

Filling the gap of Habermas' postnational constellation

Why the need for global tax regulation justifies a thick global political institutionalisation

Master Thesis Political Theory
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June 24th 2019
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“Quasi-intellectuele quote waarin iets wordt gezegd over liefde, vrijheid en/of democratie waarbij de lezer even denkt: dat is een mooie quote.”

— Dode Blanke Man, Boektitel, p. xx

Abstract

This thesis analyses Jürgen Habermas' proposal for a postnational order, which he developed around the turn of the 20th century. Habermas argues that democratic liberty is threatened by globalisation. To protect democratic liberty he proposes a three-tiered system of global governance. This theoretical research effort challenges Habermas' proposal, claiming it to be unfit to protect democratic liberty in the postnational constellation. Two main arguments of criticism underly this claim. First, the proposed system of global governance cannot do justice to Habermas' own theory of law and democracy. In this theory Habermas claims that law and democracy are co-original, while this co-originality seems to be absent in Habermas' three-tiered model of global governance.

Second, this research effort claims that Habermas underestimates the degree of interconnectedness we encounter in the postnational constellation. To illustrate this finding, international tax politics and the impact of global tax competition are used as examples. Systems of global tax regulation and global taxation have to be imposed if global politics aims to provide for a stable order and is to secure universal human rights at the supranational level. Taxation without representation is highly problematic in light of democratic liberty. Therefore will be claimed that a postnational order should contain a much thicker form of legitimation.

Keywords: Habermas, global democracy, global constitutionalism, tax competition, global tax regulation, globalisation, cosmopolitanism

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Introduction

The nation state

To a certain extent the nation state can still be seen as the primary context in which we search for a condition that is morally right: a state of democratic justice. In today's globalised world however, the sphere of influence of the nation state has rapidly decreased (Habermas, 2001, 2006a, 2006b; Held, 1995; Held & McGrew, 2003). This has led to a variety of debates in the field of political theory on matters of constitutionalism, democracy and justice. Whether the future of the nation state and its traditional political framework should be reinvented is therefore a relevant issue worth debating.

Jurgen Habermas, one of the world's leading political philosophers, has made important contributions to these debates. Not only regarding the content and form of national and transnational politics, but also concerning global politics. Regarding the level of the nation state, he has made a key contribution to our understanding of law and democracy in his reconciliation of law, justice, democracy and rights; *Between Facts and Norms* (1992/1996) (Rosenfeld & Arato, 1998). In his framework, law and democracy, private and public autonomy, are co-originally constituted. In his successive works *The Postnational Constellation* (1998/2001), *The Divided West* (2004/2006a) and *Time of Transitions* (2001/2006b), he extends this framework and tries to answer the question of how to organise the transnational and global institutional order in the best possible way. He argues that globalisation is a threat to important values, such as democratic liberty, and cannot be fully defended in the context of the nation state.

Tax

Habermas, interestingly enough, only pays little attention to a system of global tax regulation that is essential to create and sustain such a postnational order. The absence of a system of global tax regulation implies decentralized systems and therefore unregulated competition. Tax competition leads to a race to the bottom on the matter of taxation on capital, which is causing a threat to the self-determinative quality of the nation state (Rixen & Dietsch, 2016). A system of global tax regulation could reduce such a race to the bottom.

Moreover, a system of global taxation could provide for a solid financial basis for democratic global political institutions and global public goods. Taxation is presumed to be elementary for a stable political order (Murphy & Nagel, 2002). While taxation thus has a substantial role in our concept of statehood and seems essential for the proper institutionalisation of politics at any level, Habermas' proposal for global democracy does not provide for a system of global tax nor for any form of tax regulation. To this end, this thesis will examine arguments advocating a system of global tax regulations

and global taxation. It will be argued that, in the absence of a system of global tax regulation and rudimentary forms of global taxation, any postnational order will be powerless in essential matters (Brocke & Pogge, 2014; Dietsch & Rixen, 2016).

Research question

The specific focus of this thesis is on the issue of the legitimacy of political frameworks in relation to constitutionalism and democracy as studied in Habermas' theory of law and democracy, and his proposal for a postnational political order. This is illustrated with the example of global taxes. Habermas' arguments for a postnational order, as well as the proposed order itself are critically examined. The research questions to be answered are:

1. *Can Habermas' proposal for a postnational order be considered sustainable and legitimate in light of his own discourse theory of law and democracy, and can it provide a sufficient base for counterbalancing the negative implications globalisation, especially in the form of tax competition, confronts us with?*
2. *When question 1 is answered negatively, (in what way) can Habermas' proposal be adjusted to meet the prerequisites which are found during the investigation on question 1?*

In an attempt to stir up the debate on global constitutionalism, global democracy and to a lesser degree, global justice, an extended framework for a postnational order will be proposed, which meets the requirements to be successful for securing current perceptions of law, democracy and justice on the national, transnational and supranational level. This global order is developed according to the idea of the co-originality of law and democracy that Habermas describes in *Between Facts and Norms*, while doing even more justice to the threats which he envisions to be approaching us in the near future. Moreover, a universal lesson can be learnt with regards to law, democracy and justice in the realm of global politics.

The issue of globalisation

Since the mid-1980's, the number of debates surrounding the issue of globalisation has been increasing. There is great variety in positions on the normative matter of globalisation and what is causing it, and perhaps even more variety on how globalisation should be defined. It has proven difficult to reach consensus on the definition of this phenomenon and concept. There is no universally established framework through which we ought to see it and there are no clear lines of contestation. Instead, there is a mishmash of different discourses and discussions which coexist, preventing one from giving a definitive characterization of the matter (Held & McGrew, 2003).

Regardless of a universal definition that is hard to find, it can be argued that the word 'globalisation' refers to the growing interconnectedness of human affairs on a global scale. Held and McGrew argue

that: “[...] globalisation denotes the expanding scale, growing magnitude, speeding up and deepening impact of interregional flows and patterns of social interaction. It refers to a shift or transformation in the scale of human social organization that links distant communities and expands the reach of power relations across the world’s major regions and continents” (2003, p. 4). This definition shows that globalisation is far-reaching, and it is imaginable that this phenomenon has a significant impact on our everyday lives.

Globalists vs. Sceptics

There are two essential though competing views on the matter of globalisation. The first view is derived from the *globalists*, who consider globalisation as a real and significant development which is redefining or has redefined our world as well as our perception of it. This view is typical for the globalist perspective as supported by, among others, Michael Mann (1986) and Anthony Giddens (1990). They consider globalisation to be an explanatory variable, which can be linked to changes in the way culture, politics and economics are formed. Central to this standpoint is the conception that global change involves a “significant reconfiguration of the organizing principles of social life and world order” (Held & McGrew, 2003, pp. 7). One of the most important organizing principles concerned here is the political organisation of the nation state as the place where political order is defined by a homogenic identity of a people, a nation, within a territorial state. This organising principle is challenged by the fact that different economic, political and social activities increasingly exceed the defined borders of the nation state, while the concept of the nation state is based on exclusivity and boundedness within its territory. For example, nowadays consumers can order at companies like Amazon or AliExpress from anywhere in the world, and political issues are increasingly dealt with by trans- and supranational organisations, of which the European Union is a typical example.

For the *sceptics*, which are represented by authors like Tom Nairn and Paul James (2005), globalisation is nothing more than a social construction which cannot be used for explaining complex changes as described above. Since the phenomenon cannot be well-defined and it has no certain territorial impact, it is not useful as an explanatory variable in academic investigation. It can hardly be measured, and some particular sceptics, as for example Marxists, even see the use of the term ‘globalisation’ as part of a marketing campaign for the further extension of neoliberalism in the world. The term is considered to be used by governments of the Western democracies to indoctrinate citizens to make them fit the demands of a global marketplace (Held & McGrew, 2003).

Consensus

Of course, between black and white there are many shades of grey, and there are as many positions between the standpoints of the sceptics and the globalists. In contrast with the centrifugal notions on

the issue, according to Scheuerman (2018) there is consensus on five basic rudiments of the concept of globalisation. First, the notion of *detrterritorialization*. Globalisation, mainly through an exponential growth of technological measures as the internet, smartphones, and formerly the introduction of telecommunication and television, restricts social and economic activity less and less to a geographical location. Territory, in the traditional sense of a somewhat definitive position in geographical matters, no longer constitutes the 'social space' in which an individual can act (Scheuerman, 2018).

A second characteristic of globalisation is the *interconnectedness* across existing geographical and political boundaries. This means that there is a growing interference of the non-local with the local: for example, the Radboud University's database with articles, theses and books brings our academic references directly into the world of everyone with a working internet connection and a device to download these texts. So, due to globalisation information can be easily shared worldwide. The accessibility of these resources can have a big impact on the development of language and discourse: since digitalisation and automation make it easy for everyone to have an insight in what is hot and happening in academic writing, it has also become a factor in the standardisation of academic discourse around the world.

Third, globalisation refers to *velocity* of social activity. The time needed for communication with distant others, the gathering of information and transportation of persons and goods seem to shrink by the minute. Human action is nested within time and space, and the current constellation gives us the tools to act faster in a greater area of the earth: social activity moves beyond borders very fast, but the same applies to information, capital and goods. Individuals living thousands of miles apart can build a relationship on real-time communication, including sound and picture, through video-calling in ultra-high-definition.

Fourth, globalisation "should be conceived as a relatively *long-term process*" (Scheuerman, 2018, §2). It can be linked to the modern world and to modern technology, but it is hard to define a specific start, let alone predict an end to it. There is no specific event nor a particular point in time which can be identified as the spark which ignited this phenomenon. Some nineteenth-century thinkers already recognized the compression of territoriality, but one could also argue that the intense acceleration of social activity is due to more modern technological improvements (Scheuerman, 2018).

To conclude, Scheuerman argues that globalisation must be understood as a *multi-pronged process*, since all four of the elements mentioned in this chapter manifest themselves within several different forms of social activity. There are financial markets which operate 24/7 due to globalisation and there are modes of production which divide production in units, simultaneously producing the same products in different parts of the globe. Information technology makes it possible to have direct access

to vast amounts of information, and also provides us with tools to communicate on a real-time base with almost anyone in the world via the mobile phone network. The *Critique of Pure Reason* as well as *Analects of Confucius* are (openly) accessible to more people now than they ever have been.

The challenge globalisation brings to the field of political theory

Globalisation poses a challenge to the traditional assumptions political theorists have held in the past about the nation state. During the last centuries, the nation state was considered the basic construct in which topics of political theory have been investigated. The nation state was perceived as a bounded community in which a homogenous group of citizens cooperated as a closed unit, safeguarded by the sovereignty of the state. Globalisation poses a fundamental threat to this position of the state as the main institutional perspective in contemporary political theory, since the self-sufficiency of states is increasingly questionable.

This decreasing self-sufficiency results in the blurring of the clear delineation between the 'domestic' and the 'foreign'. The foreign has an increasing impact **in the domestic**, and it is therefore increasingly questionable if the realisation of fundamental normative ideals, which hitherto had their place in the nation states, can still be realized within this globalised political arena. For instance, what is the net worth of national democracy when macro-economic issues are increasingly dealt with by the global market? And how can a just welfare state be guaranteed in a global economic system where (democratic) states are increasingly part of a global tax race to the bottom? As a consequence of our changing constellation at least three main strands of political and legal theory are in need of substantial revisions: constitutionalism, democracy and justice.

(Global) Constitutionalism

One of the most rudimentary topics in political and legal theory is the one answering questions of how a legitimate political order is shaped, and how the rules of the political game are codified: constitutionalism. Constitutionalism is thus the practice of theorizing the procedure of political decision-making whereby an ultimate authority is installed by a people: "It places limits on political life through its emphasis on the rule of law" (Lang & Wientjes, 2017, pp. 2). There are two levels on which debates are taking place about postnational constitutionalism. First, the transnational level, of which the EU is the most evident example, and second, the global or supranational level. These two differ in essential ways. The problem of constitutionalism at the transnational level is very similar **with** the problem of constitutionalism at the national level, it is more or less an upscaling of the existing situation. We can find an example in the constitutive treaties of the European Union, which **shows** many similarities with the constitutions of for example Germany, France or the Netherlands.

Constitutionalism on the supranational level, however, is in many respects fundamentally different from constitutionalism at the nation state level. One fundamental assumption of a legitimate constitution on the levels of the nation state and the transnational order is **that one can never be imposed to be subject of a constitution**. Thus, the decision to be subject of a constitution should be voluntarily made. This makes the possibility to opt out a prerequisite, although opting out would mean that one should leave the territory considered. In a supranational constitution such an opt-out is impossible, since it has to be all-inclusive. There is no possibility to opt out as long as there is no other planet on which we can survive, and therefore what is at stake differs from the national perspective. Two main camps of constitutionalists are to be considered: legal cosmopolitans and sceptics (Kumm, 2009).

