

# Global Constitutionalism

<http://journals.cambridge.org/GCN>

Additional services for ***Global Constitutionalism***:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



---

## **A matter of perspective: Global governance and the distinction between public and private authority (and not law)**

MATTHIAS GOLDMANN

Global Constitutionalism / Volume 5 / Issue 01 / March 2016, pp 48 - 84  
DOI: 10.1017/S2045381715000209, Published online: 07 March 2016

**Link to this article:** [http://journals.cambridge.org/abstract\\_S2045381715000209](http://journals.cambridge.org/abstract_S2045381715000209)

### **How to cite this article:**

MATTHIAS GOLDMANN (2016). A matter of perspective: Global governance and the distinction between public and private authority (and not law). *Global Constitutionalism*, 5, pp 48-84 doi:10.1017/S2045381715000209

**Request Permissions :** [Click here](#)

# A matter of perspective: Global governance and the distinction between public and private authority (and not law)

MATTHIAS GOLDMANN

*Max Planck Institute for Comparative Public and International Law, Im Neuenheimer Feld 535,  
69120 Heidelberg, Germany*

Email: goldmann@mpil.de

**Abstract:** This article argues that a distinction between the public and the private is both desirable and feasible in times of global governance, at least as a regulative idea. The confusion surrounding this distinction originates in different understandings of the relationship between state and society in liberalism and republicanism. Discourse theory with its idea of the co-origin of democracy and human rights reconceptualises the relationship between state and society in a way that does justice to both liberal and republican approaches. Accordingly, the public/private distinction is crucial for the realisation of democracy and freedom. Classifying an act as public or private determines what kind of legitimacy it requires. The article then recalibrates discourse theory to face the challenges of global governance, shifting its focus from hard law to a broader notion of authority, and from the state to a pluralistic, cosmopolitan world order composed of multiple overlapping communities. A community is characterised by communicative action and a common identity. In such a setting, public authority is the authority exercised on behalf of a community in relation to its members. In relation to non-members, the same act may constitute an exercise of private authority. It is a different question whether such authority is legitimate. Some examples illustrate the approach.

**Keywords:** cosmopolitan pluralism; discourse theory; global governance; international organisations; public law

## I. Global governance as a challenge to the distinction between public and private

It is a well-known fact that the emergence of global governance has profoundly transformed the structure of societies. This article deals with the challenge which these transformations imply for the distinction between public and private law and authority. It originates in the observation that global governance involves a vast array of private actors, instruments,

and structures. On a global level, they nowadays assume roles that in a domestic, Westphalian-type setting used to be reserved for the state or other public entities.<sup>1</sup> For example, private actors replace or complement the regulation of financial markets, trade,<sup>2</sup> and many other industries.<sup>3</sup> Commercial transactions and dispute settlement have created private or hybrid bodies of rules and institutions which have an impact on a wide range of actors and, ultimately, people's lives.<sup>4</sup>

These developments have evoked a wide range of scholarly opinions which call into question the distinction between private law and public law. Antedating contemporary debates, Philip Jessup observed that the subjects of what he termed 'transnational law' comprised not only states, but also individuals and companies.<sup>5</sup> The emergence of private actors, instruments, and structures in the wake of globalisation signifies for some the rise of unfettered individualism which exposes domestic regulation to a race to the bottom.<sup>6</sup> It did not take long for calls for a return to publicness to appear. Approaches like Global Administrative Law,<sup>7</sup> International Public Authority,<sup>8</sup> and the debate about the constitutionalisation of international law<sup>9</sup> aim at increasing the legitimacy of exercises of authority by global actors by making them more accountable to public interests. While these approaches have caused some to worry about the remaining significance of private international law and legal scholarship,<sup>10</sup> others aim at a more principled defence of private authority and law. Teubner argues that the

<sup>1</sup> From the rich literature: D Caruso, 'Private Law and State-Making in the Age of Globalization' (2006) 39 *New York University Journal of International Law and Politics* 1, 29ff.

<sup>2</sup> E.g. M De Bellis, 'Public Law and Private Regulators in the Global Legal Space' (2011) 9 *ICON* 425.

<sup>3</sup> E.g. E Meidinger, 'The Administrative Law of Global Private-Public Regulation: the Case of Forestry' (2006) 17 *European Journal of International Law* 47.

<sup>4</sup> Pathbreaking: G Teubner, "'Global Bukowina": Legal Pluralism in the World Society' in G Teubner (ed), *Global Law Without a State* (Ashgate-Dartmouth, Aldershot, 1997) 3. Focusing on private-public hybrids: AC Cutler, *Private Power and Global Authority* (2003) 180ff; on commercial self-regulation KP Berger (ed), *The Practice of Transnational Law* (Kluwer Law International, The Hague, 2001).

<sup>5</sup> PC Jessup, *Transnational Law* (Yale University Press, New Haven, CT, 1956) 3.

<sup>6</sup> A Supiot, 'The Public-Private Relation in the Context of Today's Refeudalization' (2013) 11 *ICON* 129, 134ff.

<sup>7</sup> B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

<sup>8</sup> A von Bogdandy *et al.* (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, Heidelberg, 2010).

<sup>9</sup> Overview in M Kumm, AF Lang, J Tully and A Wiener, 'How Large is the World of Global Constitutionalism?' (2014) 3 *Global Constitutionalism* 1-8.

<sup>10</sup> H Muir Watt, 'Private International Law: Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347.

functionally differentiated structure of modern societies has led to a decoupling of politics from law.<sup>11</sup> Functionally differentiated systems might produce transnational regimes composed of private and/or public actors that have the capacity to incrementally create societal constitutions.<sup>12</sup> Zumbansen claims that traditional state-centred public law approaches are unable to take into account the pluralist structure of contemporary transnational legal order and thereby miss an important part of reality.<sup>13</sup> Intermediate positions like Schwöbel's understand the turn to publicness as a backlash against neoliberalism which overshoots by putting too much faith in public regulation while underestimating private forms of interaction.<sup>14</sup> She argues that the virtues of private law such as its capacity to ensure the equality of the parties<sup>15</sup> or the fair distribution of goods<sup>16</sup> should be taken seriously. Nico Krisch favours a gradual distinction.<sup>17</sup>

The list of diverging claims about the public/private distinction could be continued. Some of them hinge on, and try to advance, particular understandings of the present global order, others are under-theorised and do not even bother to problematise the distinction between the public and the private.<sup>18</sup> The debate being thus stuck in a conceptual quagmire seems to confirm claims that the distinction between public and private law or authority is futile and fraught with ideology.<sup>19</sup>

This article seeks to counter the futility or ideology thesis. It makes the case for the necessity and feasibility of a binary distinction between public and private authority even with respect to global governance – at least as a regulative idea which guides legal practice.<sup>20</sup> The argument proceeds as

<sup>11</sup> G Teubner, *Verfassungsfragmente* (Suhrkamp, Heidelberg, 2012) 86ff.

<sup>12</sup> *Ibid.*, 72ff, 97ff.

<sup>13</sup> P Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141.

<sup>14</sup> C Schwöbel, 'Whither the Private in Global Governance?' (2012) 10 *ICON* 1106, 1124.

<sup>15</sup> *Ibid.*, 1128. This might confuse the normative idea of equality in private law with the reality of private governance.

<sup>16</sup> *Ibid.*, 1129, confusing *iusiustitia commutativa* with *iusiustitia distributiva* which necessarily requires a third, governmental authority.

<sup>17</sup> E.g. N Krisch, 'Global Governance as Public Authority: An Introduction' (2012) 10 *ICON* 976, 985, proposing a gradual distinction.

<sup>18</sup> Overview in SS Eriksen and OJ Sending, 'There is No Global Public: The Idea of the Public and the Legitimation of Governance' (2013) 5 *International Theory* 213, 215ff.

<sup>19</sup> D Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1349.

<sup>20</sup> I therefore intend to explore on a theoretical level the narrative conveyed by the public/private distinction, skilfully uncovered in contemporary practice by C Mac Amhlaigh, 'Defending the Domain of Public Law' in C Mac Amhlaigh, C Michelon and N Walker (eds), 'After Public Law' (Oxford University Press, Oxford, 2013) 103.

follows: first, I elaborate the need for a distinction between the public and the private. It plays an indispensable role in both liberal and republican theories of democracy. However, each strand of thought has a different understanding of the distinction, which results from different views on the relation between state and society. This has brought the distinction under dispute, especially since each understanding has some inherent limitations. Discourse theory reconceptualises the relationship between state and society in a way that does justice to both of these strands and confirms the necessity of a distinction between the public and the private (II.). The emergence of global governance requires shifting the focus of discourse theory from public law to public authority, and from the state and its society to a pluralistic, cosmopolitan world order composed of multiple communities which vary by the degree to which they share a common identity (III.). On this basis, the distinction between public and private authority becomes one of perspective: ‘public’ is the authority exercised on behalf of a certain community against its members; ‘private’ is the authority affecting non-members. The operationalisation of this approach leads to some unexpected insights about international legal phenomena (IV.).

## II. The distinction between the public and the private in democratic theory

The distinction between the public and the private is a child of early modernity.<sup>21</sup> It plays a different role in liberal and republican theories of democracy, reflecting different understandings of the relationship between society and the state.<sup>22</sup> I consider this as a root cause of the confusion surrounding the public/private distinction. Each of these strands has some limitations, overemphasizing individual freedom or collective self-determination, respectively. Habermas’ discourse theory overcomes these deficits by combining both strands. At the same time, it confirms that the public/private distinction is essential for the simultaneous realisation of freedom and democracy.

<sup>21</sup> M Stolleis, ‘Öffentliches Recht und Privatrecht im Prozeß der Entstehung des modernen Staates’ in W Hoffmann-Riem and E Schmidt-Aßmann (eds), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Nomos, Baden-Baden, 1996) 41.

<sup>22</sup> M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol 1 (Beck, Munich, 1988) 126ff, 394ff; M Foucault, ‘Governmentality’ in G Burchell, C Gordon and P Miller (eds), *The Foucault Effect* (Chicago University Press, Chicago, IL, 1991) 87; D Grimm, *Das öffentliche Recht vor der Frage nach seiner Identität* (Mohr Siebeck, Tübingen, 2012) 7ff.

