative body without meeting democratic prerequisites; representatives need not be democratically elected or represent a state that respects human rights at any level (ibid.: 165).

Rather than expanding the role of democratic participation in global politics, then, Habermas' later model reduces it. Indeed, he himself recognizes that membership of undemocratic states in the Security Council and the unconditional inclusive membership in the parliamentary assembly he now advocates would both impair the democratic legitimacy of global institutions and harm precisely the universal validity of the basic human rights he seeks to protect (Habermas 2006: 163). Granting equal political rights to despotic regimes that

are undemocratic and violate human rights makes a mockery of those rights claims, much as did seats for states like Syria in the UN General Assembly's subsidiary bodies dealing with human rights. Behind Habermas' formalized legal principles, politics thus reappears through the backdoor and negatively affects the recognition and realization of human rights that he appeals to. Moreover, while Habermas accuses Kant of relying on good-will among republican states, it is unclear what institutional mechanisms beyond good-will are now supposed to ensure that a reformed Security Council enforces human rights non-selectively and acts 'independently of national interests in its choice of agenda and its resolutions' (ibid.: 173).

Reiterating and reinforcing his earlier assumptions, Habermas also suggests that the global normative agreement concerning the juridical character, scope and validity of basic human rights has already become reality. Most importantly, he extends this presupposed universally valid agreement without qualification to the rules and criteria for the global enforcement of human rights, subjected only to the judicial oversight of independent judges who are apparently to serve as unbiased Platonic guardians of those rights: 'We can take for granted that these basic rights are accepted as valid worldwide and that the judicial oversight of the enforcement of law for its part follows rules that are recognized as legitimate' (ibid.: 174). In this model, decisions about global humanitarian interventions can be delegated to executive agencies and to judges who, as interpreters of universal 'cosmopolitan law', approve or reject the application of the global use of force according to uncontested formal standards. Habermas hereby reduces complex human rights politics to the application of formal legal principles and global law enforcement.

Seeking to be more 'realistic' than his earlier, more far-reaching conception of global democracy, then, Habermas' revised model of cosmopolitan constititutionalism strictly circumscribes the areas subject to universal jurisdiction and eliminates the democracy conditions on membership of the world organization and global parliament that he had previously proposed. But this 'realism' risks dramatic consequences. Abandoning any institutional device to control abuse, Habermas' global constitutionalism proposes a significant transfer of authority to supranational institutions, centralizing global power in the areas of peace, security and human rights. While his model negates the still contested character of these global challenges and conflicts, it threatens to suffocate the space for human rights *politics*. By conceiving of and justifying cosmopolitan law largely in terms of a fixed and universally enforceable set of liberal rights that are

grounded in prepolitical normative validity, it escapes political contestation with regard to both substance and application. Such political closure ultimately grants excess power to a small elite of global leaders and governments — both democratic and undemocratic — without the necessary procedures to democratically tame it or expose it to procedural justification pressures. In fact, even more so than in his earlier model, Habermas seeks to juridify key areas of global politics from the top down, while weakening the democratic legitimation and public autonomy that could be, as Kant suggests, the strongest interlocutor for cosmopolitan norms and human rights.

Cosmopolitanism from Below: Rethinking Global Politics and Human Rights

While Habermas is right to point to sociocultural, economic and legal conditions of world society that Kant could not have anticipated, his own 'top-down' conception of cosmopolitanism as a global constitutionalization suffers from democratic deficits that Kant's 'bottom-up' conception might serve to remedy, with its emphasis on the exercise of public autonomy by demoi and multitudes in the legitimation of cosmopolitan law. For Kant's conception recuperates the concern for democratic legitimacy that Habermas pursues in his theory of state politics, but neglects in his conception of global politics. It thus not only cautions us of the failure of the current 'global public' to meet even weak democratic legitimacy requirements, let alone demanding procedural requirements of transcultural dialogue, but also responds to the need for actual, political interpretations of abstract rights and rules for particular contexts through democratic will-formation.

Habermas' global constitutionalism, especially in its most recent reformulation, largely leaves 'the question of democratic legitimacy unanswered' and fails to adequately recognize the 'necessity for mediating international norms through the will formation of democratic peoples', as Seyla Benhabib has put it (2009: 693, 696). Furthermore, if a small circle of global leaders and supposedly neutral judges were to have the authority to rigorously apply formalized criteria for global human rights enforcement without accountable public deliberation about its implications, this could possibly enable endless 'humanitarian interventions' — something to which the UN, as the centralized global institution in which Habermas invests so much hope, has not yet shown itself to be particularly well-disposed, or at least not in an unbiased way. Unlike Kant, then, Habermas ultimately tends to subsume the particular under the general or abstract,

instead of engendering universality through the particular, and does not leave sufficient space for universality's self-reflection. To be sure, it is humanity's unconditional responsibility to secure all individuals and groups against genocide and other crimes against humanity; this cannot be dependent upon democratic majorities (Adorno 1973: 365). But while military assistance can certainly be legitimated if called for by persecuted communities who face gross human atrocities, the application of prepolitical formal principles 'from above' must always remain ambiguous until critical public reflection and judgements about the means and consequences of such actions have also been provided — reflection and judgements about the specific ramifications for concrete subjects, the risk of causing more violence to human lives and the actual chances of bringing lasting improvements in human rights (Ignatieff 2000).