Legal cosmopolitans argue for a global law system among global citizens. One of the main representatives of *legal cosmopolitanism* is Immanuel Kant. In his *Perpetual Peace* (1795/1991) he was seeking for a way to reach for eternal peace. In this project Kant was one of the first theorists in International Law to change the main subject of the law from states themselves to the citizens of these states in a horizontal relation which each other. In this perception, every human being should have the same status as subject under the law, which introduces the concept of the global citizen. This added to the concept of international law so-called cosmopolitan law, in which every human being has the protection of freedom under that law, as well as the duty to act upon it. Kant himself shrunk back from the extrapolation of constitutionalism to the supranational realm due to the risk of despotism on the highest level of statehood. When the state's sovereignty cannot be broken by another powerful party, he argued, the risk that a despotic ruler gains all government power is too high. Contemporary cosmopolitans however still build on Kant's concept of the equality of human beings as global citizens. The *sceptics* of cosmopolitanism instead argue that such a concept of constitutionalism on the supranational level is not relevant empirically nor normatively. On the perspective of the sceptics, Kumm states that:

Constitutionalism with regard to international law is constitutionalism with a small c: the project to describe international law or parts of it as a coherent legal system that exhibits some structural features of domestic constitutional law, but that is not connected to the establishment of an ultimate authority, not connected to the coercive powers of state institutions and not connected to the self-governing practices of a people.

(Kumm, 2009, p. 260)

In the sceptics' view, the practice of International Law is one that cannot reach anything close to a constitution for global citizens, who as individual subjects can be regarded authors of the regime.

(Global) Democracy

The debate on global democracy is concerned with the question of how democracy should be secured in the context of globalisation. The question at stake here is if there should be a place for institutions with a significant amount of political power that operate beyond the level of the nation state and, moreover, how these institutions should be legitimised. This is therefore a debate on the normative desirability of how, and the technical framework in which, political power can be institutionalized and how these decision-making procedures can be justified on the transnational and supranational levels (Kuiper, 2016).

Again, we find a main division between two standpoints: a *statist* perspective and a *globalist* perspective. Authors sharing the *statist* perspective argue that democracy is only applicable in the realm of the nation state. Furthermore, legitimation of the political order is only considered feasible when the group of people considered is largely homogeneous. This corresponds with Immanuel Kant, who in *Perpetual Peace* (1795/1991), after he rejects the world state, argues for a global federation of peoples in the form of cooperating republican states. Transnational politics have to be dealt with through international cooperation between nations. The democratic quality then is provided by each singular nation state, which in itself is democratically designed.

Authors supporting a more *globalist* perspective argue differently, although they take a variety of routes. One of these routes is the one cosmopolitans choose. Cosmopolitans such as David Held (2002), Daniele Archibugi (2008) and Simon Caney (2005), challenge the statist view. Their ideas assume that every individual should consider himself to be author of the framework that is forming politics. When political questions should be answered on any which level, a procedure of legitimation should be institutionalised on that same level. However, cosmopolitans do not necessarily support the installation of a full-fledged world government in which full sovereignty is handed over to the highest level of politics. This opposes ideas of the world state supporters as, for example, Cabrera (2004) and Kuper (2004), which choose a different route than cosmopolitans do. Furthermore, there are supporters of deliberative democracy in a global perspective, and supporters of radical democracy, who both argue for a more specific form of global democracy (Kuyper, 2016).

(Global) Justice

The third debate dealing with the questions and challenges globalisation puts forward, is one focusing on the particular notion of redistributive justice John Rawls argues for in his *Theory of Justice* (1971). In his masterpiece, Rawls argues that resource inequality should be dealt with by the *difference principle*, which requires that inequalities concerning socially primary goods can only be justified if

these are to the benefit of the representative worst off (Blake, Michael and Smith (2015). So, the best off should only get any better off when the worst off, or poorest, gain anything by it.

The universality of this principle has been a topic of debate between *left institutionalist* and *right institutionalists*. The latter is indicated by Rawls himself (Black, Michael and Smith, 2015). In later work, especially in *The Law of Peoples* (1999), Rawls argues that the difference principle should only be applied in the context of the nation state and should not be directly extended to the global political realm or order. According to Rawls the international and the domestic realm should be clearly distinguished; global justice cannot be equated with social justice. As a matter of fact, right institutionalists are no supporters of strong global institutions in these matters. Followers of Rawls' line of argumentation see the liberal democratic state as the only context in which his two principles of justice fully apply.

For the *left institutionalists*, who think that Rawls has developed a universal account of distributive justice in his *A Theory of Justice*, such a move is problematic: if Rawls' two principles of justice only fully apply within the realm of the nation state, then it can be concluded that these principles are context-bound, and therefore cannot be regarded as universal. The *left institutionalists* argue instead that the principles of justice can be seen as universal, more so as Rawls seems to have claimed that his two principles of justice can be seen as foundational elements of a theory of distributive justice. They extend the applicability of the principles of justice to a more transnational or even supranational realm.

Both sides agree that the focus should be "on institutions or rule-governed practices as the trigger of genuinely egalitarian distributive obligations" (Black, Michael and Smith, 2015, §3). This means that they consider egalitarian principles of justice only to be applicable in the context of an institutionalised structure, whether these are nation states or other political structures. So, for Rawls' two principles of justice to apply, there has to be present a specific institutionalized context, a *basic structure*: a shared structure in which parties subject to this structure participate, and in which the structure determines the distributive shares of the participants (Black, Michael and Smith, 2015).

[Shedding new light on the main debates of global political theory](#)

The debate between left and right institutionalist on the issue of global justice seems to be in a stalemate. In this thesis, the question of global redistributive justice will therefore only be indirectly addressed. The primary focus will be on the issues of global constitutionalism and democracy. With, but also against Habermas, this thesis argues that his proposal for a postnational global order can only be sustained within the context of strong and democratically legitimate political institutions at the global level. If this is the case, however, the question of some form of global egalitarianism immediately kicks in for both left and right institutionalists. Both left and right institutionalists, after all, argue that

any application of egalitarian principles of justice presupposes a sufficient institutional framework. On the one hand strong institutions provide a trigger for distributive justice. On the other hand, it is clear that such an institutional framework has to be legitimate and democratic, for it is hard to imagine an illegitimate and undemocratic framework delivering justice since justice presupposes some form of democracy.

Methodology

The first chapter of this thesis devotes itself to Habermas' theory of law and democracy, as he carried out in *Between Facts and Norms* (1996). Central to this theory is the tension between two interconnected ideas: law and democracy or, put differently, private and public autonomy. Habermas' reconstruction of law provides a scheme in which five categories of rights are considered as the requirements to obtain a just, stable and legitimate political order.

In his later works, Habermas recognises the threats of globalisation for the power that national institutions can exert: when decision-making procedures are crossing borders, a legitimate institutional framework on the state-level loses its impact. Therefore, Habermas undertakes a quest to find out how to comprise these decision-making procedures again within a renewed institutional framework. The second chapter investigates his account of our postnational constellation and his proposal for a form of global order, which he both examines in a variety of works (2001; 2004; 2006). In these works, Habermas argues for the federalisation of nation states into transnational units that have a size comparable to the EU. Habermas' proposal for a postnational order, however, raises certain questions in light on his own account of the discourse theory of law and democracy which are discussed at the end of the chapter.

The third chapter discusses the matters of global tax competition and the 'race to the bottom' that this competition is causing. The technical description of what tax is, why we raise tax and how tax competition evades the self-determinative property of nation states, provides further insight in the tenability of arguments of statist views in this respect. This is illustrated by studying the main arguments of Peter Dietsch and Thomas Rixen, who have extensively written on the matter of tax competition and global tax regulation. Furthermore, a first argument will be brought up for establishing a global tax system.

The fourth and final chapter will evaluate Habermas' proposal for a postnational order considering both his own account on law and democracy and the arguments for global tax regulation and taxation that have been brought forward in the third chapter. The introduction of global tax regulation and global tax leaves us with substantial political questions, which can only be answered at that global level. These answers will have a substantial impact on the private autonomy of every global citizen.

Therefore, a thicker institutionalisation of politics on the global level is a mere necessity. This last chapter will end with a proposal for extending Habermas' postnational constellation. When the contours of this constellation are formed, it is suggested that the three debates on the matters of constitutionalism, democracy and justice in a global context are hardly as separable as they are mostly conceived. Finally, the research questions will be answered in a brief conclusion.

Chapter 1: Habermas' reconstruction of constitutional democracy

The Theory of Communicative Action

In his earlier works on the theory of *communicative action*, Habermas formulates an analysis of the colonisation of the lifeworld. He refers to this concept of the lifeworld in his attempt to find a way to describe social order, which he states rests mainly on the basis of what he calls 'communicative action'. This lifeworld is the horizon against which an individual seeks his place in the world and plans his actions: it depends fully on the interpretation of the individual himself to determine which part of this lifeworld is important. However, that interest can be joined by others. This opens an opportunity to broaden the horizon a little, by reaching consensus in communicative action with these other participants. This consensus can lead to changes in the lifeworld, but these changes are always piecemeal. Above all, the lifeworld functions as "stock of shared assumptions and background knowledge, of shared reasons on the basis of which agents may reach consensus" (Finlayson, 2005, p. 52). Therefore, the lifeworld, due to the common interest, rests on consensus concerning validity claims, and functions against disintegration.

An example of the way in which the lifeworld manifests itself is when a student tells his younger flatmate to buy some new crates of beer since their stock of beer is almost finished. Many assumptions are pre-supposed when the older flatmate starts uttering his command, for example, that it is a task of the junior flatmate to take care of the stock of beer. These assumptions provide the horizon against which the junior flatmate acts. Moreover, these assumptions can all be discussed by one of the flatmates as well. The junior flatmate can for example think that it is ridiculous that he must provide for the stock of beer. Discussions can take place through communicative action and can result in a new consensus. But, these discussions of the background assumptions are rather exceptions, which means that regularly, life is lived according to the background assumptions.

The system

The system is the other forming realm of social order. The system refers to established patterns of *instrumental and strategic action* instead of communicative action: "It can be divided into two different sub-systems, money and power, according to which it imposes external aims on agents" (Finlayson, 2005, p. 53). The chief function of both, what Habermas calls steering media, is the reproduction of society as it is: patterns of behaviour are predictable, due to the institutionalisation of power and money, since the social interaction of individuals is steered by these media. Instrumental and strategic action are based on the calculatable reaction of the system of power and money, and thus are rationally motivated. Since societies are getting ever more complex, the system helps the social interaction in the lifeworld to keep up with complexity. The system, therefore, has a function similar

to the lifeworld, in providing background assumptions for living a life. With what Habermas calls the colonisation of the lifeworld, he refers to the tendency of the system to displace or even destroy the lifeworld. This leads to a disequilibrium between both, and moreover, since the system is considered to be a parasite of the lifeworld, to the destruction of the system itself (Baxter, 1987).

The rationalisation of the lifeworld: from ethical to moral discourse

The premise on which Habermas progresses his investigation of the theory of law and democracy is what he describes as the 'rationalisation of the lifeworld'. This refers to the same event as the colonization of the lifeworld as mentioned before. Due to this rationalisation, which started during the Enlightenment, society becomes rather atomistic instead of holistic: since actions are based on individual rational considerations, the common background between individuals is undermined. Furthermore, this rationalisation of the lifeworld changed the norms guiding human actions: ethical norms got replaced by moral norms.

Ethics in a traditional sense has become the subject of a mere contingent praxis of reflection and discussion. In the classic world (of virtue, cultural traditions and processes of socialisation) ethics was considered a consistent base on which one could act. Ethical values were assumed as given necessities, and therefore they met the criteria of shared assumptions in the lifeworld. When the complexity of society increased due to its much bigger scale and the rationalization, this changed. Ethical values formed particularities instead of common assumptions. Every individual in a complex society is a subject of its own history and ethical assumptions, and therefore these values can't provide for a common background in a complex society. The uprooting of ethical fundamentals results in a growing number of debates concerning collective identities and their history. This growing potential for discussion and dissensus has fostered individualism and pluralism in collective forms of life: ethics has become part of politics and an ethical-political discourse emerged (Habermas, 1992/1996).

Therefore, due to the rationalization, intersubjectively shared traditions and forms of life are being or already have been replaced by an "abstract demand for a conscious, self-critical appropriation, the demand that one responsibly take possession of one's own individual, irreplaceable, and contingent life history" (Habermas, 1992/1996, p. 96). Positions taken by individuals are increasingly based on self-interest, instead of a presupposed common background. That means that to act, one cannot rely on pre-given ethical norms, but one must rationally, and above all individually, legitimise one's own acts. This results in a spread of positions due to dissensus and conflict which follow from this individualisation (Baxter, 2011). Furthermore, individuals are confronted with a cognitive deficit, since we are not in possession of the means to rationally deliberate on all choices we make, since there are simply too many; our brains are just not fast enough.

Along with this shift from given ethical consensus to discussion and dissensus, norms of interaction became reflexive. Furthermore, to decrease the complexity, more universalist value orientations have ascended. Rational discourse can only gain practical orientations from the reflexive forms of communicative action, which make the potentials of rationality penetrate the lifeworld. Laws which were derived from ethical and cultural knowledge based on metaphysics or religious utopias thus came under extended pressure: cultural-ethical discourses could not fulfil the demand for justification which was needed due to rationalisation. For that reason, a more universally applicable discourse has developed since: a moral discourse (Habermas, 1992/1996).