*Liberalism, republicanism, and the distinction between state and society*

The rise of liberalism began in the sixteenth century as a counterreaction to absolutism. Its proponents considered the sovereign state as an independent legal entity separate from the law, if not above the law, which exercised its authority over citizens from a hierarchically superior position by means of public law. By contrast, relations among the citizens were presumed to be governed by the non-statal, non-positive corpus of private law.<sup>23</sup> The normative basis of private law was believed to reside in natural law, like in Locke's account of a natural right to property;<sup>24</sup> or in practical reason, like in Kant's post-natural law theory of right;<sup>25</sup> or in Savigny's idea of a 'Volksgeist' (spirit of the people).<sup>26</sup> In all cases, liberalism emphasised the ability of society to regulate itself and assigns to the state a residual function like, for example, the enforcement of judgments.<sup>27</sup>

With some delay, liberalism has had an enormous impact on legal practice and scholarship in both civil law and common law jurisdictions (in Germany only since the eighteenth century due to the belated rise of a bourgeoisie).<sup>28</sup> In jurisdictions governed by absolute rulers, it provided the basis for an increasing division between private and public law.<sup>29</sup> On the continent, the idea of subjective, enforceable rights dominated private law,<sup>30</sup> whereas public law became the field of sometimes nearly unfettered governmental authority, immune to judicial review.<sup>31</sup> In common law jurisdictions, where the distinction between public and private law never emerged with the same clarity,<sup>32</sup> liberalist ideas led to legislative restraint in private law matters.<sup>33</sup>

<sup>23</sup> H Kelsen, *Reine Rechtslehre* (2nd edn, Deuticke, Vienna, 1960) 288; D Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Suhrkamp, Frankfurt am Main, 1987) 85ff.

<sup>24</sup> J Locke, *Two Treatises of Government* (1689), Second Treatise, ch V, especially section 44. Cf. M Rosenfeld, 'Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory' (1985) 70 *Iowa Law Review* 787.

<sup>25</sup> I Kant, *Metaphysik der Sitten* (2nd edn, Dürr, Leipzig 1797) sections 1ff.; especially section 2: 'Also ist es eine Voraussetzung a priori der praktischen Vernunft, einen jeden gegenstand meiner Willkür als objektiv-mögliches Mein oder Dein anzusehen und zu behandeln.' (B58).

<sup>26</sup> FC von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr, Heidelberg, 1814).

<sup>27</sup> Grimm (n 22) 15.

<sup>28</sup> Stolleis (n 21) 55.

<sup>29</sup> M Bullinger, *Öffentliches Recht und Privatrecht* (Kohlhammer, Stuttgart, 1968) 75.

<sup>30</sup> J Habermas, *Between Facts and Norms* (Polity Press, Cambridge, 1996) 84ff (ch 3.1.1).

<sup>31</sup> Bullinger (n 29) 49ff.

<sup>32</sup> MJ Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

<sup>33</sup> Caruso (n 1) 26ff.

This strand of thought has remained influential until today. It found a powerful reformulation in Hayek's theory of spontaneous orders.<sup>34</sup> The trust in private self-regulation and mistrust towards traditional politics reached another level with systems theory and its claim that society is divided into functionally differentiated, self-reflexive systems like law and politics which cannot directly communicate with each other.<sup>35</sup> Even though such approaches are not based on methodological individualism and even though their goal is different from Hayek's in that they seek a reconstruction of the modern welfare state instead of its destruction,<sup>36</sup> they tend to sing swansongs on democracy.<sup>37</sup> This brings liberalism on a collision course with the idea of democracy as society's self-government through law.<sup>38</sup>

The republican (holistic) strand of thought does not equal the distinction between private and public law with the one between state and society. According to Rousseau, there is no law prior to the foundation of a society. All law derives from the social contract.<sup>39</sup> But Rousseau's work does not yet distinguish between state and society. The decisive step was taken by Hegel, who coined the concept of civil society.<sup>40</sup> According to him, civil society is the place where citizens may exercise their freedom to pursue their private interests in order to meet their individual needs, while the state constitutes the realisation of the ethical idea, i.e. the collective entity which is more than just the sum of private interests.<sup>41</sup> Both private law, which lends protection to transactions in civil society, and public law are positive, statal law ('Gesetz').<sup>42</sup> In a republican perspective, the state enables

<sup>34</sup> FA von Hayek, *Law, Legislation and Liberty*, vol 1: Rules and Order (Routledge & Kegan Paul, London, 1973) 36ff.

<sup>35</sup> N Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1993) 38ff.

<sup>36</sup> Zumbansen (n 13) 150, 174.

<sup>37</sup> FA Hayek, *Law, Legislation and Liberty*, vol 3: The Political Order of a Free People (Routledge & Kegan Paul, London, 1979); G Teubner and A Fischer-Lescano, *Regime-Kollisionen* (Suhrkamp, Frankfurt am Main, 2006) 57: 'Lasciate ogni speranza'.

<sup>38</sup> With respect to the German Basic Law: O Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik* (Mohr Siebeck, Tübingen, 1999) 61ff.

<sup>39</sup> JJ Rousseau, *Du contrat social* (1762), liv. 1 ch III, V.

<sup>40</sup> M Riedel, 'Gesellschaft, bürgerliche' in O Brunner, W Conze and R Koselleck, *Geschichtliche Grundbegriffe*, vol 2 (Klett, Stuttgart, 1975) 719, 779ff. On the contribution of Friedrich Schleiermacher to the formation of the concept of civil society, see A von Scheliha, *Protestantische Ethik des Politischen* (Mohr Siebeck, Tübingen, 2013) 103ff.

<sup>41</sup> GWF Hegel, *Grundlinien der Philosophie des Rechts* (Duncker & Humblot, Berlin, 1821) sections 257ff.

<sup>42</sup> *Ibid.*, sections 188, 211; A von Bogdandy, *Hegels Theorie des Gesetzes* (Alber, Freiburg in Breisgau/München, 1989) 63ff.

freedom. Civil society is thus not opposed to the state, but essential to its operation.<sup>43</sup>

This strand of thought, a historic novelty at the time,<sup>44</sup> took account of the rising role of positive, statal law for the organisation of society. The Napoleonic codifications of private law epitomise the idea of sovereign control over private law.<sup>45</sup> But like liberalism, this strand of thought features certain flaws and risks. The trust in governmental capacity and mistrust in private self-regulation might not only bring about inefficient regulation. If taken to the extreme, on the basis of a pre-constitutional idea of the state and a rejection of methodological individualism, it might amount to an argument for the total state.<sup>46</sup> Similar, but different risks might arise from later theories belonging to this strand like those of Hans Kelsen. Although his neo-Kantian constitutionalism might make him an uneasy fit within the republican camp, his Rousseau-inspired approach to democracy justifies such a classification.<sup>47</sup> For Kelsen, the state is nothing but a legal entity. Private and public law do not reflect a difference between state and society, but merely a difference *within* the legal order.<sup>48</sup> As a consequence of his pure theory, law as such provides no justification for public authority.<sup>49</sup> Rather, such justification must derive from democratic government – a fact most often overlooked by adaptations of Kelsen in authoritarian regimes, which overemphasise and abuse the idea that the legal is legitimate.<sup>50</sup> While these risks are external to Kelsen's theory and result from a

<sup>43</sup> H Arendt, *The Human Condition* (2nd edn, University of Chicago Press, Chicago, IL, 1998) 22ff (ch II); P Pettit, *Republicanism. A Theory of Freedom and Government* (Clarendon, Oxford, 1997) 51ff (on the concept of freedom), 241ff (on civil society). On the similarity between Arendt's and Pettit's approaches: T Thiel, 'Politik, Freiheit und Demokratie – Hannah Arendt und der moderne Republikanismus' in J Wessel, C Volk and S Salzborn (eds), *Ambivalenzen der Ordnung* (Springer, Wiesbaden, 2013) 259.

<sup>44</sup> T Duve, 'Katholisches Kirchenrecht und Moralthologie im 16. Jahrhundert: Eine Globale Normative Ordnung im Schatten Schwacher Staatlichkeit' in S Kadelbach and K Günther (eds), *Recht ohne Staat? Zur Normativität nichtstaatlicher Rechtsetzung* (Campus, Frankfurt am Main/New York, NY, 2011) 147, 151.

<sup>45</sup> Grimm (n 23) 199ff; Caruso (n 1) 24ff (probably underestimating the impact of liberalism on continental private law, though).

<sup>46</sup> With reference to Carl Schmitt: D Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Clarendon, Oxford, 1997) 85ff.

<sup>47</sup> Cf. H Kelsen, *Vom Wesen und Wert der Demokratie* (Mohr, Tübingen, 1929) 13: 'An die Stelle der Freiheit des Individuums tritt die Souveränität des Volkes [...]' (emphasis added). See further H Dreier, 'Kelsens Demokratietheorie: Grundlegung, Strukturelemente, Probleme' in R Walter and C Jabloner (eds), *Hans Kelsens Wege sozialphilosophischer Forschung* (Manz, Wien, 1997) 79.

<sup>48</sup> Kelsen (n 23) 285.

<sup>49</sup> *Ibid.*, 320.

<sup>50</sup> *Ibid.*, 213.



misreading, he actually did not answer the question how social integration should be achieved, i.e. why the minority should obey the decision of the majority if compromise cannot be achieved given that the state is simply understood as a legal construct requiring no further attachment of its members.<sup>51</sup> In the absence of a discursive understanding of public law, strict forms of positivism lack explanatory capacity as to how society actually works.<sup>52</sup>

The preceding analysis reveals that, first, the distinction between the public and the private has a different function in liberal and republican theories of democracy; second, that the difference reflects diverging understandings of the relationship between state and society; and third, that both liberalism and republicanism might give rise to extreme versions which endanger individual rights or democracy. I believe that the second point is a crucial factor for the confusion surrounding the public/private law distinction, whether in a domestic or global context. We might fundamentally disagree on the relationship between state and society, so we are likely to disagree on that distinction, too. It is over such disagreement that the first point, the function of the public/private distinction for democracy, might get out of sight. It therefore seems advisable to base further reflection on the public/private distinction, especially in a global context, on a theory that attempts to combine liberalism and republicanism.

### *Discourse theory and the distinction between the public and the private*

Discourse theory as developed by Jürgen Habermas combines liberalism and republicanism in a skilful way. It acknowledges that both the liberal and the republican understanding of the relationship between state and society, as well as the associated differences in the function of the public/private divide, reflect important aspects of modern societies.<sup>53</sup> It may therefore serve as a basis for a public/private distinction in global governance.

Instead of overemphasizing either individual or collective self-determination, Habermas parts from the idea that both fundamental rights and popular sovereignty are constitutive for modern societies and, in fact, precondition each other: in the (hypothetical) formative moment of a political community, where a people begins to understand itself as a people, the members of that community implicitly grant each other certain fundamental rights. They are the basis of the community's life. They enable a free public discourse

<sup>51</sup> Kelsen (n 47) 14–16; 53ff.

<sup>52</sup> Cf. E-W Böckenförde, *Die verfassungstheoretische Unterscheidung von Staat und Gesellschaft als Bedingung der individuellen Freiheit* (Westdeutscher Verlag, Opladen, 1973) 19.