Alternative approaches absorb Habermas' cosmopolitan intentions whilst emphasizing the political moment in Kant's conception. They suggest that global constitutionalism can at best play an auxiliary role in pursuing human rights, at least in the absence of a robust global public. Endorsing global human rights conventions, they oppose sovereigntist cultural relativism, but are also sceptical of any abstract universalism that relies too heavily on prepolitical metaphysical foundations. Such a grounded, 'bottom-up' cosmopolitanism attributes special relevance to the translation of cosmopolitan norms and their specific vernacularizations in diverse collective self-understandings and political or constitutional contexts, as well as in public spaces in which 'communities in action' either exercise, or struggle to obtain, the fundamental human right to political voice and freedom from physical harm (Benhabib 2009; Merry 2006; Rensmann 2012). Habermas' own discursive theory of deliberative democracy, which allocates a central place to self-legislating subjects in culturally grounded communicative communities, can hereby function as a critical resource to challenge the democratic deficits in his global constitutionalism.

As Benhabib has emphasized, human rights can be contextualized without yielding to cultural relativism by focusing on their 'jurisgenerative power' and on democratic iterations in diverse constitutional contexts. These contexts are distinguished by situated meanings, layers, appropriations and translations of cosmopolitan claims in multiple publics and languages, within and across territorial and legal boundaries (Benhabib 2011). The more culturally embedded transnationally active human rights and feminist groups are within a state, the more effective is their capacity to incorporate cosmopolitan

norms in local struggles (Benhabib 2009: 700; Moghadam 2009). The vernacularization of cosmopolitan claims can also push beyond the horizon and content that liberal cosmopolitans envision, and even need not preclude extrajudicial transformative practices that fundamentally challenge existing political orders (Rensmann 2012). The political significance of cosmopolitan claims in fact often rests on their unruly articulations by struggling communities that, emerging unpredictably, act in concert while challenging conventions as well as ruling authorities and global expert opinions.

As significant recent examples of this, the Iranian uprising, the Jasmine Revolution in Tunisia and the Arab Spring more generally have shown that self-constituting democratic multitudes often mobilize cosmopolitan human rights claims from below, generating new public spaces and agreements while acting *against* existing legal processes and systems of rule whose legitimacy is irreversibly exhausted. Such unrest points to an extraordinary cosmopolitics: legal transgressions that appropriate and collectively legitimate human rights claims under conditions in which authoritarian regimes persecute minorities or deny political freedom. Formal rights enabling due process, the rule of law and legal stability can matter tremendously in protecting individuals and groups from arbitrary rule — indeed, failing states often allow for the worst human rights violations. But under conditions of violent authoritarian 'outlaw states' (Rawls 2001), democratic appropriations of cosmopolitan claims often do not function in as neat and orderly a way as we might hope. Especially where the rule of law no longer guarantees viable rights, they may be messy and chaotic. If citizens refuse to subjugate themselves to legal obligations they no longer accept as legitimate, this may also indicate that formal rules and rights do not mean much if they are not supported by a culture of solidarity, responsibility and transparency. And these rules and rights may depend on the fundamentally unsettling power of contingent self-constituting publics that subvert existing legal boundaries or resort to extralegal means. Transnational networks that act in solidarity and help dismantle repressive regimes can thus display crucial supportive functions.

The democratic yet militant uprising in Libya shows that a cosmopolitanism sensitive to difference will also raise significant dilemmas. While cosmopolitanism from below is generally oriented at local democratic public mediations and the reduction of violence, in cases of persecution and gross human rights violations global interference

can become strongly legitimated if it is induced by the voices of persecuted minorities and self-constituting democratic multitudes. Such requests are both more legitimate and more significant than appeals to formal principles inspired by Habermas' global constitutionalism.

Furthermore, cosmopolitan translations and re-articulations can also challenge the content and scope of 'basic human rights' in unpredictable ways. To employ the terms of Walter Benjamin's 'The Task of the Translator' (1968), cosmopolitan claims express human experiences and purposes only if more layers are added to the original — more voices, more languages and more translations — rather than by eliminating new interpretations and cultural appropriations, reducing them to an abstract commonality or formal principle or seeking to recover any presumed 'original' cultural meaning. For instance, local and transnational political communities have often articulated more demanding conceptions of human rights and dignity in their struggles against authoritarian rule, or against economic forms of domination that fall outside the minimalist definitions of Habermas' liberal global constitutionalism.

Of course, global institutional and legal reforms such as those to which Habermas gestures are significant if Kant's cosmopolitan project is ever to be transferred into the contemporary horizon.

In the face of crimes against humanity and nation-states' roles in them, the responsibility to guarantee the universal 'human right' to membership, to 'have rights', has to a considerable extent shifted to humanity as a whole (Arendt 1968: 297ff.). Human rights regimes can also play a positive role in advancing cosmopolitan causes and engendering national legal claims to human dignity, and more effective global regulatory regimes may help to tame, for instance, global social inequalities and the crises caused by unregulated global finance and markets that nation-states can no longer domesticate. But we also need to take Kant's reservations about coercive cosmopolitan law seriously. Global agreements about cosmopolitan norms are possible, but they require actual (trans)national communication and agency, and often involve struggles and contestations. It is important to prevent what Herbert Marcuse calls the 'closing of the political universe' (1964: 19, 32) — that is, the neutralizing of domination through forms of legalism which establish incontestable formal principles and administrative procedures while excluding and concealing underlying problems of democratic legitimation and transparency, global social and political asymmetries, and the critical voices reflecting them. 'Deprovincializing' Habermas'

cosmopolitanism thus also means turning to marginalized political subjectivities and publics which challenge various forms of domination, exclusion and genocidal persecution, and which legitimate claims to human rights and dignity by articulating, interpreting and vernacularizing them in (trans-)national political struggles. Rather than pursuing an integrated global system concerned with enforcing pre-political formal principles from above, the primary task of global political theorists today may well be to pursue a cosmopolitanism 'from below', reconstructing the multiple legal and non-legal ways in which local and transnational interlocutors can help to actualize cosmopolitan claims and solidarity in a decentred world society.

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