The system of law

Ethics has an implicit goal, due to its particularity, for an individual's own good or the good of the society the individual considers itself a part of. Morality, instead, is free from that ego- or ethnocentrism. What is to be called moral is to be considered in the same interest for all human individuals. Laws have to be based on principles of universal justice and solidarity to be legitimised, according to a framework of universal morality. The discourse of law thus serves as a mediator between these discourses of the ethical and the moral, and therefore these two bases form the soil from which democratic self-legislation sprouts.

Habermas argues that law is a necessary institute which can lighten the burden of the cognitive deficit individuals are confronted with due to the rationalisation of the lifeworld. When individuals are acting under legitimate law, there is no need to legitimise every single action one performs. Law thus provides for a renewed common background for society to act upon. Furthermore, it relieves the individuals in society from the burden of continuous communicative action to reach consensus.

Difficulties which results from the pluralism of society due to rationalisation of the lifeworld can't be addressed by the process of communicative action alone; because humans are not equipped to handle all these questions of legitimacy tied to their actions due to **the** cognitive deficit. Habermas argues that these difficulties can be addressed through the matter of modern law, if a law system can fulfil two necessary conditions. First, the **law system** has to be coercive. Compliance with the law has to be enforced upon subjects when necessary. Second, the legitimation of the legal order should not be under discussion. Subjects should regard the procedure of the formation of the content of law legitimate and unquestionable (Baxter, 2006).

Habermas' investigation on such a law system starts with the **analysis** of existing theories of law. He discusses various discourses involved in the creation and application of legitimate law: German civil law theory, and the theories of Kant and Rousseau. Central to Habermas' investigation is the constant tension between what he refers to as private and public autonomy. Private autonomy secures the

sovereignty of the individual by strictly demarcating their own space of self-determination through a set of basic rights, while public autonomy secures the authorship one has over these rights. Following Habermas through his investigation of the three discourses, the tension between both forms of autonomy constantly returns.

German civil law theory has a deficit on the matter of public autonomy according to Habermas. It thus has a legitimacy problem: it is not possible to penetrate the law system from the lifeworld through communicative action. Therefore, the justification the law system refers to is that of personal sovereignty and private autonomy (Baxter, 2006). But this system is paradoxical in nature: on the one hand, the rights that are proposed to be granted to every individual have the same structure as every other right granting individuals their freedom of choice. But, on the other hand, these rights have no reference to a democratic procedure that has a socially integrating force.

Rousseau provides us with an account of democratic law-making which is based primarily on what he calls the general will. This form of the general will can only work in a small community where the value of the common will is pre-given in society. Rousseau cannot succeed in the legitimisation of the common will as a principle mediating the free choices of all individuals (Baxter, 2006). The common will has to be normatively construed. The general laws which are proposed as the common will, therefore, cannot be valid, since there is no room for individuals to accept the norms on the basis of their own reasoning. While providing for some sense of public autonomy, there is thus no secure private autonomy in which one has the freedom to question that common will.

In Kant, Habermas happily finds attention both for private and public autonomy, but argues that these are incompatible due to the moral fundament of the former. Private autonomy in Kant's theory of law is deduced from a universal moral premise, in which individual rights are secured within a mutual recognition of equal rights among all citizens. When morality is considered to be the foundation on which the system of law has to be built, and there's only one moral law, that morality seems to be presupposed. When these moral norms are presupposed, the room for penetration of this system of law by the lifeworld is abandoned: a pre-given universal morality laid down in law restricts communicative action on the content of law and therefore prevents individuals to be considered the **author** of the law (Habermas, 1992/1996). This theory therefore falls short on the side of public autonomy.

A keystone to balance private and public autonomy

As we saw, **in the discourses** the two concepts of private and public autonomy compete with each other. Kant's system of natural rights, which belong "inalienably" to every human being, is constituted independently from these human beings' own elaboration. Rousseau's republican reading is more

concerned with the will of the people as a collective decision procedure, which will map out the route law has to take. This contrast is what Habermas extensively points out in his theory of law and democracy, and which is the root cause of the tension which he wants to make visible. He argues that:

Liberals invoke the danger of a “tyranny of the majority” and postulate the priority of human rights that guarantee the pre-political liberties of the individual and set limits on the sovereign will of the political legislator. The proponents of a civic republicanism, on the contrary, emphasize the intrinsic, non-instrumentalizable value of civic self-organization, so that human rights have a binding character for a political community only as elements of their own consciously appropriated tradition. [...] In the one case, the moral-cognitive moment predominates, in the other, the ethical-volitional.

(Habermas, 1992/1996, p. 100)

Kant and Rousseau did not succeed in creating a mutual understanding of these two conceptions law needs, according to Habermas. According to Kant, universal human rights are pre-political: there is no withdrawal from them, and they are given in universal moral principles. Kant assumed that these rights are non-negotiable and not subject to bargaining. In contrast, according to Rousseau, universal rights are given a normative content, since they are supposed to carry out the peoples’ sovereignty. Rousseau therefore gives a more ethical interpretation, which can take more pluralistic forms. As a result, Habermas wants to show this ‘unacknowledged competition’. On one side the morally constituted human rights prevail, as in Kant’s theory and German civil law theory. On the other side the principle of popular sovereignty does. These two visions make up the self-understanding of contemporary constitutional democracies.

Habermas, after rejecting the three discourses of law discussed above, continues his investigation by searching for a law system in which private and public law are considered to be co-originally constituted. A law system should integrate the individual as subject of the law into the ordered network of relationships that surround him and bind him with others. Human rights are based on the reciprocal recognition of cooperating legal persons, who are considered the subjects of universal and identical laws. Therefore, these rights should be mutually granted to each other within a society, while the subjects of the law are at the same time each other’s competitors in that society.

Habermas, therefore, states that there is a missing link in Kant’s perception of law: rights of a negative kind of freedom do not immediately refer to atomistic and estranged individuals. They suggest instead some natural form of cooperation. Supporting a law system that protects negative freedom is not only securing one’s own freedom, but also enhancing the freedom of all other subjects under that law system. Therefore, for Habermas, the discursive process of rational discourse functions as the keystone between both perspectives of civil rights on one hand, and popular sovereignty on the other. Habermas summarises the tension as follows:

If the rational will can take shape only in the individual subject, then the individual's moral autonomy must reach through the political autonomy of the united will of all in order to secure the private autonomy of each in advance via natural law. If the rational will can take shape only in the macro-subject of a people or nations, then political autonomy must be understood as the self-conscious realization of the ethical substance of a concrete community; and private autonomy is protected from the overpowering force of political autonomy only by the non-discriminatory form of general laws. Both conceptions miss the legitimating force of a discursive process of opinion- and will-formation, in which the illocutionary binding forces of a use of language oriented to mutual understanding serve to bring reason and will together – and lead to convincing positions to which all individuals can agree without coercion. [...] Consequently, the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized. The system of rights can be reduced neither to a moral reading of human rights nor to an ethical reading of popular sovereignty, because the private autonomy of citizens must neither be set above, nor made subordinate to, their political autonomy.

(Habermas, 1992/1996, pp. 103-104)

The created relation between rights and law, private and public autonomy, must be explicated further. According to the theory stated above, the intersubjective structure of rights and the communicative structure of the law have to be merged. Habermas refers to history to take us back to the rationalisation of the lifeworld: in history, legal as well as moral norms are derived from traditional ethical life, with reference to virtues. Concerning the premise of the rationalisation of the lifeworld these virtues are questioned, and therefore the law needs a renewed constitutional factor: a discursive process of the formation of opinion and will. This can only be possible if human rights are made subject to the citizens' practice of democratic self-determination. Therefore, human rights have to be constricted by the self-realisation of people, and at the same time are prerequisites for this self-realisation.

Habermas concludes his elaboration on the theory of law and democracy by making the essentials of his system of positive law concrete.¹ The main task of law, extracted from the tension between private and public autonomy, is the distribution and safeguarding of individual liberties in a way that these are compatible with the same liberties for others. Habermas states that: "This system should contain precisely the basic rights that citizens must mutually grant one another if they want to legitimately

¹ Habermas does this via the application of three major principles. First, the *Discourse Principle* and *Moral Principle* as formulated in his earlier works on the Theory of Communicative Action and his Discourse Ethics (Habermas, 1981/ 1984, 1983/1991). Furthermore the *Democratic Principle* as he formulated during the investigation on the theory of law and democracy in *Between Facts and Norms* (1992/1996). I consider these not elementary for the understanding of his theory of law and democracy needed in the further investigation laid down in this thesis.

regulate their life in common by means of positive law” (1992/1996, p. 118). It should thus provide for the most extensive set of rights that can be reciprocally accepted by and guaranteed to all individuals.

From theory to legal code: five categories of rights

This concretisation leads to five different categories of rights. The first three are categories that, in abstract form, generate the legal code itself, by defining the status of legal persons and securing an extensive set of basic rights:

1. “Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties.*” (Habermas, 1992/1996, p. 122)

Habermas seems to reach this formulation since ‘all affected persons’ in a rational discourse could not agree on a set of rights that would result in unequal individual liberties. Furthermore, it suggests that if equal liberties are the outcome of, and the prerequisites for, the rational discourse, the individuals participating would choose the maximum amount of individual liberties. This is anchored in the phrase “greatest possible measure” (Baxter, 2006). Important, furthermore, is that according to the formulation, the elaboration on which rights should have a part in the final statute is carried out by the subjects of the law themselves, and not by any theorist. Thus, the decisive content is in the hands of the citizens who are supposed to reach consensus via a discursive process.

The second and third categories follow out of the first:

2. “Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.” (Habermas, 1992/1996, p. 122)
3. “Basis rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection.*” (Habermas, 1992/1996, p. 122)

These first three categories secure the horizontal association of the citizens that become subjects of the law that is institutionalised. Every subject has to be a free person and have equal access to the discursive process of law formation. These basic rights guarantee the reciprocal recognition of each subject and their private autonomy, but at the same time give them the status of addressees of the same law as well. A distinction is made here between participants and non-participants in the legal community. Important is that Habermas argues that the legal community is voluntary and therefore: “One cannot be said to “consent” to a legal or political order if one is not free to leave it” (Baxter, 2006, p. 72).

Furthermore, the third category secures the requirement of enforcement through the means of an institutionalised court system in which one has the opportunity to defend **their** private sphere. Here, the discourse principle can impose again the requirements of equal opportunity and treatment. All

these three requirements are still in need of the institutionalisation of political autonomy. Therefore, the fourth category Habermas proposes has to fulfil this debt:

4. "Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law." (1992/1996, p. 123)

This fourth set of rights is essential for the formation of the first three, as well as the fourth itself. Due to the rights that will construct the framework for the process of opinion- and will-formation, there is a space in which the ongoing discursive process can be executed. This framework of political rights securing the public autonomy is therefore reflexive as well as essential for concretising the explicit rights that are going to be invoked. This is a confirmation of the co-originality of both private and public autonomy in the framework. Habermas argues in this regard that:

[...] the desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on criticisable validity claims. Equal opportunities for the political use of communicative freedoms require a legally structured deliberative praxis in which the discourse principle is applied. These various forms of communication and implementation of democratic procedures [...] are meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy.

(Habermas, 1992/1996, p. 127)

The establishment of these procedures in the fourth set of rights secures a valid claim to legitimacy considering the first three sets of rights: the procedure through which the discursive process takes place has primacy above the actual outcome of the process. Therefore, the tension between private and public autonomy is not eternally settled: "That would be inconsistent with the main theme of his discourse theory of law: an inescapable and ongoing tension between facticity and validity" (Baxter, 2006, p. 73). In the fourth set of rights the individual reflection on the rights shifts from the subject from being non-participant to a participant in the process of law formation. As a participant, one is constantly given the possibility to rethink the law in a discursive process of communicative action.

In the end, there is one more category of rights, that is implied from the four preceding categories:

5. "Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4)." (Habermas, 1996, p. 123)

This fifth set of rights can only be justified in relative terms, while the other four are justified in absolute terms. While the first four are necessary to secure the balance between private and public autonomy,

the last is only conditionally necessary: it seems that for social rights there is a constant need to debate the necessity.

Legitimate law on a postnational level

Habermas' theory of law and democracy provides a framework for legitimate and democratic law systems on any level of political organisation. His theory provides us with the tools to examine a system of law on criteria it should necessary meet for it to be legitimate, which makes it very relevant in the debates on global constitutionalisation and global democracy. Essential in his theory is the co-originality of law and democracy: the lifeworld, through a procedure of opinion- and will-formation should always have the possibility to penetrate the law system and change the set of equal individual rights and liberties. Perspectives of the detailed definition of these equal individual rights and liberties are defined within individual perspectives and can change through discursive practices in the lifeworld: communicative action. The 3th and 4th sets of rights Habermas is proposing secure this position of authorship for any subject of the law system.