<sup>53</sup> Habermas (n 30) 295ff (ch 7.1.2).

that feeds into law-making processes by representative institutions as well as law-application by the administration and courts. Fundamental rights are thus a condition for processes of public reasoning which ultimately lead to decisions that the members of the community have reason to accept.<sup>54</sup>

The mutual preconditioning of popular sovereignty and fundamental rights is the point where the public and the private spheres come together in discourse theory. Accordingly, the interaction of the public and the private spheres, of state and society, are essential for modern statehood. Without the former, there would be no democracy, while there would be no freedom without the latter. The political institutions of democratic states constitute society's integrative centre. On the one hand, this is where ethical discourse in civil society about a good society is transformed into legally binding decisions reflecting society's common interest.<sup>55</sup> This constitutes the republican element of the theory. While liberal theories claim that common interests are nothing but the aggregate of private interests, Habermas argues that strategic action in the pursuit of self-interest ('bargaining') is just one side of the medal in human communication. There is also communicative action whereby people seek a form of understanding that transcends the level of mutual self-interest ('arguing').<sup>56</sup> This enables ethical discourse that becomes constitutive for the convictions of a community. On the other hand, the political institutions may also absorb pragmatic discourse among self-interested individuals. They give rise to negotiations whereby self-interested individuals seek a compromise.<sup>57</sup> This is discourse theory's liberal element. Thus, the democratic process is able to integrate different types of discourse: ethical self-reflection; pragmatic negotiations; as well as universal moral arguments.<sup>58</sup> Consequently, the freedom prevailing in the private sphere is not opposed to the democratic institutions at the apex of the public sphere.

Habermas deems the dividing line between the public and the private spheres, i.e. between the pursuit of collective self-determination and the realm of individual freedom, to be variable and subject to change.

<sup>54</sup> Ibid, 89ff (ch 3.1.2).

<sup>55</sup> Ibid, 312ff (ch 7.2.2). Cf. also Arendt (n 43) ch 2.

<sup>56</sup> J Habermas, *Theorie des kommunikativen Handelns*, vol 1 (Suhrkamp, Frankfurt am Main, 1981) 369ff. The concepts of arguing and bargaining derive from J Elster, 'Arguing and Bargaining in Two Constituent Assemblies' (2000) 2 *Journal of Constitutional Law* 345. This distinction has generated much debate. In this respect, one may point out against J Steffek, 'Norms, Persuasion and the New German Idealism in IR' in O Kessler *et al.* (eds), *On Rules, Politics, and Knowledge: Friedrich Kratochwil, International Relations, and Domestic Affairs* (Palgrave, Basingstoke, 2010) 191, 196, that Habermas distinguishes between communication in language and communication as a mode of action, see Habermas (n 30) 17ff (ch 1.2).

<sup>57</sup> Habermas (n 30) 174ff (ch 4.3.1.d); 297ff (ch 7.1.2).

<sup>58</sup> Ibid, 151ff (ch 4.2).

In principle, every issue might move into the public sphere if it is important enough to a large enough group of people.<sup>59</sup> Nevertheless, the distinction between the public and the private spheres as such remains a crucial precondition for the coexistence of democracy and individual freedom, including the freedom to pursue economic activities.<sup>60</sup> In sum, by combining elements of republicanism and liberalism and by holding the public/private distinction to be contingent and not fixed to any rigid understanding of the relationship between state and society, discourse theory lends itself as a basis for a reconceptualisation of the distinction on a global scale.

A further argument for relying on discourse theory is that it can inspire a relatively clear-cut distinction between public and private law, the source of much of our recent conceptual confusion. Accordingly, public law is tied to the political process. It has the twin functions of enabling the exercise of public authority as emanations of collective self-determination, and of limiting it out of respect for individual rights. In line with legal practice, public law makes public authority both legitimate and effective.<sup>61</sup> Like in any theory of democracy deploying the legitimizing potential of rational discourse, including those by John Rawls and Amartya Sen, this requires putting in place basic requirements of the rule of law and of democratic government. They include the separation of powers, the principle of legality, and legal remedies protecting the rights of those who disagree.<sup>62</sup> Authoritative acts respecting these public law requirements do not merely claim to be legitimate<sup>63</sup> – they may be rationally presumed to be legitimate as long as that claim is not rebutted. The conditions of legitimacy and their applications are not absolute givens but can be questioned in political discourse.<sup>64</sup>

Private law, by contrast, is composed of legal acts emanating from private individuals, not from the state. Areas traditionally termed as ‘private law’ like the law of contracts may deserve this designation

<sup>59</sup> Ibid, 306ff (ch 7.2.1).

<sup>60</sup> Cf. C Möllers, *Der vermisste Leviathan* (Suhrkamp, Frankfurt am Main, 2008) 103; Böckenförde (n 52) 30.

<sup>61</sup> For a comparative overview, see A von Bogdandy, ‘The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges Facing Constitutional Scholarship in Europe’ (2009) 7 *International Journal of Constitutional Law* 364, 369–70.

<sup>62</sup> Habermas (n 30) 168ff (ch 4.3.1).

<sup>63</sup> Cf. J Raz, ‘Authority, Law, and Morality’ in J Raz (ed), *Ethics in the Public Domain* (2nd edn, Clarendon, Oxford, 2001) 210, 215–20; J Raz, *The Authority of Law* (Clarendon, Oxford, 1979) 5ff.

<sup>64</sup> Habermas (n 30) 32ff (ch 1.3.1); 304 (ch 7.2).

because they *regulate* private activity, but not because they *are* private in an ontological sense.<sup>65</sup> Rather, as legislative acts, they constitute exercises of public authority.<sup>66</sup> Consequently, Habermas emphasises the political character of provisions determining the scope of legitimate private authority, including market activity, promoting public policy goals, or addressing market failures, such as structural inequalities among market participants.<sup>67</sup>

While these advantages make discourse theory an attractive option for tackling the problem of the private/public distinction in global governance, one should be aware of two particular aspects of discourse theory that might create problems in that respect. First, discourse theory claims that ‘hard’, enforceable law is the only form of legitimate public authority. The reason for this resides in the possibility of rational disagreement. Habermas quite realistically assumes that political processes will not always lead to a result with which everyone agrees. Indeed, decisions often only receive the support of the majority. According to what has been said above, those in the minority have good reasons to accept the decision nevertheless. But they will not always do so. It is for this reason that Habermas emphasises the dual function of the law originally devised by Kant: one might follow the law because it is legitimate, or one might do so because disobedience might entail negative consequences such as enforcement action.<sup>68</sup> ‘The point of law is to enable us to act in the face of disagreement.’<sup>69</sup> Second, discourse about non-universal, ethical questions might reveal areas of fundamental disagreement among the participants. According to Habermas, social integration through rational discourse will therefore only work in communities sharing a common ‘life-world’ characterised by a background consensus about the idea of a good, ethical life. Such a background consensus will reduce the risk of rupture as a consequence of disagreement over specific political questions.<sup>70</sup> The following section will show how, when turning to global governance, these two aspects require some recalibrations of the discourse theoretical framework devised by Habermas.

<sup>65</sup> However, this idea has dominated the idea of law since Hobbes, cf. Habermas (n 30) 28 (ch 1.3). Nineteenth-century scholarship wrongly attributed it to Roman law, cf. R von Jhering, *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (Schünemann, Bremen, 1866 [1965]) [10].

<sup>66</sup> Cf. Kelsen (n 23) 285.

<sup>67</sup> Habermas (n 30) 58ff (ch 1, III.3).

<sup>68</sup> *Ibid.*, 28ff (ch 1.3).

<sup>69</sup> J Waldron, *Law and Disagreement* (Clarendon, Oxford, 1999) 7.

<sup>70</sup> *Ibid.*, 176ff (ch 4.3.2). On the concept of life-world (‘Lebenswelt’), see 21ff (ch 1.2.3).

### III. Recalibrating discourse theory for global governance

Habermas developed his discourse theory with a view to the nation state and its practice of democracy and the rule of law. Approaching global governance from a discourse theoretical perspective requires some recalibrations of the theoretical framework. First, global governance is characterised by an array of soft law and entirely non-legal instruments, which calls into question discourse theory's focus on hard law. A wider concept of authority seems apposite. Second, absent a world state or any other hierarchical structure for the exercise of public authority on the international level, one needs to think of a fairly consistent and realistic idea of global order which would lend itself to the operation of discourse theory on a global scale. Cosmopolitan pluralism is one of them.

#### *Public and private authority, not hard law*

Habermas' theory of democracy is based on the understanding that hard, binding law is a form of authority, and in fact, the only relevant one, because it can be enforced by the government. Other types of influence are not equally coercive and therefore do not necessarily require democratic legitimacy. This view, which I call the 'constraint theory' of law, has been very popular in legal scholarship and political thought since early modernity. It might originate in an anthropology of early modernity that resonated especially well with Protestantism.<sup>71</sup> In late antiquity, Augustine had built his theory of society on the idea that every person is an *imago dei*.<sup>72</sup> Medieval scholastics had presumed human nature to be amenable to both good and evil purposes and ends.<sup>73</sup> The Protestant Reformation, however, firmly established the idea of the *natura corrupta*, of the sinful character of human nature since the fall.<sup>74</sup> This is a core theme in Luther's theory of

<sup>71</sup> Note, however, that important works reflecting this anthropology predate the Reformation, especially Niccolò Machiavelli's *Il Principe* (1513).

<sup>72</sup> Augustine of Hippo, *De Civitate Dei*, vol 2 (1877 [413–26]) 88ff (ch XV).

<sup>73</sup> Thomas Aquinas, *Summa theologiae*, vol 2 (1894 [1265–73]) I-II, q. 109, art II, 829: 'Respondeo dicendum, quod natura hominis potest *dupliciter* considerari: *uno modo* in sui integritate, sicut fuit in primo parente ante peccatum: *alio modo*, secundum quod est corrupta in nobis post peccatum primi parentis.'

<sup>74</sup> M Luther, *Werkausgabe*, Abt. 1, vol 40, Part 2 (Hermann Böhlaus Nachfolger, Weimar/Graz, 1914), 323,1 1–324,1 (regarding Psalm 51): 'Sed ubi peccasset, corrupta est voluntas et omnia Naturalia, et credo, quod corrupti etiam sint sensus naturales et corpus vitiatum in ipsis sensibus, sanguine, nervis, vidit Adam ante lapsum fortius.' See also art 2 of the Confessio Augustana (AD 1530): 'Also they teach that, after Adam's fall, all men begotten after the common course of nature are born with sin; that is, without the fear of God, without trust in him, and with fleshly appetite; and that this disease, or original fault, is truly sin, condemning and bringing eternal death now also upon all that are not born again by baptism and the Holy Spirit. [...]' (translation by CP Krauth, 1874, see <<http://www.ccel.org/ccel/schaff/creeds3.iii.ii.html>>).

justification. Without man's sinful nature, there would have been no need for the passion of Christ.<sup>75</sup> Theories like that of Hobbes secularised this anthropology. He concluded that society requires a Leviathan to keep in check the rational egoists of which it is composed.<sup>76</sup> From there, the 'constraint theory' of law made its career through legal and political theory. It found a prominent representation in Kant's philosophy.<sup>77</sup> Later, the idea of the *homo oeconomicus* reinforced a narrow concept of self-interest that could only be modified by rules that were enforceable. It maculated theories as diverse as the ones proposed by Smith,<sup>78</sup> Austin,<sup>79</sup> or even Marx and Engels.<sup>80</sup> Only Max Weber began unpacking the relationship between law and physical enforcement. His concept of command, albeit state-centric, includes orders corroborated by psychological pressure.<sup>81</sup>

The reality of contemporary global governance suggests that hard, enforceable law is no longer the only relevant means for the organisation of international society, maybe not even the predominant one. The international level has recently experienced a development which Michel Foucault observed to have taken place on the domestic level since the end of the eighteenth century, namely the diversification of the instruments and methods by which governments effectively influence society.<sup>82</sup> The concept of global governance epitomises the fact that states, international organisations, and non-state actors use many new types of instruments that do not have the status of a source of international law in the sense of Article 38 of the Statute of the International Court of Justice.<sup>83</sup>

<sup>75</sup> M Luther, *Vom unfreien Willen* (Kaiser, Munich, 1924 [1525]) on man's need for divine redemption after the fall due to his sinful nature. Luther's understanding of state and society is consistent with his theology of justification, see E-W Böckenförde, *Geschichte der Rechts- und Staatsphilosophie* (2nd edn, Mohr Siebeck, Tübingen, 2006) 418; A-E Buchrucker, 'Luthers Anthropologie nach der großen Genesisvorlesung von 1535/45' (1972) 14 *Neue Zeitschrift für systematische Theologie* 250, 257ff.

<sup>76</sup> T Hobbes, *De Cive* (1647), Epistola dedicatoria, section [1].

<sup>77</sup> Kant (n 25) 231 (Introduction to the Theory of Right, section D).

<sup>78</sup> A Smith, *The Wealth of Nations* (1776), book I, ch 2.

<sup>79</sup> J Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, New York, 1832 (2001)) 21.

<sup>80</sup> K Marx and F Engels, 'Manifest der Kommunistischen Partei' in *Werke*, vol 4 (Dietz Verlag, Berlin, 1956 [1848]) 459, 477.

<sup>81</sup> M Weber *Wirtschaft und Gesellschaft* (5th edn, Mohr, Tübingen 1972) 181ff (Part II, ch I, section 1).

<sup>82</sup> Foucault (n 22); M Foucault, *Histoire de la sexualité*, vol 1: La volonté de savoir (Gallimard, Paris, 1976) 109ff.

<sup>83</sup> JN Rosenau, 'Governance, Order, and Change in World Politics' in JN Rosenau and E-O Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, Cambridge, 1992) 1.

These instruments take the form of all kinds of soft law, but also of entirely non-legal instruments, such as information, including indicators and indexes.<sup>84</sup> Many of these instruments seem to have an impact on individual freedom or collective self-determination and might therefore require democratic legitimacy.

A discourse theoretical approach to global governance that wants to ensure its democratic legitimacy cannot gloss over these phenomena. It needs a wider concept of authority, one that encompasses not just hard law, but all kinds of instruments by which global governance affects people's lives. This wider concept of authority should become the reference point for the public/private distinction. It will enable the public/private distinction to operate effectively and single out from a larger array of authoritative instruments those which require democratic legitimacy. Importantly, one cannot reach such a wider definition of authority by simply adding further sources to the concept of hard international law, or by extending the scope of existing ones.<sup>85</sup> For the concept of authority also needs to be able to map the influence of information. If the concept of law (hard or soft) is to make any sense, it should not comprise simple information that addresses our cognitive, not our normative expectations.<sup>86</sup> One should therefore decouple the concept of authority from the concept of law (hard or soft) and understand authority more broadly as *the law-based capacity to legally or factually limit or otherwise affect other persons' or entities' use of their freedom*.

The definition contains a few elements which require further clarification. First, what does it mean to be 'affected' by a governance instrument? This is a search for relevant forms of influence beyond governmental enforcement. One might argue that this requires a new anthropology. The most sublime forms of influence cannot count as authority, because then everything would count as authority and probably require democratic legitimacy. Rather, as the Kantian idea of the dual function of the law endorsed by Habermas shows, authority is characterised by the specific property that it

<sup>84</sup> From the vast literature, cf. D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000); P Joost, RA Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press, Oxford, 2012); KE Davis, A Fisher, B Kingsbury and S E Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford University Press, Oxford, 2012); von Bogdandy *et al.* (n 8).

<sup>85</sup> Overview of such approaches in M Goldmann, 'We Need to Cut off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) 25 *Leiden Journal of International Law* 335.

<sup>86</sup> On the difference between law and information, see J Habermas, *Wahrheit und Rechtfertigung* (Suhrkamp, Frankfurt am Main, 2004) 299ff.

does not rely only on voluntary compliance on the part of its addressees. They might always disagree. Therefore, authoritative acts are in a position to trigger extrinsic constraints which reduce the risk that the addressees might disobey in case of disagreement. Beyond governmental enforcement, which (potential) extrinsic constraints suffice for an act to be considered authoritative? The answer might benefit from the insights of motivational psychology. Accordingly, extrinsic motivation is not confined to physical force. Ryan and Deci distinguish four forms of extrinsic motivation. They enjoy some empirical plausibility for the explanation of human behaviour and might therefore serve as ideal types which guide the development of a wider concept of authority.<sup>87</sup> These four forms of extrinsic motivation range in between the poles of complete demotivation and pure intrinsic motivation. Each form assumes that a person's behavior is influenced by external events. The forms vary with respect to the type of impact and the degree to which a person perceives such impact as imposed on her from the outside:<sup>88</sup>

- The first form of extrinsic motivation is called 'external regulation'. It describes motivation induced by positive or negative sanctions which people perceive as external, such as physical force, economic incentives, or the potential of reputational consequences. External regulation is the usual way in which binding law triggers extrinsic motivation. But even soft law might motivate its addressees in this way to the extent that it influences their reputation.<sup>89</sup>
- The second form, called 'introjection',<sup>90</sup> presupposes a certain self-understanding, a predisposition on the part of the addressee, which allows certain external events to have the effect of a positive or negative sanction. The addressee feels motivated by external constraint, though only partially. Examples from global governance include the discursive constraints to which participants in international courts and other fora are exposed due to their wish to be and remain a member of a certain group. This resembles what Goodman and Jinks call 'acculturation'.<sup>91</sup>

<sup>87</sup> RM Ryan and EL Deci, 'Intrinsic and Extrinsic Motivations: Classic Definitions and New Directions' (2000) 25 *Contemporary Educational Psychology* 54; on the underlying theory of cognitive evaluation EL Deci and RM Ryan, *Intrinsic Motivation and Self-Determination in Human Behavior* (Springer, Luxemburg, 1985) 43ff.

<sup>88</sup> Ryan and Deci (n 87) 61; on internalisation cf. Deci and Ryan, *Intrinsic Motivation and Self-Determination* (n 87) 133ff.

<sup>89</sup> Cf. AT Guzman, 'How International Law Works: A Rational Choice Theory' (Oxford University Press, Oxford, 2008).

<sup>90</sup> On the origins of this term in psychoanalysis S Ferenczi, 'Zur Begriffsbestimmung der Introjektion' in S Ferenczi (ed), *Bausteine zur Psychoanalyse*, vol 1 (Huber, Bern, 1984 [1912]) 58.

<sup>91</sup> R Goodman and D Jinks, *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, Oxford, 2013) 25ff.



In the context of legal argumentation, one could speak of ‘semantic authority’.<sup>92</sup>

- The third form is called ‘identification’ and captures situations where the addressee considers external influence as conducive to his or her own goals and partially internalizes it. Examples include governance by information, which triggers learning processes.<sup>93</sup>
- The fourth form is called ‘integration’ and describes situations where the addressee completely internalizes some external influence and is not aware of the fact that his or her reasons for acting have been induced externally. Examples include cognitive framing through terminology, categories, and ideas.<sup>94</sup>

The qualification of an instrument as an act of authority requires a comprehensive assessment of all forms of extrinsic motivation that it might trigger. However, since only the first and the second form of extrinsic motivation correspond to situations where the addressee feels compelled by external constraints, a discourse theoretical understanding of authority always presupposes the first or second form of extrinsic motivation, at least to some degree. The third and fourth forms of extrinsic motivation might corroborate or reinforce the authority of the instrument in question. They do not suffice alone for qualifying an instrument as an act of authority.

Another element of the definition of authority requiring clarification is the requirement that it be ‘law-based’. This has two implications. First, affectedness as the sole criterion would be incompatible with discourse theory: affectedness only emerges *ex post*. Discourse theory, like the pedigree thesis in legal positivism,<sup>95</sup> requires that the legal qualification of an act does not hinge on its actual *ex post* effects, but that law makers determine their legal status *ex ante*.<sup>96</sup> One might solve the supposed paradox by using standardised *ex-ante* descriptions of acts which typically entail effects that justify considering them as authoritative. Hence, it is necessary

<sup>92</sup> I Venzke, *How Interpretation Makes International Law* (Oxford University Press, Oxford, 2012) 62ff.

<sup>93</sup> A von Bogdandy and M Goldmann, ‘Taming and Framing Indicators: A Legal Reconstruction of the OECD’s Programme for International Student Assessment (PISA)’ in KE Davis, A Fisher, B Kingsbury and S Engle Merry (eds), *Governance by Indicators. Global Power through Classification and Rankings* (Oxford University Press, Oxford, 2012) 52.

<sup>94</sup> On framing through statistics: A Desrosières, *The Politics of Large Numbers. A History of Statistical Reasoning* (Harvard University Press, Cambridge, MA, 1998) 263ff.

<sup>95</sup> HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford, 1994) 100ff; J d’Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, Oxford, 2011) 38ff.