Since there is a need for a democratic procedure as a procedure of opinion- and will formation, law systems, in a national as well as in a postnational order, are in need of a proper form of representation of all subjects of the law. When the democratic procedure, and therefore the authorship of the subjects in a law system, is lacking, then the law system cannot be functioning as a bridge between the lifeworld and the system. Without democratic influence the law system will not have a connection with the lifeworld, but instead takes sides with the system and loses its base of legitimacy. Finally, when extrapolating Habermas' theory of law and democracy to a postnational order, we should keep in mind that social justice is only relatively justified. This means it's only justified as long it is needed to facilitate *de facto*, thus actual instead of theoretical, private and public autonomy.

Chapter 2: Habermas' postnational constellation

All generations born in the second half of the 20th century or after, grew up as members of a nation state. These individuals cannot imagine a world in which the nation state is not regarded as the most important political structure. After the French and American revolutions in the 18th century the nation state has developed itself as the basic political unit, in which there seems to be a natural correspondence between the nation as a presupposed delimitation of a group of people, and the territorial border in which such a group is able to manifest itself. Most important political matters, as for example security and economy, are decided upon in the realm of the nation state. Furthermore, in a lot of countries, this political unit has achieved the capability of democratic self-control.

According to Habermas, as he writes in *The Postnational Constellation* (1998/2001, pp. 60): “[...] the idea that one part of a democratic society is capable of a reflexive intervention into society as a whole has, until now, been realized only in the context of nation states.” Therefore, the idea of a postnational order makes us shiver a little when that would herald the end of the nation state era and therefore jeopardize the principle of democratic liberty as is referred to in this quote. Habermas argues that the current political order is threatened by globalisation. Our political framework has to catch up with the postnational constellation to secure the democratic liberty we concern to be so important. Habermas took up this project in different texts published around the last turn of the century, among others: *The Postnational Constellation* (1998/2001), *The Divided West* (2004/2006a) and *Time in Transitions* (2001/2006b).

Considering a new three tier-system of global governance

Eventually, Habermas suggests a system of multilevel governance, derived from the arguments for a federal form of world governance and the threats to our contemporary order which is dominated by the concept of the nation state. His postnational order is built with three tiers: the supranational or global level, the intermediate or transnational level and the nation state level. The most important level in this new order seems to be the transnational level. The EU, viewed from a late 20th century and early 21st century perspective is regarded as the main example to build on (Habermas, 2004/2006a; Scheuerman, 2008).

Four aspects that facilitate a self-governing society

Habermas considers four aspects of the nation state to be essential for the development and maintenance of a political unit which can be under a form of democratic self-control (Habermas, 1998/2001). First of these four is the need for a functional specialisation in the form of an *administrative state*, which has to be constituted in the form of positive law. This administrative function is important to clearly separate the private and the public sphere. The functions of the market

should be dependent on the decisions of participants in that market taken in the realm of private autonomy. But, maybe even more important, if society wants to intervene in its own private autonomy it needs a subsystem that allows it to impose collectively binding decisions. This subsystem can be delivered by public autonomy. As we saw in the previous chapter, the system of law Habermas proposes provides society with both this private and public autonomy.

Second, the 'self' of the state has to be well-defined: a *geographical territory* has to be determined with a determined number of persons living within it. The territory will define the law's domain of application. Membership of the state is therefore defined territorially: in the defined area every individual is subjected to the law. Moreover, every individual grants the community as a whole the permission to shape positive law, which intervenes in and secures the freedom of every individual. This co-originality of private and public autonomy, as we saw in the previous chapter, legitimizes the state's authority. The institutions rigged up with the construction of the state are therefore under a form of self-control of the society as such.

The third important feature of a democratically self-controlled political unit Habermas argues to be: "the symbolic construction of 'a people' which turns the modern state into a nation state. (1998/2001, pp. 64)" This *cultural integration* has language, history and descent as constituting attributes. These attributes are providing a common feeling of mutual responsibility and result in a tendency to make sacrifices for each other. This tendency is expressed, for example, in the motivation for the fulfilment of military duties and the willingness to pay taxes used for redistributive politics.

Finally, Habermas mentions as the fourth aspect the *democratic mode of legitimation of political authority*, in which subjects under the law are converted to citizens with liberal and political civil rights. Habermas argues that: "The democratic constitutional state, by its own definition, is a political order created by the people themselves and legitimated by their opinion- and will-formation, which allows the addressees of law to regard themselves at the same time as the authors of the law" (1998/2001, pp. 65). Democratic liberty, therefore, can be found in the possibility for every citizen to persuade others to change their opinion and will, and campaign for the change of positive law accordingly.

The dangers of globalisation for the current political configuration

For Habermas, these four aspects are more or less institutionalised in the nation states of post-war Europe. These are now endangered by the force of globalisation, which he defines as (1998/2001, pp. 66): "the increasing scope and intensity of commercial, communicative, and exchange relations beyond national borders." He argues that the problem, or danger, in the event of globalisation, manifests itself in different ways according to the four different aspects of the democratic process as described above.

First, there is the unreliability of high-tech facilities and ecological degradation, whose scope and severity make their occurrence unmanageable in the context of the nation state: for example, imaginable accidents with nuclear power plants, and the increased capital mobility, which makes taxation and monetary management for steering the states macro economy much more difficult. The topic of taxation will be more extensively discussed in the next chapter. Second, there is the formation of an increasingly interconnected world in the sense of economics, culture and ecology. This growing interconnectedness results in an ever less perfect congruence between the persons and territory affected by state policy and the persons and territory in which the state policy formally should have its impact.

The third element concerns the 'people' living in a nation state: (mass) immigration leads to the necessary expanding of national identity. Sometimes against the will of the people of a nation state, ties with their common history are lost. Subsequently, there can be searched for a new, probably less evident, common ground. Another option is to live in assimilation, which results in less ground for solidarity (Soroka et al., 2016). Fourth and last, the pressure of globalisation leads to a loss of instruments and capacity for nation states to influence their economic cycles, which lead to a 'dismantling' of the social welfare state (Habermas, 1998/2001).

Balancing between opening and closing

Habermas (2001) argues that the threats to the four prerequisites for a democratically self-controlled political unit undermine the foundations of the nation state and therefore its legitimacy as well. Habermas considers there to be two available options for nation states to deal with the challenges globalisation brings to them. A defensive strategy would close off the country from the floods of foreign direct investment, information, immigrants and everything else globalisation brings in. This, however, will not lead to a restoration of legitimacy of the state. The other strategy is to fully open the borders: "as a liberation of the oppressed from the normalizing violence of state regulation, and also as the emancipation of the individual from compulsory assimilation to the behavioural patterns of the collective" (Habermas, 1998/2001, p. 81). That would mean that democratic liberty would be even more exposed to the impact of globalisation. It will lead to a full sale of social policy to fulfil demands of global economy.

Getting grip on the negative impacts of globalisation is thus about balancing between the openness and closedness of borders. Habermas argues that European nation states have a history of ongoing openings and closures. Every opening brings in new dissonant and unknown experiences with foreign events and individuals, in which the horizon of the member is broadened and expanded. The individuals' capacity for action is expanded in three dimensions. First, an increased latitude for a

reflective appropriation of identity-forming traditions is gained. Second, an increased autonomy in interactions with others and in relating to the norms of collective social life is developed. Third, the individual sphere of shaping one's own life is broadened (Habermas, 1998/2001).

Habermas warns however for a total opening of what he calls 'organised modernity', which is manifested through the means of national systems of law. He states that when the national constellation would fully open, there is no closure to be imagined thereafter. Moreover, the base for social politics will be abandoned: "the capacity for collectively binding decisions, politics as such, vanishes with the collapse of the nation state. And with its collapse, a social politics [...] loses its basis" (1998/2001, p. 87-88). Habermas argues that we will only be able to meet the challenges of globalisation in a reasonable manner if the postnational order we will develop contains new forms for society's democratic self-steering.

Globalisation challenges the welfare state as we know it, and therefore we have to figure out how we can adjust our political system to conserve the achievements in the sense of personal, political and social liberties. In *Time of Transitions* he states:

Indeed, the challenge is less to invent something new than to conserve the great achievements of the European nation state beyond its frontiers in a new form. What is new is only the entity which will arise through these endeavours. What must be conserved are the standards of living, the opportunities for education and leisure, and the social space for personal self-realization which are necessary to ensure the fair value of individual liberty, and thereby make democratic participation possible.

(Habermas, 2001/2006b, p. 90)

Habermas argues, in line with his theory of law and democracy, that the mode in which social interactions on a higher political level should be coordinated is of great importance: it should be a horizontal mode of coordination (Habermas, 1998/2001). In the case of the market a functional form of integration is concerned, which is stabilised "through efficiently generated, positively valued action consequences" (1998/2001 pp. 82). This form of integration is based on instrumental coordination of actions through diverse measures that can be taken on the subjects of economics, immigration and technology. This form of integration competes with "social integration" of the collective lifeworld of those who share a collective identity – thus of different 'peoples' with each other; social integration is based on mutual understanding, intersubjectively shared norms, and collective values – and thus not sparked by instrumental or strategic, but by communicative action.

Habermas clearly wants to design a postnational order in such a way that it secures what was already obtained.

Habermas on Kant's perpetual peace: cosmopolitanism in legal theory

When confronted with the U.S. turn in foreign policy under the Bush' administration, which resulted in the invasions of Afghanistan and Iraq, Habermas' wrote *The Divided West* (2004/2006a). The U.S. in these days refrained from further imposing a framework of internationalisation on the world order, which it had supported for decades. Interpreting these events, Habermas revives Kant's project in *Perpetual Peace* to find building blocks for the institutionalisation of the international realm. This institutionalisation should lead to a new wave of internationalisation which can be executed without the support of the U.S., as considered hegemon, to be necessary.

Kant's elaboration on the development of cosmopolitan law with the goal of achieving a state of eternal peace can be seen as a rejection of political realism. Political realists argue that nation states act fully rational and moreover they reject moral and legal duties as a base to act upon in international politics. An important contributor to this theory is Carl Schmitt (1932/1996), who considers behaviour of a state to be morally indifferent. States have the right, or maybe even a duty, to wage war to one another, which makes international politics inherently antagonistic. Moreover, third parties are not falling short of any duty when taking position on the side-line during acts of war.

There is no law considered to be valid between states, the only organisational structure is the so-called balance of power. The relation between power and law in the international realm reflects the underlying power constellations between states. A normative transformation of the political framework in which states would interact is therefore unthinkable for realists. The balance of power, in which states are concerned to have a natural urge to seek for constantly shifting alliances which will deter the other parties to wage war on them, is concerned to facilitate peace.

Kant's alternative to the balance of power: cosmopolitan law

Kant, however, contests this idea of the balance of power as fostering peace. Moreover, he accuses countries waging war to be guilty of using individuals as mere machines in the battlefield. According to Kant "The abolition of war is a command of reason" (Habermas, 2004/2006a, p. 121). Practical reason will rationally prevent humans from waging war, which Kant defines to be not much more than the systemic killing of other humans. He proposes to implement law between states, but also points to the differences of national and international law.

In the national domain the law and the authority of the state are mutually interdependent: the law is an internal attribute of the state. Law forms a framework for the state and its citizens to operate in, and this framework is separating inside and outside due to territorial borders. On the inside, the coercion of the law, enforced by the means of the state, is regulating human interaction. In the

international domain the position of law is different. In the international realm law is only mutually recognised among equal actors, which are the states themselves.

Kant's theory is famous for his proposal to add a third form of law that is regulating matters on a level beyond the nation states, while individuals are considered its subject. When citizens of every nation state are subject to this law, the idea of a global citizen, and with it, the idea of cosmopolitan law, is born. Under that law every human being is a subject, and not only enjoys the protection of certain fundamental freedoms, but also has the duty to act upon them. Therefore, cosmopolitan law fundamentally differs from international law.

As Habermas argues in *The Inclusion of The Other* (1996/1998, pp. 168): "cosmopolitan law would resemble state sanctioned civil law in definitively bringing the state of nature to an end." Thus, the emergence of a cosmopolitan system of law would abandon the constant re-creation of a balance of power to secure the state's position: war has no place in a realm in which fundamental freedoms are protected. Furthermore, as peace is considered the end state of the completion of cosmopolitan law, peace becomes a matter of right, instead of a matter of morality.

Constitutionalisation of the relations between global citizens means that relations between global individuals become law governed: therefore, everyone's freedom co-exists with the freedom of all others. For Kant this constitution for the international community was conceivable only in the form of a republic of republics: a world republic. War therein is impossible, because there are no states or other parties that can fight each other in an anarchic realm. In the world republic conflicts between two actors would be considered regulated internal police actions. When this cosmopolitan law is institutionalised, states will come under the authority of a higher order, a world state of global citizens.

Habermas identifies in Kant's theory three trends, which are long-term factors that would lead to the accommodation of this world state:

The peaceful character of republics, which will form the avant-garde of the league of nations; The pacifying effect of free trade, which makes state actors dependent on the growing interdependences of the world market and compels them to cooperate with one another; and the critical functions of an emergent global public sphere that mobilizes the conscience and political participation of citizens all over the world, because violations of law in one place of the earth are felt in all.