<sup>96</sup> Cf. Habermas (n 30) 134 (ch 4.1).

to develop ‘standard instruments’ of global governance which legally define categories of authoritative acts by a set of formal parameters.<sup>97</sup> Such a broadened concept of authority might level off much of the critique accusing public law approaches of being out of touch with empirical reality,<sup>98</sup> without, however, committing itself to a purely sociological perspective on the law.<sup>99</sup>

Second, authority in whatever form (hard or soft law, information) needs to be ‘law-based’, i.e. based on a legal mandate to exercise such authority. This requirement distinguishes authority from brute force on the one hand, and from mere morality on the other. Gunman-style brute force does not claim, nor receive, any legal justification. It posits itself outside the law. The authority of morality claims to be universal, not to depend on the law. Authority should be considered as law-based inasmuch as the author may reasonably claim the necessary legal mandate.<sup>100</sup> Law-based authority claims legitimacy, although the claim can be rebutted.<sup>101</sup>

The shift from hard law to a broader concept of authority that includes soft law, information and other, more subtle forms of influence thus provides a point of attachment for the public/private distinction. This implies that the concept of authority applies to both private and public authority. Private and public authority might cause similar effects. They only require different justifications. It will be the task of the public/private distinction to identify those authoritative instruments which require democratic legitimacy. But before proceeding to this distinction, another problem faced by discourse theory when transferred to a global context requires consideration.

### *The case for cosmopolitan pluralism*

Shifting discourse theory to the global level raises another important question. The public in the original, nation-state-centred version of discourse theory is the state. Its citizens exercise collective self-determination. Beyond the state, there is no defined community which would constitute the subject of collective self-determination and legitimise international public authority.

<sup>97</sup> M Goldmann, ‘Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority’ (2008) 9 *German Law Journal* 1865; von Bogdandy and Goldmann (n 93) 71ff.

<sup>98</sup> E.g. Zumbansen (n 13) 170ff, especially 180.

<sup>99</sup> M Loughlin, ‘The Nature of Public Law’ in Mac Amhlaigh, Michelon and Walker, *After Public Law* (n 20) 11–24, 22.

<sup>100</sup> This criterion returns in the definition of public authority. See below IV, especially n 170 and accompanying text.

<sup>101</sup> Cf. nn 63 and 64 and accompanying text.

Such legitimacy would be all the more necessary since the authority exercised by international institutions might have distributive effects which transcend the borders of their members. Especially acts of non-universal organisations like the OECD might affect third states or the competence of other institutions. Some institutions can only provide limited legitimacy for the potentially far-reaching effects of their decisions, such as private standard setters or dispute settlement tribunals. Legitimizing international public authority by state consent is miserable comfort from a discourse theoretical point of view. It does not even come close to the idea that each person should have one vote.<sup>102</sup> So what should be the relevant public, the community which might legitimately exercise public authority for the purpose of self-determination on the international level? And how should it be determined?

Radical pluralist theories suggest giving up the idea of universal principles guiding the exercise of public authority in a pluralist global environment.<sup>103</sup> But then again, it seems difficult to imagine how legitimate decisions should emanate from uncoordinated processes of mutual contestation, unpredictable not only in a substantive, but also a procedural sense; or how international courts should develop an ‘ordre public international’ without the possibility of determining the ‘public’.<sup>104</sup> Proposals for a responsive pluralism based on decentralised, loose mechanisms of coordination among the various communities within a pluralistic setting might not do the trick, either.<sup>105</sup> They merely avoid the question of the universal principles that need to guide such coordination should it be successful and legitimate.<sup>106</sup> On the other side of the spectrum, cosmopolitan theories suggest taking the individual as the be-all and end-all of collective self-determination.<sup>107</sup> However, neither the institutional, nor the social

<sup>102</sup> For a both normative and empirical assessment of the role of consent in contemporary international law, cf. N Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 *American Journal of International Law* 1.

<sup>103</sup> N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2011); N Krisch, ‘Who is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space’ (2011) 24 *Ratio Juris* 386; Teubner and Fischer-Lescano (n 37); Zumbansen (n 13).

<sup>104</sup> M Renner, ‘Selbstgeschaffenes Recht der Wirtschaft?’ (2010) 43 *Kritische Justiz* 62, 73.

<sup>105</sup> Krisch (n 103) 285ff.; L Viellechner, ‘Responsiver Rechtspluralismus: Zur Entwicklung eines transnationalen Kollisionsrechts’ (2012) 51 *Der Staat* 559, 570ff.

<sup>106</sup> M Loughlin, ‘Constitutional Pluralism: An Oxymoron?’ (2014) 3 *Global Constitutionalism* 9.

<sup>107</sup> D Archibugi and D Held, *Cosmopolitan Democracy. An Agenda for a New World Order* (Polity Press, Cambridge, 1995); MKumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009) 258.

prerequisites for worldwide democracy exist. Cosmopolitan approaches might therefore end up concluding that there is no legitimate global public actor.<sup>108</sup> This appears unsatisfactory given that, first, many international institutions claim to promote public interests, and second, this corresponds to claims for effective international regulation voiced by public opinion at many occasions and on a worldwide scale.<sup>109</sup> It might therefore be worthwhile looking for alternatives between the extremes of a largely unstructured world society and a cosmopolitan world state.

Pluralistic approaches which recognise the political role of communities other than the state are anything but new.<sup>110</sup> In what might appear as a cosmopolitan reinterpretation of such approaches, and following the European Union's model of dual legitimacy,<sup>111</sup> Habermas has suggested a dual strategy, which considers both individuals (world citizens) and states as the relevant subjects from which the legitimacy of international public authority needs to derive.<sup>112</sup> Besides individuals and states, one might also consider other entities as possible subjects of legitimacy, such as international and supranational organisations, or non-governmental organisations.<sup>113</sup> Accordingly, one and the same person might be a member of various, partly overlapping communities, commensurate to the multiplicity of identities of men and women in modern pluralistic societies.<sup>114</sup> This amounts to the idea of a pluralistic cosmopolitan (or constitutional) order which has

<sup>108</sup> Eriksen and Sending (n 18) 227.

<sup>109</sup> M Zürn and M Ecker-Ehrhardt, 'Politisierung als Konzept der Internationalen Beziehungen' in M Zürn and M Ecker-Ehrhardt (eds), *Die Politisierung der Weltpolitik* (Suhrkamp, Berlin, 2013) 7.

<sup>110</sup> H Laski, 'The Sovereignty of the State' (1916) 13 *Journal of Philosophy, Psychology and Scientific Methods* 85, 90; see also H Preuß, *Gemeinde, Staat, Reich als Gebietskörperschaften* (Scientia, Aalen, 1889) 92ff.

<sup>111</sup> Cf. A von Bogdandy, 'Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung' (2000) 83 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 284.

<sup>112</sup> Habermas (n 123) 449; J Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (2005) 38 *Kritische Justiz* 222, 244. This resembles the proposal by A Somek, *The Cosmopolitan Constitution* (Oxford University Press, Oxford, 2014) 262, who argues that individuals should conceive of themselves simultaneously as citizens and as foreigners.

<sup>113</sup> E.g. KD Wolf, 'The Non-Existence of Private Self-Regulation in the Transnational Sphere and its Implications for the Responsibility to Procure Legitimacy: The Case of the *lex sportiva*' (2014) 3 *Global Constitutionalism* 275.

<sup>114</sup> S Besson, 'Institutionalising global *demoi-cracy*' in LH Meyer (ed), *Legitimacy, Justice and Public International Law* (2009) 58; in the context of the European Union: JHH Weiler and JP Trachtman, 'European Constitutionalism and Its Discontents' (1997) 17 *Northwestern Journal of International Law and Business* 354, 382; in a global context, yet without cosmopolitanism as a guiding idea: B Kingsbury, 'International Law as Inter-Public Law' in HR Richardson and MS Williams (eds), *NOMOS XLIX: Moral Universalism and Pluralism* (New York University Press, New York, NY, 2009) 167, 175.

found much support in the literature.<sup>115</sup> The cosmopolitan underpinning within an overall pluralist structure provides the ground for a thin layer of common principles, the ‘trinitarian commitment’ of democracy, human rights and the rule of law.<sup>116</sup>

But the question is whether groups beyond the level of the state are actually communities in a discourse theoretical understanding. What characterises a *community* as opposed to, for example, the parties to an exchange contract pursuing their mutual self-interest? Why should the parties to an exchange contract not be considered a community? This question is far from trivial, since liberal theories claim that common interests are nothing but the aggregate of private interests. At a key point in ‘Between Facts and Norms’, Habermas, referring to Kant, emphasises the difference between an exchange contract based on a convergence of the self-interests of rational egoists, and a social contract, which establishes a common interest, thereby becoming an end in itself.<sup>117</sup> Hence, for discourse theory, a community is characterised by its ability to express a common interest by way of communicative action (or ‘arguing’). By contrast, private interests reflect mainly the outcomes of strategic action.<sup>118</sup> There is thus a qualitative difference between common interests and aggregate private interests. This provides an epistemological basis for the identification of communities beyond the state. Indeed, the point has been made that states engage in communicative action when they meet in international organisations and similar fora.<sup>119</sup> Empirically, it is not easy to

<sup>115</sup> PS Berman, *Global Legal Pluralism. A Jurisprudence of Law beyond Borders* (Cambridge University Press, Cambridge, 2012) 141ff; N MacCormick, ‘Beyond the Sovereign State’ (1993) 56 *The Modern Law Review* 1; N Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *The Modern Law Review* 317; S Besson, ‘Institutionalising global *demoi*-cracy’ (n 113) 58; A Peters, ‘Dual Democracy’ in J Klabbers *et al.* (eds), *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) 263; A von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations’ (2012) 23 *European Journal of International Law* 315, 321ff.

<sup>116</sup> M Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20 *Indiana Journal of Global Legal Studies* 605, 607.

<sup>117</sup> Habermas (n 30) 92ff (ch 3.1.2).

<sup>118</sup> See above n 56 and accompanying text.

<sup>119</sup> From the international relations literature: T Risse, ‘“Let’s Argue!”: Communicative Action in World Politics’ (2000) 54 *International Organization* 1; H Müller, ‘Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations’ (2004) 10 *European Journal of International Relations* 395; J Steffek, ‘The Legitimation of International Governance: A Discourse Approach’ (2003) 9 *European Journal of International Relations* 249. Legal scholars have also observed phenomena one might consider as communicative action: J Klabbers, ‘Two Concepts of International Organization’ (2005) 2 *International Organizations Law Review* 277; J Brunnée, ‘Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements’ in R Wolfrum and V Röben (eds), *Developments of International Law in Treaty Making* (Springer, Berlin/Heidelberg, 2005) 101.

clearly distinguish communicative and strategic action in such settings.<sup>120</sup> But discourse theory recognises that practical discourse always consists in a mix of pragmatic (i.e. strategic action), moral (i.e. universal communicative action), and ethical (i.e. particular communicative action) discourse.<sup>121</sup> I consider communities beyond the state to be characterised by the prevalence of ethical discourse. The subsequent section will elaborate how their identification can be facilitated.

In a discourse theoretical perspective, the problem with such a cosmopolitan pluralist order is that the institutional and communicative structures of most of these communities might not meet the requirements for a traditional discourse theoretical justification of the exercise of public authority.<sup>122</sup> They often lack bodies that would represent the citizens concerned, or a corresponding public sphere for opinion-formation. From the viewpoint of discourse theory, global governance risks resulting in a technocratic form of authority, removed from the citizens affected, characterised by non-inclusive decision-making in fragmented institutions.<sup>123</sup> Habermas has therefore suggested that apart from the UN Security Council, whose decisions he considers as embedded in a thick layer of converging moral convictions, international institutions should refrain from decisions with distributive consequences.<sup>124</sup>

Yet, given contemporary global economic, ecological, security, and other challenges, the chances implied in such decisions might outweigh the risks. Inaction often does not seem to be an option which any responsible decision-maker would prefer.<sup>125</sup> This calls for the acceptance of less than perfect solutions. The lack of representative structures and public spheres might be mitigated on the international level by mechanisms of participation,

<sup>120</sup> N Deitelhoff, *Überzeugung in der Politik* (Suhrkamp, Frankfurt am Main, 2006) 27ff.

<sup>121</sup> Habermas (n 30) 151ff (ch 4.2); see also above n 58 and accompanying text.

<sup>122</sup> S Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in S Benhabib (ed), *Democracy and Difference* (Princeton University Press, Princeton, NJ, 1996) 67, 74ff.

<sup>123</sup> E.g. J Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 *Constellations* 444. For a recent summary: J Habermas, 'Stichworte zu einer Diskurstheorie des Rechts und des demokratischen Rechtsstaates' in J Habermas (ed), *Im Sog der Technokratie* (Suhrkamp, Berlin, 2013) 67.

<sup>124</sup> J Habermas, 'Die postnationale Konstellation und die Zukunft der Demokratie' in J Habermas (ed), *Die postnationale Konstellation* (Suhrkamp, Frankfurt am Main, 1998) 91, 164ff; J Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in J Habermas (ed), *Der gespaltene Westen* (Suhrkamp, Frankfurt am Main, 2004) 113, 173, 177.

<sup>125</sup> Habermas recently argued that the taking of distributive decisions might be legitimate for international organisations ('negotiating systems') operating under the guidance of a reformed United Nations that includes a world parliament, ensures peace and security effectively, and strives for worldwide economic and social equality: J Habermas, *Zur Verfassung Europas* (Suhrkamp, Frankfurt am Main, 2011) 93ff.

transparency, and accountability.<sup>126</sup> And maybe there is more of a public sphere on the international level than common wisdom assumes. Empirical research has traced the emergence of transnational cleavages which amount to elements of world public opinion.<sup>127</sup> Even if one assumes that there is no global (or cosmopolitan) public like there is a domestic one,<sup>128</sup> one might tap the potential of domestic, regional and functional communities. They might contribute to debates about global issues to the extent that their respective public spheres are not only inward-oriented.<sup>129</sup> These proposals are far from perfect and probably not in line with an orthodox reading of discourse theory. But they might render international institutions as good as it gets and legitimate enough in order to satisfy the pressing need for cooperation in a world society characterised by enormous social, economic, environmental and other challenges of a global scale.

### *The concept of community as a question of identity*

The concept of community elaborated in the preceding section comprises some degree of vagueness that might render its application difficult. But the legal nature of the actor may function as a proxy facilitating the identification of a community. In the following, I will first argue that communities beyond the state are characterised by a common identity rather than by a shared life-world. Second, I will show that the legal status of a certain community allows for a good guess about the ‘thickness’ of its common identity. It may therefore serve for the classification of communities according to their legal status.

<sup>126</sup> Kingsbury (n 114) 195; RO Keohane and A Buchanan, ‘The Legitimacy of Global Governance Institutions’ in R Wolfrum and V Röben (eds), *The Legitimacy in International Law* (Springer, Berlin/Heidelberg, 2008) 25; E Benvenisti and GW Downs, ‘Toward Global Checks and Balances’ (2009) 20 *Constitutional Political Economy* 366; M Kumm, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 *European Journal of International Law* 907, 924; K-H Ladeur, ‘The Emergence of Global Administrative Law and Transnational Regulation’ (2013) 3 *Transnational Legal Theory* 243. R Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108 *American Journal of International Law* 211, 233ff, distinguishes ‘accountability mechanisms’ in the narrow sense that comprise legally regulated review mechanisms from the wider notion of ‘other-regard promoting practices’. Both types of mechanism might provide relief to the interests of disregarded people who do not have the right to participate in the making of the respective decision, whether directly or through representatives.

<sup>127</sup> M Zürn, M Binder and M Ecker-Ehrhardt, ‘International Authority and Its Politicization’ (2012) 4 *International Theory* 69.

<sup>128</sup> Somek (n 112) 274; A Somek, ‘On Cosmopolitan Self-Determination’ (2012) 1 *Global Constitutionalism* 405, 409ff.

<sup>129</sup> Somek (n 128) 420: ‘universally detached citizens’.

Regarding the first point: discourse theory rejects any kind of foundational concept of community that would be held together by substantive bonds reaching back to times immemorial like a common history or ethnic or linguistic affiliation, as traditional accounts of nationhood have it.<sup>130</sup> The only requirement for a community is a communicative one: in a community, ethical discourse prevails and enables social integration. According to Habermas, one can only engage in meaningful ethical discourse if one shares a common life-world, i.e. if one holds shared basic convictions about an ethical life resulting from processes of opinion-formation in the public sphere of an open society.<sup>131</sup> Despite what has been said about world public opinion,<sup>132</sup> the members of the fragmented communities of a cosmopolitan pluralist order do not share a common life-world which is as thick and rich as that shared by the citizens of many states. They might only possess a rudimentary array of shared convictions. The latter is perhaps better called 'identity' instead of life-world, since it does not amount to the thick layer of common basic convictions usually associated with a life-world. Identity in this respect does not refer to sameness, but to shared elements in the self-understanding of the members of a community on the supranational level.<sup>133</sup> This concept of identity is not to be confused with the idea of a constitutional identity in the debate about the delimitation of domestic and supranational authority.<sup>134</sup> Rather, this concept of identity refers to a social phenomenon that is independent from the law and presupposed by it.<sup>135</sup> Identity designates the frames necessary for value judgments, which hinge on a person's self-understanding. That in turn depends on how she sees herself in relation to others. Identity is therefore an intersubjective construction characterised by the dynamic interplay of the identities of the self and of our respective communities.<sup>136</sup> In the case of a community composed of abstract entities such as states, the relevant community identity will always include the individual members of these

<sup>130</sup> E.g. E-W Böckenförde, *Staat, Nation, Europa* (Suhrkamp, Frankfurt am Main, 1999) 124ff.

<sup>131</sup> See n 70 and accompanying text.

<sup>132</sup> See nn 122 and 127 and accompanying text.

<sup>133</sup> Cf. A von Bogdandy, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?' (2003) 62 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 156, 162.

<sup>134</sup> E.g. art 2(1), second dash; art 6(3) TEU; German Federal Constitutional Court, *Lisbon Treaty Case* (2009), BVerfGE 123, 267 (para 240, 249).

<sup>135</sup> In the context of the concept of life-world: Habermas (n 30) 498ff. (Appendix II: Citizenship and National Identity).

<sup>136</sup> C Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, Cambridge, MA, 1989) ch 1.5.



entities such as citizens. This follows from the idea advocated above that individuals are the ultimate subjects of legitimacy.<sup>137</sup>

As to the second point: by virtue of their structure, some legal entities might be more predisposed to bring about ethical discourse than others. They might therefore be presumed to constitute a community. This is based on the following consideration: the idea of the identity of a community has a factual and a normative dimension. On the one hand, the members of a community may as a matter of fact share a stronger or a weaker form of community identity; on the other hand, community membership might require its members to share a stronger or a weaker form of community identity. A strong community identity resembles a life-world.<sup>138</sup> The stronger the community identity is as a matter of fact, the better will ethical reasoning work. The more a community requires its members to share a common identity, the less inclusive it will be and the more externalities it will produce. As a result, the 'ideal' community may rely on a strong shared identity of its members (i.e. a common life-world) which facilitates communicative action, but it may not require its members to share much of that identity, thereby keeping it inclusive.

It is not difficult to derive from this that the modern liberal state assumes a predominant role for the exercise of public authority. It has few identity requirements and protects the freedom of its citizens to make up their minds about their idea of a good life.<sup>139</sup> At the same time, most states may rely on the broad, shared life-world of its members. The same applies for substate territorial entities, although the shared identity of their citizens may vary by degrees.

With respect to international organisations, one needs to distinguish the United Nations as a universal organisation with broad powers from other more specialised or regional organisations. According to the preamble of its charter, the United Nations requires even less commitment from its member states or their members than a state. However, the citizens of the world are far from sharing a common life-world. Only some rudimentary shared convictions might exist, which are at best coextensive with the principles of the preamble. Thus, while the United Nations is an extremely inclusive actor, communicative action is hard to organise. It may therefore very well exercise public authority, but such authority must not be very

<sup>137</sup> See above n 107 and accompanying text.

<sup>138</sup> R Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21 *Ratio Juris* 1, 12, suggests Weber's four types of social action: instrumental, value-based, emotional and traditional. While the first type corresponds to strategic action, the other three categories might play varying roles in the constitution of a life-world.

<sup>139</sup> von Bogdandy (n 133) 180ff.

intrusive, unless it corresponds to the few shared convictions that might find worldwide acceptance.

Specialised international organisations like the WTO or regional organisations like the Council of Europe require a specific kind of common identity on the part of their members. In case of the WTO, they need to subscribe to the idea of free trade, and the Council of Europe requires commitment to rather specific human rights obligations. This should in principle facilitate the potential of these organisations to bring about communicative reasoning, although that might be higher in regional organisations like the OECD than in organisations with broad membership like the WTO. At the same time, they have a huge potential to create externalities both for non-member states and for policy areas outside their jurisdiction over which their shared identity does not extend.