(Habermas, 2004/2006a, p. 126)

Insights in the past centuries tell us that the first is not necessarily true: while democratic republics wage war for different reasons, they are not less present in wars in an absolute sense (Habermas, 1996/1998). Furthermore, the effect of free trade and especially the denationalisation of modes of production and financial markets have a dubious effect on world peace.

From world republic to a federation of free states

Kant, however, concluded that such a world republic cannot be desirable because despotism would be almost inevitable, due to the lack of a political challenger on the global level (Habermas, 1996/1998). States at least have to give up jurisdiction on some topics and would then fall under the authority of cosmopolitan law on these particular matters. Kant, moreover, argues that such a world republic would be inconsistent, since members of states would lose their ethical freedom which they do have in the context of the nation state. He argues that this cannot be reconciled with the idea of a state overlapping an identifiable and homogenic people:

That would be a contradiction inasmuch as every state involves the relation of a *superior* (legislating) to an *inferior* (obeying, namely the people); but a number of nations in one state would constitute only one nation, and this contradicts the presupposition (since here we have to consider the right of *nations* in relations to one another insofar as they comprise different states and are not to be fused into single state).

(Habermas, 2004/2006a, p. 127)

Kant therefore concludes that since there is no room for ethno-political pluralism in a world state, it is inevitable that a world state will lead to social and cultural uniformity. As a result, he weakens his initial proposal and starts to advocate for a much less extensive proposal for a global federation of republics. Habermas however states that Kant misses the point that the transformation of the law in the international realm is fundamentally different from that of the national realm.

Habermas: the difference between 'constitution' and 'state'

The despotic character of a cosmopolitan constitution, according to Habermas, can be **prohibited** when the law is the result of: "a fair process of opinion and will-formation among all those potentially affected" (Habermas, 2004/2006a, pp. 122). Because the national order differs on essential matters from the global order, the development of such a process for cosmopolitan law is not impossible.

In the national realm a state as sovereign power is presupposed, and that state has the means to execute the rule of law by force. In history, this sovereign often started as a despotic ruler. **Hence can be argued** that the monopoly on the use of violence preceded the legitimation of the rule of law. This legitimate rule of law is the product of an evolution of European social contracts through centuries. The elementary law system became subjected to the will of the people through time. Hereby the despotic state evolved in a state in which a procedure of democratic opinion- and will-formation became constitutive for the law.

The development from a despotic state to a democratic state is what Habermas defines as the constitutionalisation of the state: "A state is a complex of hierarchically organized capacities available

for the exercise of political power or the implementation of political programs; a “constitution”, by contrast, defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other” (Habermas, 2004/2006a, pp. 131). Thus, when a democratic state is considered, that state uses its power for the goal of securing the constitution. Such a state cannot have a despotic nature due to the prerequisite of that horizontal relation of free and equal citizens, who together are the authors of the constitution.

In the international realm, there is no sovereign prior to the mutual recognition of every other human under the universal law (Habermas, 1996/1998). Moreover, it are states, not individuals, that are operating in a mainly anarchic realm. The constitutionalisation of cosmopolitan law therefore is like a reversal of the initial situation in the nation states. In the latter there was a sense of state power which was not derived from the horizontal contract of the citizens, but slowly got subjected to that horizontal contract.

In the constitutionalisation of cosmopolitan law, instead, every state is concerned to exist in ‘sovereign equality’ with the others. Since states have the possibility to intervene through sanctions to enforce human rights, the international realm can be considered a community of states and citizens. That dual reference means that there are two different forms of institutionalisation necessary: a federal world republic in which **representation** of states has a place and a politically constituted global society in which all global citizens are represented. So, one can imagine a multi-level system that lacks some of the characteristics of a state as a whole, since there is no thick central bureaucracy with the means to enforce law (Habermas, 2004/2006a). The transition from national and international to cosmopolitan law has thus to be understood as the constitutionalisation of the global realm, but without the presupposed means of force on the supranational level. Habermas hence argues for a world constitution without a world state.

Contours of a postnational order

The outline of that multi-level system is central to Habermas’ framework of the postnational constellation:

On this conception, a suitably reformed world organization could perform the vital but clearly circumscribed functions of securing peace and promoting human rights at the *supranational* level in an effective and non-selective fashion without having to assume the state-like character of a world republic. At the intermediate, *transnational* level, the major powers would address the difficult problems of a global domestic politics which is no longer restricted to mere coordination but extend to promoting actively a rebalanced world order. [...] Nation states in the various world regions would have to unite to form continental regimes on the model of an EU equipped with sufficient power to conduct an effective foreign policy of its own.

(Habermas, 2004/2006a, p. 136)

Central to this matter, he argues, should be the democratic self-control of the people on the level of the transnational and supranational political institutes. In the constitutional state (2004/2006a, p. 132): “all authority springs from the autonomously formed will of civil society”. It is, according to Habermas, the constitutionalisation which is lacking on the supranational level. Therefore, we need to make clear what are the prerequisites for such a constitutionalised postnational framework he suggests. In this framework the main goal is to conserve the democratic liberty we have enjoyed in the order of the nation state.

Considering a new three tier-system of global governance

Eventually, Habermas suggests a system of multilevel governance, derived from the arguments given for a federal form of world governance and the threats to our contemporary order which is dominated by the concept of the nation state. His postnational order is built with three tiers: the supranational or global level, the intermediate or transnational level and the nation state level. The most important level in this new order seems to be the transnational level. The EU, viewed from a late 20th century and early 21st century perspective, is regarded as the main example to build on (Habermas, 2004/2006a; Scheuerman, 2008).

The emergence of a transnational order

The transnational level consists of continental size institutions like the European Union, with the prerequisite of an expansion of the basis for legitimacy and a strengthening of government capacity. As such, it does need a directly chosen parliament (Habermas, 2001/2006b). This has to lead to the emergence of a European civil society, with a common practice of opinion- and will-formation. That civil society moreover includes the need for a Europe-wide political arena, in which the citizens of Europe can feel themselves authors of a law which is also enriched with coercive power.

The question one could ask, and which is arising in many debates on the extension of the mandate of the European Union, is if there is something that can be **concerned** a European people; since in the realm of the nation state there was an overlap between the people and the state. And if there is no such European people, should that not be a reason to reject constitutionalisation on this level? Habermas argues that this argument against constitutionalisation only holds when a particular definition of ‘a people’ is assumed (Habermas, 2001/2006b). It can only be an argument when a people is a pre-political basis. However, reading the essay *What is a People?* (2001/2006b) we see that Habermas does not confirm a people to be such a pre-political basis, since he advocates that in Europe there is rather little naturalness in the ‘nations’ as homogeneous groups in the contemporary constellation of nation states. He substantiates this with different arguments. For example, language,

he argues, is mostly standardized because of the imposed use by state bureaucracies, not because the nation has been speaking and writing in the same institutionalised dialect for centuries. His point here is that (2001, pp. 19): “collective identities are made, not found. “

If a constitutionalisation on the transnational level is accepted, then Habermas moreover argues for tax to be part of the topics on which there is jurisdiction on this level. He argues that: “The duty to pay taxes follow from the decision to use coercive positive law as a medium for the construction of a political order whose first responsibility is to guarantee individual rights” (2001/2006b, p. 101). This argument, moreover, seems to be applicable for any level on which coercive positive law is used as a medium for the construction of a political order.

The other side of the coin, which Habermas acknowledges, is that the transnational level is a mere upscaling of the highest political unit. It will thus not change the mode of operation entirely, but he argues that it leads at least to legitimate political institutions catching up with global markets. If the actors on this transnational level are legitimately acting towards a common life that is providing for the standard of living, education, the individual space for self-determination, and the political autonomy necessary for participation, some threats of globalisation can be withstood.

Supranational order

The global order is concerned to be the final level of political institutionalisation. Here Habermas clearly shrinks back from providing a constitutionalisation of cosmopolitan law with extensive characteristics of statehood. He argues that (2001/2006b, pp. 105): “On the global level, however, both the competence for political action of a world government and corresponding basis for legitimation are lacking.” There is no such thing, he argues, as a world community of people who can legitimately make political decisions and can make these into relevant implementations for all affected.

This has different reasons. For one, it would be highly ineffective (Habermas, 2001/2006b). Another objections he raises is the basis on which such a government is operating, namely, the basis of complete inclusion of every individual on earth: there is no other political institution in which one could have his or her place when he or she would reject the global order. So, there is no opt-out, and therefore the procedure of opinion- and will-formation cannot be regarded as a process that is executed in freedom. Moreover, there is no such thing as the forming of a collective identity and there is a lack of ethical-political self-understanding on this level.

On the level of global politics therefore the only goal that can be served is the safeguarding of human rights through the means of a reformed UN that Habermas proposes in *The Divided West* (2004) and earlier in *The Inclusion of the Other* (1996). This ‘new’ UN has to gain more legitimacy from a global

public opinion and moreover should be able to act more independently from national interests. The Security Council (Habermas, 2004, pp. 173) “[...] must bind itself to actionable rules that lay down, in general terms, when the UN is authorized *and* obligated to take up a case.” The vetoes in the security council have to make place for a qualified majority. Furthermore, Habermas proposes that the UN is equipped with highly mobile military units which can defend the morally universal human rights (Habermas, 2004, pp. 163). The Security Council should moreover be extended with some kind of tribunal that can prosecute the crimes which are committed under cosmopolitan and international law.

A further elaboration on the constitutionalisation of the global realm

Habermas’ proposals for a postnational order comprises a substantial extension and democratisation of the current international order. Yet, one could raise some valid questions on his proposals against the background of his own theory of law and democracy, his account on the theory of cosmopolitanism, and the threats he recognises through the matter of globalisation. After shortly commenting on his proposals for the transnational level, I will further discuss some main points of discussion on the matter of the framework he proposes for the global level.

The transnational order: ready to fix the deficits?

On the transnational level, significant steps are taken on the matter of constitutionalisation. It is however not really clear in what way this level of governance would provide for a real distinctive empowerment of democratic liberties which can withstand the threats of globalisation Habermas points at. This transnational step seems to be rather an increase of scale, whereby one can question if all the threats globalisation confronts us with, can be sufficiently dealt with on this level. In the next chapter I will argue that at least global tax competition is a phenomenon attributed to globalisation which can only be sufficiently dealt with on the supranational level. In short, the degree of interconnectedness on some topics is maybe too high for institutions on a non-global level to fix the democratic deficit. For example, matters of high-tech facilities and ecological issues can pose threats that cannot be stopped at any border whatsoever, whether it is a border of a nation state or one which defines the territory of a transnational entity. It is thus questionable in light of the threats Habermas wants to resist if the transnational level can deliver enough. The goals of these democratised transnational institutions are to “fulfil expectations of fairness and cooperation” (Habermas, 2004, p. 142). It is however questionable if these goals can be fulfilled when only human rights, which Habermas is addressing on the supranational level, are dealt with on the highest level of politics. In the fourth chapter this issue will be further discussed.

The global order: a missing link between private and public autonomy?

Habermas chooses to reject a state-like institutionalisation on the global level, since he argues that the mere constitutionalisation of cosmopolitan law should be the framework in which a global society could find peace. As Scheuerman (2008) frames it, Habermas seem to propose a framework for 'global governance without global government'. Habermas argues that his reorganisation of the UN has the goal to abandon practices of "uncooperative governments that continue to enjoy exclusive control over military resources" (2004, p. 170). The cosmopolitan law of human rights should be unselectively enforced by the UN, and therefore he proposes the UN to have measures for law enforcement and thus the ability to deploy troops (Scheuerman, 2008). However, when the selective government that denies implications of cosmopolitan law, that has to be enforced by the UN, is, for example, the U.S., China, the Russian Federation or The Netherlands, that means that the UN is in need of a substantial modern military force for that cause. One could question if such a military apparatus can be upheld sufficiently without the means to fund it with an independent, and thus tax based, financial organisation.

Furthermore, such a military power to enforce law seems to require some form of authorship of that law of parties in the social contract. Put otherwise, the authorship should be found in the horizontal relation between global citizens as Habermas himself argued (2004/2006a). If not, the co-originality of law and democracy that is regarded to be essential for a legitimate law system in Habermas' theory of law and democracy, would not be respected. The result will be an imbalance of private and public autonomy in a such a system of law. On the supranational level Habermas thus seems to put this co-originality aside (Schaffer, 2015; Tinnevelt & Mertens, 2009).

Formal democracy on the supranational level is only provided for through a layered institutionalization. Schaffer summarizes Habermas' account of the institutionalisation of global democracy as follows: "Habermas suggests that the legitimation of authority at both the supranational and transnational levels must rely on the 'flows of legitimacy' from democratic, constitutional nation states. Additionally, if reformed global institutions conform to established constitutional principles and processes, an informal public opinion could suffice to meet the 'remaining need for legitimation'" (2015, p. 111). The democratic base of legitimation for the global order thus lies on the level of the nation states and arrives through transnational entities at the supranational level. The transnational level is where the institutionalisation of democracy stops and the informal process of opinion- and will-formation in global society has to take over.