Non-profit corporations established under domestic law usually require their members to share a strong community identity like, for example, the purposes of the World Wildlife Fund. This alleviates the need for deliberative structures in their internal organisation. Thus, under German law, the internal regulations of non-profit corporations only need to guarantee a minimum of procedural fairness to its members. However, the structure of organisations with an important economic or social position (i.e. a quasi-monopoly) need to respect democratic principles.<sup>140</sup> In line with this, the Model Nonprofit Corporation Act of the American Bar Association proposes a number of provisions on the internal organisation which ensure that governance of the organisation is member-driven. Corporations may not derogate from some of these provisions.<sup>141</sup> The flip side of the strong community identity is, again, the risk that they might create externalities for non-members. On the domestic level, the rules of private law keep these externalities in check. On the international level, there might be lacunae. In this respect, so-called hybrid corporations which count governmental institutions among their members might have an advantage since this membership structure broadens the basis of the relevant community, sometimes including the citizens of the respective territorial entities in a more direct fashion. This is one of the reasons why the concept of hybridity needs to be ‘unpacked’.<sup>142</sup>

A crucial question is whether groups composed of for-profit corporations are communities, such as professional associations or the invisible group

<sup>140</sup> M Schöpflin, ‘Section 25’ in HG Bamberger and H Roth (eds), *BGB-Kommentar* (Beck, Munich, 2013) margin no 40–1.

<sup>141</sup> Cf. ME Malamut, ‘Issues of Concern to Parliamentarians Raised by the 2008 Revision of the Model Nonprofit Corporation Act’ (2009) *National Parliamentarian* 24–31.

<sup>142</sup> Casini (n 152) 412.

of global players from which the *lex mercatoria* emerged. Habermas considers economic activity as the exclusive domain of strategic action of self-interested actors. It does contribute to social integration, but not through communicative action. Only their legal framework establishes a relationship between markets and the integrative forces of communicative action.<sup>143</sup> While it is true that economic activity and market forces are ultimately geared towards mutual self-interest, I find it difficult to imagine that market participants would not occasionally switch to communicative action.<sup>144</sup> Indeed, the fact that transnational market participants have created a *lex mercatoria*,<sup>145</sup> or that professional organisations routinely engage in norm-setting<sup>146</sup> provides strong hints that market participants might every now and then switch from bargaining to arguing about what is best for the community in order to maintain or improve the functioning of the market as a whole.<sup>147</sup> On the domestic level, the predominance and specificity of positive law relegates such communicative action among market participants to a back seat, perhaps with the exception of a few principles of honest trade. The situation is different for the international level. Here, the more substantial the shared identity of economic actors is, the more they might be expected to successfully engage in communicative action – and the more externalities they might create for non-participants. But it depends on the individual case whether such groups are to be considered as communities.

A different thing is the relationship between for-profit associations and their members. While partnerships might occasionally witness communicative action (although strategic action might prevail), communicative action is extremely unlikely to come about among the shareholders of a public company. There is no identity requirement except for the ownership of at least one share, and no shared community identity may be presumed. Therefore, this is the ideal-typical model of a legally constituted group which regulates its relationship by way of private authority, the antipode of the state.<sup>148</sup>

<sup>143</sup> Habermas (n 30) 38ff (ch 1.3.3).

<sup>144</sup> See A Honneth, *Das Recht der Freiheit* (Suhrkamp, Berlin, 2011) 19 (with reference to Talcott Parsons), 320ff (with reference to the ideas of Adam Smith and Hegel, who believed that economic activity presupposes not only legal, but also moral or ethical rules). Of course, the financial crisis exposes the gap between reality and the theoretical model.

<sup>145</sup> G Teubner, 'Breaking Frames: Economic Globalisation and the Emergence of Lex Mercatoria' (2002) 5 *European Journal of Social Theory* 199.

<sup>146</sup> E.g. O Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (Hart, Oxford, 2004) 169ff.

<sup>147</sup> Müller (n 119) 414ff.

<sup>148</sup> This statement does not refer to the relationship between such companies and their employees. While strategic action might prevail here, too, the establishment of staff committees might increase the chance for communicative action.

By way of an intermediate conclusion, it turned out to be possible to transfer the discourse theoretical understanding of legitimate authority to global governance, provided that one focuses on authority, not on hard law. The present cosmopolitan pluralist order has the capacity to legitimise such authority through its various communities. The communities which form part of this order can largely be recognised by their legal nature.

#### IV. The distinction between public and private authority

To recap: both the liberal and the republican strands in the theory of democracy consider the public/private distinction as essential. Discourse theory proposes a combination of both strands that does justice to each of them. Accordingly, the public/private distinction is necessary to reconcile freedom and democratic legitimacy. But the distinction has become blurred in global governance. Discourse theory can be adapted to the conditions of global governance, where comparatively more sublime forms of authority are at work, and where a plurality of cosmopolitan communities seems to exist. This leaves one question open: what is ‘public’ in such a cosmopolitan pluralist setting? Is it every act adopted by one of the composite communities of the global cosmopolitan pluralist order? I will first engage with some common misconceptions before I set out my proposal and apply it to a few examples.

##### *What the distinction is not*

Under the Westphalian model, the distinction between public and private authority was relatively straightforward: in the end, all public authority derived from the state.<sup>149</sup> The idea of citizenship legitimised state authority to a sufficient degree, since the citizens of the state were presumed to be by and large identical with those affected by its exercise of authority. This approach still pervades contemporary conceptions of the public/private divide. Accordingly, in German administrative law, public authority is defined as authority exercised on a legal basis empowering an institution established for the exercise of state authority in that capacity. These institutions and their powers may ultimately be derived from the federal or state constitutions.<sup>150</sup> Certainly, this model always comprises an element

<sup>149</sup> J Basedow, ‘The Law of Open Societies – Private Ordering and Public Regulation of International Relations’ (2013) 306 *Recueil des Cours* 9, 50ff.

<sup>150</sup> On German administrative law H Sodan, section 40 in H Sodan and J Ziekow, *Verwaltungsgerichtsordnung* (2nd edn, Nomos, Baden-Baden, 2006) marginal notes 287ff.

of fiction.<sup>151</sup> Alien residents have never had a right to vote, while emigrants sometimes have. Transborder externalities of the exercise of state authority have often affected the citizens of other states. Nevertheless, the model worked as long as those empowering public authority were by and large identical with those affected by it.

Under the conditions of cosmopolitan pluralism, the Westphalian model no longer holds. Sticking to distinctions between private and public law, authority, or actors, leads to enormous conceptual complexities.<sup>152</sup> Many overlapping communities on different levels exercise authority whose effects regularly transcend the borders of the respective communities. What is ‘the public’ which may define the public interest? One might avoid the issue – but never resolve it – by referring to notions of ‘hybridity’. Instead, some try to operate with a material definition of publicness which defines certain issues as matters of public interest.<sup>153</sup> But a fixed distinction between public and private interests or subject matters contradicts discourse theory, which holds that the delimitation is politically contingent and subject to rational discourse.<sup>154</sup>

Alternatively, one might claim that private authority is consensual and public authority non-consensual. However, in most modern theories of democracy, public authority is ultimately based on the consent of those governed, whether that consent is expressed in some – fictitious – social contract or in continuous political participation. Consent in private-law relationships is often no less fictitious. One only needs to think of standard terms, or the decisions of corporate executive boards which generate effects for shareholders.<sup>155</sup>

Others advance ‘affectedness’ as the decisive criterion identifying public authority. In her impressive account of a pluralistic global stakeholder democracy, Macdonald states that ‘power should be designated as “public” and subject to democratic control whenever it impacts in some problematic way upon the capacity of a group of individuals to lead autonomous lives’.<sup>156</sup>

<sup>151</sup> Cf. N Fraser, *Scales of Justice* (Polity Press, Cambridge, 2008) 94ff.

<sup>152</sup> L Casini, “Down the Rabbit-Hole”: The Projection of the Public/Private Distinction beyond the State’ (2014) 12 *International Journal of Constitutional Law* 402, 419ff.

<sup>153</sup> A Fischer-Lescano, ‘Transnationales Verwaltungsrecht. Privatverwaltungsrecht, Verbandsklage und Kollisionsrecht nach der Århus-Konvention’ (2008) 63 *Juristenzeitung* 373, 376.

<sup>154</sup> Habermas (n 30) 302ff (ch 7.2).

<sup>155</sup> Pettit (n 43) 62.

<sup>156</sup> T Macdonald, *Global Stakeholder Democracy. Power and Representation Beyond Liberal States* (Oxford University Press, Oxford, 2008) 35.

However, this solution involves major problems, both practically and theoretically. First, which persons should count as ‘affected’ since one act may affect a myriad of people in at least an infinitesimal way?<sup>157</sup> Also, different acts will almost never affect exactly the same group of people, which would make it necessary to define a new group of stakeholders in each case.<sup>158</sup> Second, to rely on affectedness as a criterion for distinguishing private and public authority amounts to giving up that very distinction. If private authority is defined by its lack of effects, it seems that it would not qualify as authority at all under the terms of the definition of authority stated above.<sup>159</sup> However, this is entirely out of step with the role of private authority in a purely domestic setting where the distinction between the private and the public is relatively straightforward: domestic private authority may very well ‘affect’ other persons or groups, i.e. constitute an external constraint on their freedom. Contracts, their terms and enforcement might turn out to contravene the changing interests and preferences of parties and thereby compromise their freedom – even in the absence of unfair contractual clauses or power asymmetries among the contracting parties. Third, the group of ‘those affected’ is not a community intended and constituted for the exercise of collective self-determination on the basis of ethical discourse. It is not even a community, but only a more or less random group. Approaches based solely on the *effects* of authority would thus be tainted by a liberal bias which takes private autonomy and the exercise of private authority as the be-all and end-all of the organisation of society and does not recognise such a thing as the collective self-determination of communities. Therefore, the criterion of ‘affectedness’ does not allow for a meaningful distinction between private and public authority.

### *Public and private authority as different perspectives*

My proposal is based on the concept of community set out earlier. The difference between private and public authority neither resides in the author, nor in the effects of such authority. Rather, considering discourse theory’s roots in a theory of action, I believe the difference to reside in the mode of action pursued by such authority. What distinguishes public from private authority is the presence of a community that pursues a common interest determined in an act of

<sup>157</sup> Fraser (n 151) 64.

<sup>158</sup> S Wheatley, *The Democratic Legitimacy of International Law* (Hart, Oxford, 2010) 322–5.