This proposal can maybe be defended due to the very narrow jurisdiction Habermas considers on the global level. But, when this jurisdiction has to be substantially broadened, this democratic deficit is

questionable in light of Habermas' theory of law and democracy. Both this and the previous issues will be further examined in the fourth chapter of this thesis. Now I will continue on the matter of a global tax race to the bottom, and why it provides us with a strong argument for the broadening of jurisdiction and institutionalisation on the global level.

Chapter 3: From self-determination to global tax regulation

The previous chapter has outlined the arguments made by Jürgen Habermas on the threats to democratic liberty that the postnational constellation confronts us with. According to these arguments the nation state as a framework in which a procedure of opinion- and will-formation can penetrate the law system has become insufficient. One of the arguments Habermas brings forward is that a limitless flow of capital through globalisation is uncontrollable by, and destabilising of, the nation state. In this chapter, there will be more attention for this topic and the reasons why this limitless flow of capital threatens the prerequisites of a democratically and legitimately organized society. The self-determinative quality of the political organisation is at stake. Tax competition and tax evasion, as will be argued, are external phenomena which lead to policy changes on a nation state level that are not legitimately formulated through a democratic procedure of opinion- and will-formation. Moreover, both result in a tax race to the bottom, which undermines the self-decisive quality of societies even more, as will be shown throughout this chapter.

In this chapter I will first elaborate on the reasons and means for levying tax, and the justification for taxation, as given by Nagel and Murphy in their *The Myth of Ownership. Taxes and Justice*. (2002). Then, a closer look will be taken at ways in which tax competition occurs and the negative impact it has on the self-determinative quality of nation states. Furthermore, this chapter will look at measures Dietsch and Rixen propose to secure the tax base of nation states, in the form of global tax regulation. Finally, I will argue that there are valid arguments to extend this proposed regulative framework with a form of global tax.

Tax: why (it is just)

Taxes are imposed to pay for public goods. The state facilitates an exchange procedure between a variety of individuals who are trying to supply themselves with public goods necessary to fulfil their conception of the good life. Examples of these public goods, which cannot be sufficiently provided for by the market are: a court system, education and law enforcement. They are particularly goods in which the state's interference is needed and wanted by society to overcome problems of collective action. Simply put, tax concerns the raising of revenue to cover government spending and taxation, therefore, serves a so-called allocative function (Dietsch & Rixen, 2014a).

Besides spending on public goods, there are other goals for which taxes are levied. One is the goal of redistribution: tax is used to effectively promote a particular perception of social justice that is the outcome of a democratic process of opinion- and will-formation. The final purpose for levying taxes, especially found in Keynesian economic perceptions, is the stabilisation of the economic business cycle. Economic peaks are flattened by raising revenues, while in time of recessions the economy can

be boosted by lowering revenues through tax cuts and increased government spending (Dietsch & Rixen, 2014a).

The justice of taxation has been heavily debated. Libertarians, such as Friedrich von Hayek (1944) and Robert Nozick (1974), argue that taxation can only be justified for the limited purpose of protecting economic activity. Taxation for other ends, they argue, is equal to forced labour, since people have to give up some of their income to the state. Therefore, they are forced to work more than would otherwise be necessary just in order to attain their private goals. Both von Hayek and Nozick thus argue that market outcomes can validly be claimed as owned by the individuals who have earned these outcomes.

Murphy and Nagel (2002) however argue that this reasoning of libertarians fails: the ownership rights Nozick and von Hayek presume people to hold are part of property regimes that are largely conventional. As such, they are based on mutual acceptance by society as a whole. The protection of this system of conventions then has to be enforced by a system of law, and this is where the libertarian argument finally strands, according to Risse and Meyer: “The enforcement of these rules requires resources, which have to be financed out of pre-tax income either directly or indirectly” (2018, p. 13). For a system of ownership to stay in place and be legitimate, and thus for anyone’s income, this system has to be enforced, for which taxation is needed.

Tax: what and how

There are essentially two variants of taxation: direct and indirect taxes. Indirect taxation is mostly taxation on consumption, of which the value added tax is a good example. Direct taxes are levied based on the three factors of production: land, labour and capital (Dietsch & Rixen, 2014a). These direct taxes are the most important in the debate on global tax competition.

Besides the reasons for, and the different kinds of, taxation, we need a clear view on the matter of who should be the taxing party. Dietsch and Rixen state that: “The power to tax in order to provide public goods should ideally be situated at the level of government that best reflects the reach of the benefits provided and burdens imposed. This “principle of fiscal equivalence” requires that all beneficiaries of certain government activities can be made to share the costs” (2014, pp. 64). The level of taxation should thus be decided according to the so-called principle of subsidiarity: the government function should be located at ‘the lowest possible level’.

For example, when you live in a student flat, the household money to pay for rubbish bags and cleaning materials is to be raised in the community of the flat itself. It would be rather inefficient if the university would provide it by raising more tuition fees, as not every student needs rubbish bags and cleaning materials. Moreover, the democratic process would become unnecessarily complex and the level of

pluralism would rise exponentially: the whole student community is necessarily much more diverse than when only one's flatmates are concerned.

What is fiscal self-determination?

As explained in the first chapter, to overcome issues that are emerging due to pluralism and the complex coherence of the society, the law in a democratic state is the result of a procedure of opinion- and will-formation. As already mentioned, because of the democratic procedure in which this is done, the subjects on which the rules are enforced should be considered the authors of these rules. This is a legitimate procedure as long as the collection of subjects under the law are the authors of that law as well. Moreover, for a truly legitimate procedure, the influence of third parties, which are no party of this procedure because they are no citizens of the state, should not be very substantial. Otherwise the procedure would be no more than a formality. Considering this same procedure in the light of taxation, it is necessary that the subjects of a fiscal regime are the authors of that regime.

For these reasons, fiscal self-determination means: for a community to be able to be in charge of making two basic decisions. First, a community should be able to decide on the size of the public budget. Second, a community should be able to decide on the matter of relative benefits and burdens from this tax revenue: the amount of redistribution of resources. A state should be in the position to self-determine the means by which these goals are met: the rates of direct and indirect taxes.

When rethinking a world order, this fiscal self-determination should also be considered important. As Rixen & Dietsch state on the first page of their book *Global Tax Governance; What's Wrong With It And How To Fix It?*:

Taxation represents one of the core functions of the modern nation state. Therefore, it should be key to an understanding of how economic globalisation affects state sovereignty and the choice and development of international institutions, as well as the effectiveness and legitimacy of both national and international institutions; these are of course, the major themes of the literature on global governance.

(Rixen & Dietsch, 2016, p. 1)

Thus, when talking about global governance, we should take into account that taxation is one of the prerequisites for any form of governance at all.

To examine the problem of global tax competition and possible measures to tackle this problem, there are three main points that should be taken into account (Rixen & Dietsch, 2014b). In the investigation that follows, the assumption is held that a government can perfectly know the preferences of its citizens and act in line with these preferences. This is ideal theory. Furthermore, on the notion of sovereignty, we distinguish *de jure* and *de facto* state sovereignty. *De jure* sovereignty means that

sovereignty is legally recognised, while *de facto* sovereignty means that the described situation also reflects the genuine state of being. *De facto* sovereignty is a prerequisite for the self-determination of a state. Furthermore, it is important to mention that self-determination from the perspective of the nation state is a self-limiting concept. It can be regarded in some sense to have a similar dynamic as the concept of private autonomy of individuals under a sovereign regime: to secure self-determination of states in the context of global taxation, self-determination has to be limited. The reasons why will become clear in the following paragraphs.

The matter of tax competition in a global perspective

The necessity of taxation on the nation state level has been explained. When one assumes a very basic form of public autonomy to be essential for legitimacy, some form of taxation is unavoidable in order to fund the institutions necessary. The same counts for private autonomy, since the state needs to provide for the security of subjects concerning their basic rights. Instead, the matter of international tax regulation or forms of international taxation seems much less evident, since private and public autonomy are not (yet) provided for on this postnational level. When leaving tax policies on the global level unregulated, this can have a great impact on the domestic tax base and therefore on the self-determining capacity of the nation state. Following Dietsch and Rixen:

While the importance of taxation as a means of implementing *domestic* public policy and conceptions of justice is widely acknowledged – and indeed often taken for granted – issues of *international* tax justice are mostly neglected. Tax competition between states puts pressure on domestic fiscal regimes. Mobile factors of production have the opportunity to “shop around” to minimize their tax burden. This interdependence of national tax regimes generates external effects that undermine the *de facto* sovereignty of states. As a consequence, tax competition tends to exacerbate inequalities of income and wealth both within countries and across borders.

(Dietsch & Rixen, 2014b, pp. 150-151)

Tax competition thus leads to the undermining of the fiscal self-determination of states and, as we will see, it leaves countries with many difficulties with regards to the financing of their public budget, developing countries in particular: they are prevented on the state level from executing policies that are the direct outcome of a process of democratic opinion- and will-formation. Tax competition occurs in different forms, which will be discussed below.

Tax competition – poaching & luring

The interactive tax setting is one in which the fiscal regime is determined by independent governments in a non-cooperative, strategic way. Dietsch argues that “For tax competition to exist there must be *fiscal interdependence*. This condition holds when the fiscal policy of one jurisdiction creates externalities for other jurisdictions in the sense that it affects their tax bases” (2015, p. 36). Tax

competition thus occurs at all levels of government. Our focus will be on competition between states. The phenomenon of tax competition takes different forms, from lowering tax rates themselves, to regimes of law that make it impossible for foreign governments to have access to information on the amount of capital individuals or corporations have stored in a country. The following paragraphs first discuss the measures which the OECD calls “poaching”, the competition for portfolio capital and paper profits, which helps individuals and corporations evade tax. Secondly, I will elaborate on ‘real’ tax competition, in which countries try to tempt corporations to make real investments (Dietsch & Rixen, 2014a).

Portfolio capital

Investors have an incentive to shift their cash, securities, and equity holdings to countries where tax rates on their earnings are lowest. Since the last two decades of the 20th century, this has become much easier due to relaxed WTO regulations. Exchange controls on capital had been in place until then, which limited the ability of multinational corporations (MNC’s) to shift their capital and profits from one country to another. Furthermore, there were so-called ‘withholding taxes’, which had as a result that moving assets was not necessarily lucrative. When these were abolished by the U.S. in 1984, the governments of other developed countries followed in order to secure their competitiveness.

Since these days, tax havens have emerged. These tax havens have tax rates that are almost zero and legal perspectives in which the fiscal situation of individuals and corporations becomes rather non-transparent. For example, bank secrecy is secured to make information unreachable for other governments. In research done by Jason Sharman (2010, 2011), he searched for financial institutions that could provide him with anonymous corporate vehicles without proof of identity, and which were also able and willing to open bank accounts for these vehicles. While strictly prohibited, of the 54 institutions contacted, 5 would serve him with both. The estimates of the global loss of taxes due to these prohibited practices are between 155 – 255 billion US dollars a year (Sharman, 2010, 2011). Some of this secret money is even reinvested in companies’ home countries, where it is then treated as Foreign Direct Investment (FDI) – this phenomenon is called ‘round-tripping’ (Dietsch, 2015).

Paper profits

A second form of tax competition is called *paper profits*. Multinationals have the possibility to shift the profits they make between different jurisdictions, letting the details of these shifts depend on imposed tax rates. They use two different techniques to avoid taxes, namely *transfer pricing* and *thin capitalization*. Transfer pricing is executed when one subsidiary of a company sells a product or a service to another subsidiary of the same company. These transactions should conform to what is called the ‘arm length standard’ (ALS), as this principle is adopted by the OECD and WTO. This means

that these products should be sold at market prices: a price that is logically derived from the price one would be paying for the product when it would be attracted externally in the same location.

In a case of transfer pricing the ALS is violated. For example, a company's subsidiary in a low tax country sells a coffee brewer, with a production cost of 30 euros and a market price of 50 euros, for 100 euros to another subsidiary in a high tax country. There it is sold for 90 euro's, under the jurisdiction of the high tax country. A profit of 70 euros is made in the low tax country, in which the tax rate on profit is 10 percent. A 10 euros loss is taken in the second country, where profit would be taxed with a rate of 25 percent. In this case a tax of 7 euros has to be paid in the first country and the tax to be paid in the second country would be lowered with 2,50 euros. This means that the net tax over the profit made from selling the coffee brewer would be 4,50 euros. When the company would act in accordance with the ALS, in the first country the tax on a 20 euro profit would have been 2 euros. In the second country 12,50 euros would have been charged on a profit of 50 euros. This means that when the ALS is respected the net tax to be paid would be 14,50 euros, and the violation of the ALS makes the tax revenue 69 percent lower than it would have been when the ALS is respected.

The second form of paper profits is *thin capitalization*, which is similar to transfer pricing but is executed with different means. Here, a subsidiary in a high tax jurisdiction is funded by a subsidiary in a low tax country via a loan. The positive result of the former is charged on the result as the interest rate for the loan, which can be booked as 'costs', which means the profit is transferred to the low-tax country. This all happens without movement of real business activity, and furthermore, it is not necessarily illegal (Dietsch, 2015). Governments use these possibilities of tax evasion to attract capital from other countries. For example, The Netherlands makes special deals with multinational corporations that channel their capital through Dutch jurisdiction (Dietsch, 2015).

Pushing and pulling: 'real' tax competition

A final way in which countries can compete for tax bases, is through attracting 'real investments': for example, by imposing very low corporate or profit taxes and preferential tax regimes in order to attract foreign direct investment (FDI). The main difference with poaching is that in this way, the owner of capital migrates with their capital, which is not the case when poaching is concerned. This 'pulling' can be encouraged by a pushing incentive of the source or home country. This country then, through its own regulations, pushes its tax base to residence countries and fosters that country in some way to compete with others on tax rates. The U.S. does this with the deferral of profits made in other countries, and Canada with exemptions of profits for their own tax base. When profits due to policies of deferral or exemption are not taxed in the home country, regulations to avoid double taxation

enable the residence country to tax them instead. This gives these countries of residence, the ones 'luring' in foreign capital, an incentive to compete over tax rates.

The erosive impact of tax competition

Due to global tax competition, there is a pressure on nation states to lower tax rates: a state in need of capital has an incentive to lower these rates to stimulate the attraction of foreign direct investment. There is, however, no full 'race to the bottom' when tax revenues are concerned (Dietsch, 2015). This is mainly the case because of the shift governments make in their tax distribution: there is an empirically observable increase in other forms of taxation, namely on labour and consumption. But this is not without consequences, as it leads to a regressive impact on redistribution: "It shifts the tax burden from capital to labour, from direct taxation on revenue to indirect taxation on consumption, and from high incomes to low incomes" (Dietsch, 2015, p. 48). This means that the shift in tax base to sustain fiscal stability is executed at the price of a less progressive level of redistribution.

Moreover, the situation differs between developed countries and developing countries. In the latter, there is no possibility to stabilise tax revenue through extending taxation on labour and consumption, since there is not so much to tax anyway. Dietsch: "As a result, what we observe in developing countries is closer to the economic prediction of a race to the bottom" (2015, p. 48). Thus, the impact on developing countries is asymmetrical when compared to the impact on developed countries. Governments of developing countries are deprived of the resources they need to secure basic rights and needs for the poorest: tax competition, therefore, tends to widen the income gap between the global poor and the global rich. This is further endorsed by Brock & Pogge who argue that:

Practices of international taxation sustain a substantial headwind against which developing countries must struggle and failure to pay or collect taxes greatly reduces revenues available to address poverty, which is among the most pressing global injustices humanity is currently facing. In both these ways, the capacity of poor countries to advance their own development is substantially impeded by an unjust global taxation regime that richer, more powerful states are imposing on them.

(Brock & Pogge, 2014, p. 2)

It has even been claimed that developing countries lose more than three times the amount of aid that they are given due to tax competition (Gurria, 2008).

Shifting taxation away from mobile factors, like capital, to immobile factors, like consumptions, has two other noteworthy implications. First, it puts pressure on government expenditure: when the tax base shrinks and shifts, the revenue of a government to spend will be lower when levels of consumption or labour declines. This leads to cutbacks in spending in a time of economic low tide, which can lead to a worsening of the state of infrastructure and less equal opportunities due to lower

quality education and a lower quality health care system (Dietsch, 2015). So, aside from an inequality of outcome, tax competition also leads to a situation in which there is less equality of opportunity.

Furthermore, tax competition, according to Dietsch (2015), also has effects on the distribution of employment in and between states. FDI has a direct effect on the number of jobs: when a state decides to lower taxes to lure in FDI, this will result in more jobs. This means that when jobs are created for a political goal (for example by a politician campaigning on the promise to create more jobs) by lowering tax rates on FDI to attract FDI, this leads to lower tax revenue from capital. This again is a trade-off which can lure states into a race to the bottom. Therefore, it can be concerned another reason why tax competition has a great effect on the ability of self-determination of states.

Globalisation and the trilemma of the world economy

The previous paragraphs have shown why tax competition is an important obstruct for the self-determinative ability of a political entity, such as the nation state. As Dietsch and Rixen argue: “One obvious desideratum for any tax system is that it should have effective control over the various elements of its tax base” (2014a, p. 64). In the current state of globalisation, this essential prerequisite is constantly violated and nation states are confronted with a problem of collective action when trying to tackle these violations.

As argued before, the worst problems of tax competition occurred after the removal of capital controls in the 1980s (Rodrik, 2011). According to Rodrik (2011), in order to return to a democratic and legitimate form of government, in which we can provide for a stable form of fiscal self-determination again, we only have three options to choose from. In this regard, he considers globalisation as we know it today to be incompatible with national democracy: “We can *restrict* democracy in the interest of minimizing international transaction costs, disregarding the economic and social whiplash that the global economy occasionally produces. We can *limit globalisation*, in the hope of building democratic legitimacy at home. Or we can *globalize democracy*, at the cost of national sovereignty” (Rodrik, 2011, p. 200).

When we give up democracy, the whole concept of democratic liberty will vanish, which is why I will not examine that option. That leaves us with two other options: the limiting of globalisation or the globalisation of democracy. Rodrik (2011) argues for the former, since he sees the pluralism of world society as a fundamental obstacle for global governance. Rixen & Dietsch are less sceptic: they opt for global governance, but, moreover, reject global justice in a sense of a global redistribution scheme due to feasibility problems. What they do argue for, in their article *Tax Competition & Global Background Justice* (2014b), are global regulations on the matter of taxation that should be enforced by an

International Tax Organisation. They qualify some forms of tax competition as unjust, and therefore propose two different principles for restricting the discussed phenomena of poaching and luring.

Solutions: the membership principle and fiscal policy constraint

The first principle is the *membership principle*, which would have to be imposed in order to restrict poaching by countries: it obligates all natural and legal persons “to pay tax in the state of which they are a member” (Rixen & Dietsch, 2016, p. 158). Therefore, openness is required and, when this can be coercively imposed, it takes away the possibility of targeting portfolio capital and paper profits. This principle safeguards the fiscal self-determination of countries. But, as this will make the competition for ‘real’ investment probably even tougher, the authors argue for a second measure to tackle the impact of luring.

The second principle in the form of the *fiscal policy constraint*, therefore, restricts this fiscal self-determination by putting qualitative constraints on the design of fiscal policy. This fiscal policy constraint is two-fold: first of all, a tax policy should not produce a suboptimal outcome, because that would prevent a state of *de facto* sovereignty for other countries. Secondly, it should not intentionally produce such an outcome: thus, a country should not be luring in FDI. This makes the authors argue for what they call a mixed constraint, which should be sensitive to both. It should prohibit: “policies that are formulated strategically *and* have a negative outcome” (Rixen & Dietsch, 2016, p. 165). Here, the negative outcome is an outcome that negatively affects the fiscal self-determination of other countries.

Both principles are to be institutionalised through the establishment of an International Tax Organization (ITO) (Rixen & Dietsch, 2014b). This should be a forum for negotiating and defining the international legal framework which captures both the membership principle and the fiscal policy constraint. Moreover, the authors argue for a dispute settlement body which can independently judge disputes brought up to them. They recognise the shortcomings of democratic legitimacy in this proposal, but they furthermore argue that their proposal is a step forward compared to the current state of tax competition. Moreover, they regard democratically legitimised institutions as non-feasible.

Towards a more extended framework

The principles and framework proposed by Rixen and Dietsch are definitively a step forward when the restriction of global tax competition is concerned. But it is questionable whether these principles and the institutionalization of the ITO can provide the necessary basis for restoring the fiscal self-determination of the nation states. The main problem with their proposal is that it lacks proper means of enforcement of sanctions which can be imposed by the dispute settlement body. Moreover, as far

as global tax competition is concerned, one tax haven that does not respect the principles can pull all others back into a prisoner's dilemma.

As argued, **Fiscal** self-determination is a prerequisite for self-determination of a society. Without it, people are not able to properly decide on the amount of tax revenue raised. There cannot be full authorship for a society in the decisions made on the size and goals of public spending. Thus, the lack of fiscal self-determination can have a determining influence on the capability of a nation state to secure private and public autonomy. Therefore, it should be argued that fiscal self-determination has to be incorporated into the framework of cosmopolitan law.

This argument can be supported by the fact that especially developing countries, but to a lesser degree developed countries as well, are suffering from tax competition. When, due to lack of fiscal self-determination, the negative freedom of people in least development countries (LCD's) is structurally undermined, and therefore, for example, the right to self-preservation of individuals is violated, fiscal self-determination of nation states in some way has to be part of the framework of the most elementary cosmopolitan rights.

Habermas proposes cosmopolitan law to be institutionalized in the form of a modernized UN, as discussed in the previous chapter. But fiscal self-determination has not been a topic in his proposal for the supranational order, related topics are only mentioned by him in the context of the transnational order. Adding the membership principle and the fiscal policy constraint to the supranational framework would mean that cosmopolitan law contains not only rights that can be provided through the safeguarding of negative freedom, but that very political issues such as fiscal norms have to be part of it as well. Otherwise, the set of human rights only contains rights that form a *de jure* framework for individuals. But this framework has not so much to offer people when these human rights cannot be met due to a lack of global tax regulation.

Habermas argues in his works that it is essentially the realm of transnational politics that should provide for solutions to economic globalisation. However, our elaboration on tax competition in this chapter makes it clear that tax competition is rather an issue for global politics. This is due to the fact that any state violating the proposed principles on taxation of capital, pulls every state back into a race to the bottom. The interconnectedness of the world on this issue thus outflanks the capabilities of a transnational order.

Extending the myth of ownership to the global level

It is argued that the matter of tax regulation is essential for the securitisation of human rights. Besides, there is another reason why the proposals made by Rixen & Dietsch will not be sufficient to fulfil the essential needs for re-establishing fiscal self-determination of nation states. When a form of taxation

on this level is not established, both the ITO and UN will be dependent on nation states to pay their contributions to these institutions. As we can observe in many other cases of international cooperation, it is foreseeable that these contributions are infinitely discussed and renegotiated. That does not serve the goal of a stable and capable supranational institutionalisation.

Moreover, nation-states, while they will certainly gain from the ITO and UN, are not the primary beneficiaries of the public goods provided for by these supranational institutions. Brocke argues on this matter that: "There are a number of global public goods that enable and facilitate trade and without which it could not flourish. Examples include: peace, social and political stability, stability of the international and financial monetary system, protection from organized crime, effective law enforcement, populations that enjoy adequate health [...]" (2008, p. 169). The ownership of capital and income of internationally operating individuals and MNCs is, in the same way as income of private persons in a nation state, based on social conventions which provide the means through which ownership can be assigned.

When respecting the argumentation in *The Myth of Ownership* (Murphy & Nagel, 2002), this argumentation can be extended to the global realm. This has an impact for both Habermas' proposal of a modernised UN and Rixen & Dietsch' proposal for the ITO. It is the framework of international tax regulation and the framework of human rights in the renewed UN that will provide public goods on the global level. For that reason, on the global level, a tax for financing the institutions (ITO and UN) that provides for this ownership by securing the public goods can be justified. Since MNCs are operating internationally they will profit even more from public goods that are provided on the supranational level, thus it is defensible that they pay their fair share for this institutionalisation.

Chapter 4: Filling the gap?

Habermas argues in his works on the postnational constellation that there are four essential aspects for a self-governing society. These four are all threatened in the national constellation by the phenomenon of globalisation, as has been argued in the second chapter of this thesis. The growing interconnectedness of the world intervenes the nation states' framework. It poses a threat to the private and public autonomy of citizens in the configuration of the nation state. The border between the 'domestic' and the 'foreign' is blurred and democratic liberty cannot be guaranteed anymore.

Habermas rejects the possibilities of fully opening or closing the borders. Instead, he starts to theorise a new framework that can secure democratic liberty in the postnational constellation. Moreover, this proposed postnational order should provide for a balance between opening and closing of the borders. In his investigation of this order he raises the debates on constitutionalism and democracy to the transnational and global level. In this last chapter his effort on the postnational order will be examined in light of his own theory of law and democracy, and in light of the investigation done on the matter of global tax competition.

The transnational order and global constitutionalism

As argued, Habermas presents a solution of multi-level governance. In this proposal he outlines a three-tier system which consists of nation states, transnational political entities, and a supranational authority in the form of a reformed United Nations. The nation state remains the primary political order in his proposal. On the base of subsidiarity some political issues, as for example economic policies, are shifted to the transnational order. As Habermas argues, this transnational order needs a substantial democratic legitimation and should "fulfil expectations of fairness and cooperation" (Habermas, 2004/2006a, p. 142).

On the supranational order Habermas re-energizes Kant's investigation on legal cosmopolitanism, arguing that Kant's fear for despotism on the global level is not necessarily valid. Since cosmopolitan law is not in need of a global state, he argues, there is no presupposed coercive structure as there is in a theory of law and democracy of the nation state. Therefore, as long as the political order is the product of a democratic procedure of opinion- and will-formation, the issue of despotism can be overcome. Cosmopolitan law, he argues, should be constitutionalised to ensure human rights for every individual.

The lack of public autonomy on the supranational level

A reformed UN has to function as the institutionalisation of such a cosmopolitan constitution. But when one examines this UN in Habermas' framework, it seems to be the product of international law

instead of cosmopolitan law. There is no substantial provision for public autonomy included in the reform proposals, while in *Between Facts and Norms* (1992/1996) Habermas argues that private and public autonomy need to be co-originally constituted in a legitimate political order. Here he “fails to do justice to the idea that rights require democratic articulation” (Schaffer, 2015, p. 108). Human rights in Habermas’ proposal for global constitutionalism seem to be presupposed as moral norms which enjoy universal validity. Habermas himself argues that “Supranational constitutions rest at any rate on basic rights, legal principles, and criminal codes which are the product of prior learning processes and have been tried and tested within democratic nation-states” (Habermas, 2004/2006a, p. 140). These rights are not an outcome of a procedure of opinion- and will-formation, and therefore cannot do justice to pluralism in the world.

A parallel with the Kantian law system Habermas discusses in *Between Facts and Norms* (1992/1996) is easily made: here, he argues that these rights always have to be the outcome of a discursive process of communicative action. In the proposal for the postnational order he seems to have no trouble when such a process is lacking. Habermas thus argues against a substantial form of global democracy.

An illegitimate army?

Furthermore, in the light of the lack of legitimation on the global level, his proposal for an UN-commanded military apparatus is a striking detail. While the military units themselves are to be made available by the nation-states, Habermas argues that the Security Council should be able to take command of these units to protect human rights around the globe. As already argued, it is quite vague what such a military apparatus should look like: when it is meant to enforce coercive measures taken by the security council with a qualified majority, it needs the capabilities to convincingly intervene in those states that are the object of intervention. These can also be very large states with a high military spending, which means that the military capacity of the UN-commanded units should be substantial as well.

This military apparatus thus seems to be in need of a sufficient coercive capacity. That also means that it can hardly be argued that the constitutionalisation of cosmopolitan law in Habermas’ proposal does not include a form of a world state. Instead, he argues for the provision of one of the most elementary attributes of a state: hard power. If the military units, instead, cannot provide for a sufficient coercive capacity, then the military apparatus is a toothless tiger against big states. That would mean that there is not so much risk for despotism on the global level, but it also means that compliance with the law cannot be enforced successfully.

Extending jurisdiction and an increasing democratic deficit due to global tax legislation

Hence, Habermas argues for a minimal global political order, and bets mainly on the transnational order to fix the deficit of democratic liberty which emerged due to the postnational constellation. But here he seems to underestimate the degree of global interconnectedness in the economic realm which undermines one of the prerequisites of a legitimate political order. As we saw in the first chapter on Habermas' theory of law a democracy, the law system needs to relieve individuals from the burden of a cognitive deficit. This is done by adding a basis of legitimacy for actions. One can legitimise actions based on one's own rationale, or one's actions can be instrumentally legitimised by the coercive quality of the law system. The co-originality of private and public autonomy makes it possible for the lifeworld to penetrate the system of law: through a procedure of opinion- and will-formation the system of law can be changed by society itself. **But this so-called** private and public autonomy can only be secured in a context in which the framework itself is stable and self-securing: when external actors are having a great impact on the internal affairs of statehood, this violates private and public autonomy. When these external influences cannot be controlled by the lifeworld, they belong to the system of power or money.

Global tax competition is an aspect of globalisation that for these reasons can only be controlled at the highest possible level of politics: the supranational level. The transnational level is not likely to provide for the needs to restrict tax competition and re-establish the fiscal self-determination of the nation states. It is therefore questionable if the transnational order can "fulfil expectations of fairness and cooperation" (Habermas, 2004, p. 142). Since the interconnectedness of financial systems throughout the whole globe is so extensive, one city-state which manifests itself as tax haven will lure all others back into prisoners' dilemma. This means that this matter should be controlled on an all-inclusive level of economic politics, the global level. Otherwise, no authorship on the topic can be regained by individuals, and thus the self-determinative quality cannot be restored.

Furthermore, the formation of transnational political blocks is questionable on different matters. First, it has to be decided which countries should be part of which block. History of the EU has shown that this is far from simple, and therefore the feasibility of a quick formation of these transnational orders can be considered low. Second, it is probably in the disadvantage of developing countries to form these monetary blocks. Blocks of developed countries would have a big advantage over developing countries. Developed countries, with large economies and relatively small debts, could impose low tax rates on capital from the start. This will lure in foreign direct investment – wherewith low tax revenue will be compensated with jobs and indirect taxes. Developing countries cannot do this, and therefore their self-determinative quality is violated. Low tax rates in developed countries have a negative

influence on tax revenue in developing countries. This makes it harder for these governments to spend on public goods to secure private and public autonomy.

When looking for an order which can provide these countries with fiscal self-determination, this order can only be properly constructed on the supranational level. Such an order needs at least a form of global tax regulation. As argued, the threats of tax competition lead to the undermining of the self-determinative qualities of the nation-states, and furthermore it can endanger even the self-preserving qualities of citizens of these states. Such a framework would not be approved by equal citizens in a (cosmopolitan) law system. In terms of Habermas' sets of rights, some form of the fifth set of rights has to be provided on this global level to secure *de facto* private and public autonomy for global citizens.

Overcoming tax competition – choosing between the systems of power and money

When we look at Habermas' postnational order in light of the theory of communication he seems to develop a postnational order to restore the balance between the system of power, the system of money, and the lifeworld. Our contemporary law system, constituted in the realm of the nation-state, is not able to restrict the system of money anymore, due to the matter of globalisation. If this system is in need of restriction, a form of global tax regulation seems to be unavoidable. Otherwise, tax competition will lead to a lacking self-determinative quality of society, and then the system of money will have a far-reaching impact on the course of life. Furthermore, without it, human rights cannot be universally provisioned.

When Habermas' cosmopolitan law system is coupled with the matter of global tax regulations there seems to be quite a substantial law system to be established. In this law system answers are given to serious political matters. These matters on the securitisation of human rights and global tax regulations will need a judicial system for enforcement. Such a system is well-prepared to restrict the influence of the system of money. However, it goes together with the danger of a growing influence of the system of power. As Kant argued, such a cosmopolitan law system without competitors and with an all-inclusive nature is quite likely to become despotic.

The need for global democracy

We joined Habermas on a search for a political order that will preserve democratic liberty in the postnational constellation. To preserve democratic liberty, a political institutionalisation on the global level asks for a much thicker legitimation than his proposal contains. Global tax regulation will intervene substantially in the self-determinative quality of the nation-state, and therefore in the self-determinative quality of any global citizen's life. This intervention can be defended in the light of that

self-determination itself, which this regulation is also enabling. Thus, in a globalised world we should regard fiscal self-determination and global tax regulation as co-originally constituted.

A system of tax regulations should be carefully implemented. Regulations should not switch the mode of operations from the system of money to the system of power. Instead it should switch to a system of law penetrable by the lifeworld. The co-originality of fiscal self-determination and global tax regulations should be established in a framework of legitimised law, in which law and democracy are co-originally anchored as they have been in the democratic nation state. Global citizens need to be concerned authors of this system of law. So, while taking the decisive role of MNCs and tax havens away from them, the curtailing global law system should ensure private and public autonomy for all global citizens. This seems to be the only possible measure to secure democratic liberty, while not fully renouncing the phenomenon of globalisation. As argued by Rodrik (2011), the only other options are to restrain globalisation or democracy. The former is argued by Habermas to be unfeasible; the latter is unwanted.

From global legitimation to global taxation

As argued, we need a form of democratic legitimation on the global level. Furthermore, we are in need of the institutionalisation of human rights and tax legislation. Both systems provide for public goods that can't be provided for by the market. Habermas argues that: "The duty to pay taxes follows from the decision to use coercive positive law as a medium for the construction of a political order whose first responsibility is to guarantee individual rights" (2001/2006b, p. 101). If we want to overcome issues of instability, the global system can best be facilitated through a system of taxation that is funded by the main profiting parties. Murphy and Nagel provide us with the justification for taxation which provides means to fund the public goods provided (2002). As argued in the previous chapter, the parties which are profiting the most from a supranational order are the MNCs, therefore a tax on their profits can legitimately imposed on the global level.

A form of taxation cannot be regarded as an impartial matter: the institutionalisation of any form of global taxation is definitely a political issue and thus in need of proper legitimation conform the American Revolutionary motto: "no taxation without representation". When tax is concerned, representation is essential for it to not be regarded as theft. Combined with the matter of cosmopolitan law, global tax regulation, and the means for enforcement, a thick institutionalisation is needed for the safeguarding of democratic liberty. Moreover, on the global level, there is a need to deal with the two most important issues of politics: money and power.

Global justice?

This thesis has focused mainly on the matters of global constitutionalism and global democracy. As argued, Habermas' global political structure needs an extension on the matter of tax regulation, since tax competition cannot be controlled on a lower level of political organization. The combined need for the institutionalisation of human rights and fiscal regulation on the global level makes the legitimation of these by securing public autonomy on the global level insurmountable in the light of democratic liberty. To provide for a stable global bureaucracy, a global tax system is justifiable and will furthermore strengthen the need for democratic liberty on the global level. On the global level constitutionalism and democracy should therefore be co-originally constituted.

From there, it is not a long shot to the third main political theoretic debate, the debate on global justice. When there is a framework for cosmopolitan law, cosmopolitan democracy, and global tax, which will necessarily have a redistributive component, this seems to fit the necessary components of a sufficient institutional framework left and right institutionalist regard to be essential for global justice. What prevents us from the applicability of the difference principle on a global level? The three debates dealing with the matters of globalization manifest themselves as much less distinguishable than they are often approached by political theorists. For now, I will leave the topic of global justice for further research.

Conclusion

In this thesis Jürgen Habermas' proposal for a postnational order has been examined in light of his own theory of law and democracy and the account of Thomas Rixen and Peter Dietsch on the issue of global tax competition. Habermas holds globalisation to be threatening democratic liberty. This democratic liberty was obtained through centuries of development of the political order of the nation state. Therefore, he starts an investigation on how to secure democratic liberty in the postnational constellation. His proposal concerns a three-tiered model of global governance. While in his theory of law and democracy, the co-originality of law and democracy is claimed, this claim is downgraded in his proposal for global governance.

Furthermore, his proposal is not equipped for the safeguarding of democratic liberty in the light of the impact of global tax competition. Habermas underestimates the degree of interconnectedness we encounter in the postnational constellation in respect to international tax politics. In this thesis it is therefore claimed that on a global scale, fiscal self-determination and global tax regulations have to be considered co-original. Habermas' proposal for a postnational order cannot provide for both the co-originalities of private and public autonomy, and the nation state's fiscal self-determination and global tax regulations.

The first research question therefore has to be answered negatively. Habermas' proposal for a postnational order, as examined in this thesis, cannot be considered sustainable and legitimate in light of his own discourse theory of law and democracy, and it cannot provide a sufficient base for counterbalancing the negative implications globalisation confronts us with. But, to directly answer the second research question: his proposal can be adjusted to make it fit the prerequisites which are found through the investigation done in the first three chapters of this thesis.

There are three essential adjustments to be made for a postnational order to be sustainable and legitimate. First, human rights and global tax regulation are to be secured in a global order. They are both essential for democratic liberty in the postnational constellation and cannot be safeguarded on a lower political level. Second, that global order, laid down in a cosmopolitan system of law, should provide for both private and public autonomy: a procedure of opinion- and will-formation which can penetrate this law system is essential. Third, for a sustainable and stable order, the global order needs a form of taxation to fund the public goods necessary to secure de facto private and public autonomy for all global citizens.

Discussion

To conclude, the investigation of this thesis shows that the debates on global constitutionalism, global democracy and global justice are less easily separated than they are often supposed to be. While constitutionalism and democracy were the main focus of this thesis, global tax popped up as a necessity for the sustainable institutionalisation of law and democracy on a global level. Since tax will always be associated with some form of redistribution of resources, with the proposed levying of global tax the debate on justice immediately kicks in. In this thesis, we extended the theory of Murphy and Nagel on the myth of ownership to a global realm to justify a system of global tax that can provide for the necessary funding of global public goods. These public goods are essential for the securitization of democratic liberty. This argument could be investigated more detailed and precise in further research. Moreover, the institutionalisation proposed probably gives an occasion for the development of a more extensive form of global justice that is more egalitarian. Both have not been in the scope of this research.

Furthermore, the adjustments suggested to Habermas' proposal for a postnational order are proposed in a context of ideal theory. We are not likely to face such a thick institutionalisation of a global order any day soon. The main argument made is that when one would institutionalise a political order beyond the realm of the nation state for the cause of democratic liberty, this political order is in need of essential prerequisites to provide for the goal of democratic liberty: the co-originality of private and public autonomy, a system of tax regulation and a system of taxation. Further research is necessary to provide for a more detailed account of global constitutionalism and global democracy. Maybe on a road to global democratic liberty, Habermas' proposed transnational level is a more feasible intermediate step forward, while in the light of ideal theory it cannot be an end state. Moreover, ultimately, political decisiveness on a global scale is determinative for bringing theory to practice.

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