<sup>159</sup> See above, text after n 86.

collective self-determination.<sup>160</sup> By contrast, private authority pursues the (mutual) self-interest of the actor(s) as part of their individual self-determination. When translating this distinction between common and private interests to a pluralistic, cosmopolitan environment characterised by multiple communities with overlapping membership, public authority becomes a matter of perspective: public authority is the authority exercised *within* one such community. On that basis, I propose the following definition: *public authority is an act of authority whose actor reasonably claims to be mandated to act on behalf of a community of which the observer is a member, or a member of such member.*

Some crucial explanations are in order. First, one needs to carefully distinguish the descriptive dimension of the definition and its normative consequences. The definition has a *descriptive purpose*, namely that of identifying acts which require a specific kind of legitimacy because the actor claims to promote the interest of a community on its behalf, i.e. to act in furtherance of the community's collective self-determination. Whether an act thus identified actually has that kind of legitimacy is a different question. This is where the *normative upshot* of the above definition comes into play. Accordingly, public authority needs to be equipped with a legal framework that ensures it enjoys a presumption of legitimacy. In a discourse theoretical perspective, this requires structures of adequate representation, participation, transparency, accountability, as well as human rights protection that will bring about ethical and moral discourse based on communicative action, not only pragmatic compromise based on strategic action. The assumption of legitimacy is rebuttable.<sup>161</sup>

To clarify what I mean here, my approach can be contrasted with that of Kingsbury and Donaldson. While I agree with Kingsbury and Donaldson that public authority is the authority adopted in the name of a public (i.e. a community),<sup>162</sup> they establish the additional requirement that such

<sup>160</sup> Habermas, see above n 56 and accompanying text; see also J Waldron, 'Can there be a democratic jurisprudence?' (2009) 58 *Emory Law Journal* 675, 700ff. Of course, both authors refer to 'law' instead of authority (Waldron occasionally contrasts 'law' with 'private exercises of power', *ibid* 701, showing that he is ultimately concerned about authority). Kingsbury (n 114) 175ff endorses the definition of Waldron, but combines it with Fuller's natural law-positivist criteria. A wider definition is favoured by J Best and A Gheciu, 'Theorizing the Public as Practices: Transformations of the Public in Historical Contexts' in J Best and A Gheciu, *The Return of the Public in Global Governance* (Cambridge University Press, Cambridge, 2014) 15, defining as public 'those goods, actors, or processes that are recognized by the community in which they are carried out as being of common concern' (at 32).

<sup>161</sup> See above n 64 and accompanying text.

<sup>162</sup> B Kingsbury and M Donaldson, 'From Bilateralism to Publicness in International Law' in U Fastenrath *et al.* (eds), *From Bilateralism to Community Interest (Festschrift Simma)* (Oxford University Press, Oxford, 2011) 79, 84; referring even to 'the whole society': Kingsbury (n 114) 180ff.

exercises of authority need to respect certain defined substantive and procedural principles *in order to be considered as public authority*. By contrast, the present definition of public authority rests on the conviction that it is better not to fuse legality with legitimacy. Public authority should comprise acts which *claim* to be legitimate because they meet the applicable legal requirements – and nothing more. This move gives the concept of public authority its particular emancipatory thrust. Classifying as public authority all acts which claim a certain legitimacy (the descriptive dimension of the concept) immediately engages the responsibility of their authors to ensure that the act effectively respects individual and collective self-determination (the normative dimension of the concept). By contrast, the proposal of Kingsbury and Donaldson leaves open what should happen with acts that do not meet all public law principles. Should one classify them as ‘private authority’ (or private law, since they do not use the concept of authority)? Or as ‘non-authority’ (non-law)? If one does not classify such acts, one runs the risk of defining the problem away. By way of example: I do not see who would be served by categorizing the most egregious decisions, such as the UN Security Council’s listing of terror suspects, as private authority (or as non-authority) instead of public authority, albeit a potentially illegitimate version of it. The Kingsbury/Donaldson proposal features the reverse problem of Kelsen’s pure theory of law and democracy: while Kelsen did not want to tie his concept of law to any requirement of democracy, Kingsbury and Donaldson define as law (authority in the terminology used here) only that which is democratically sound. Kelsen’s theory ran the risk of beatifying authoritative acts with problematic impacts and doubtful legitimacy, Kingsbury/Donaldson run the risk of losing them out of sight. And while Hayek overestimated private self-coordination to the detriment of democratic forms of interaction, they might overestimate the latter to the detriment of the former. Possibly in recognition of these risks, Kingsbury and Donaldson recently clarified that they did not intend to draw a sharp distinction between private and public law (or authority).<sup>163</sup> In any case, the present definition takes a middle road and establishes a connection between authority and legitimacy that is stronger than in Kelsen’s theory because it claims that legality and legitimacy should ideally converge, and more flexible than Kingsbury’s and Donaldson’s original definition since it recognises that legality and legitimacy do not always converge as a matter of fact.

<sup>163</sup> M Donaldson and B Kingsbury, ‘Ersatz Normativity or Public Law in Global Governance: The Hard Case of International Prescriptions for National Infrastructure Regulation’ (2013) 14 *Chicago Journal of International Law* 1, 44. Similar: Casini (n 152) 426.



Second, public authority is always exercised within a community. This is why I refer to the *observer*: one and the same act may affect different people or groups, some of which may be members of the community on whose behalf the actor is mandated to act, others may not. For the non-members, the act might be considered as one of private authority. Accordingly, the rules of private law apply to it, be it domestic contract and tort law or their international law equivalents like the Vienna Convention on the Law of Treaties and the customary law of state responsibility as codified in the Articles on State Responsibility. They ensure that such authority is exercised on the basis of consent, the justificatory backbone of the private law paradigm. But the exercise of private authority does not require democratic legitimacy. To give an example: authoritative acts of non-universal international organisations such as the OECD are acts of public authority for their members. This means that they need to derive their democratic legitimacy from the member states and their citizens. However, they do not need to derive democratic legitimacy from non-member states and their citizens, even if they cause indirect effects for them, such as an act of the OECD causing policy changes in OECD member states that might affect their trade with non-member states. Only if the OECD could credibly claim to have a legal mandate to act also on behalf of non-members, the latter would see themselves confronted with an act of public authority.

The case is different if the impact of such private authority on the self-determination of those affected becomes too strong to be justified by consent, for example, because it causes enormous, non-remediable externalities or is exercised in the context of huge, unacceptable power disparities. This would be the case if an OECD policy establishes a global standard that has enormous consequences for non-member states, such as the OECD policy on tax havens.<sup>164</sup> In such a case, two options remain: either a competent public authority such as the state or an international institution needs to regulate the exercise of such private authority. Fundamental rights might afford additional legal protection and mitigate power disequilibria to the extent that they have horizontal effects.<sup>165</sup> Or, the exercise of such authority needs to be transformed into public authority to be exercised

<sup>164</sup> On the varying success of this policy: JC Sharman, *Havens in a Storm. The Struggle for Global Tax Regulation* (Cornell University Press, Ithaca, NY, 2006).

<sup>165</sup> Pathbreaking: German Constitutional Court, *Liith*, BVerfGE 7, 198; on horizontal effects of fundamental rights in the law of the European Union see V Trstenjak and E Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU' (2013) 38 *European Law Review* 293, 307–9; D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 *European Law Review* 479; Muir Watt (n 10) 400–2.

by an institution with a mandate allowing it to act on behalf of a more inclusive community, a community comprising those so severely affected.<sup>166</sup> Ideally, this would lead to the convergence of the group of those more than only marginally affected by an authoritative act, with the community in whose name such authority is being exercised. Such a shift from private to public authority might require the creation of new international institutions.<sup>167</sup> It would be illiberal to prescribe an existing group to expand its membership. It may only do so of its own. If one allows people to form communities for the purpose of self-determination, there will be exclusion. Public law can only impose restrictions on whether and how such communities may exercise authority.

Certainly, it is a political question, a question of legitimacy and not one of legality, to determine the point at which someone needs to intervene and regulate private authority, or to transform it into public authority by shifting it to a more inclusive institution. This issue is therefore up for contestation, and absent a world parliament, there is no forum that could ultimately decide this question in a legitimate manner. However, the United Nations General Assembly provides a relatively inclusive forum for the discussion of such matters, although it only comprises states.<sup>168</sup>

Third, it is not sufficient that the actor subjectively has the intention to pursue the community's interest. The actor also needs to claim to be *mandated* to act on behalf of a community. It belongs to the community's collective self-determination to select the persons or entities that may pursue its common interest, and how. Also, only those who claim to be empowered by the community face claims for democratic legitimacy, not those who voluntarily align their action with what they think is the common interest.

It is irrelevant whether the mandate has a legal basis in soft or hard law. As set out above, I consider both soft and hard law as potential acts of authority, hence as acts that might empower other exercises of authority. Likewise, the legal basis may be contained in private or in public law as traditionally understood. Associations governed by domestic private law such as standardisation organisations or professional associations might very well exercise public authority over their members (and even beyond, if acting upon a mandate by an international institution). This aspect of

<sup>166</sup> This seems to me one of the main differences between this approach and Donaldson and Kingsbury (n 163) 45ff.

<sup>167</sup> Cf. Wheatley (n 158) 330ff.

<sup>168</sup> A recent example is the call of the UN General Assembly for the incremental development of a global sovereign debt workout mechanism, UN Doc A/Res/66/189 of 14 February 2012, operative para 22.

the definition might refute one of the strongest criticisms advanced by the school of transnational legal pluralism against the publicness approach.<sup>169</sup> Under which circumstance private law associations may exercise public authority hinges on the concept of community and requires some further consideration, which the next section will provide. Finally, public authority might be based on international or domestic law. In the former case, we refer to international public authority.

Fourth, the actor exercising public authority needs to make a *reasonable claim* that he or she is mandated to act on behalf of a certain community. Such a claim is reasonable if the actor may with some plausibility invoke a legal basis entitling him to act on behalf of the respective community.<sup>170</sup> This is an intersubjective criterion which is meant to exclude gross abuses of power. Striking *ultra vires* acts should not be beatified by according to them the status of public authority, since public authority implies a claim to at least potential legitimacy, not only in the understanding of discourse theory.<sup>171</sup> However, this has nothing to do with the question whether such egregious *ultra vires* acts may trigger the responsibility of the agent or institution. One should not mix up questions of *iustitia distributiva* (public authority and its legitimacy) with questions of *iustitia commutativa* (damages) or criminal law sanctions.

Fifth, the above definition not only applies if the affected entity is a member of the community in whose name the act has been adopted, but also if it is *a member of such member*. The latter case concerns in particular acts of international or supranational institutions which directly affect private individuals of their member states. Examples comprise arrest warrants of the International Criminal Court, judgments of international courts and tribunals where one of the parties is a private individual, or acts of information such as Interpol red notices. Each of these examples has direct legal or factual consequences for private individuals. States granted the respective international institution the necessary powers to exercise such authority directly over their citizens. This necessitates considering such authority as public, even though the individual affected is not directly a member of the acting institution.

### *Operationalizing the distinction*

This section operationalizes the distinction set out above and points out some of its ramifications for international law in general. One of the most

<sup>169</sup> See above nn 11 and 13.

<sup>170</sup> Teubner (n 11) 103 – admitting that this requires an intersubjective understanding of community.

<sup>171</sup> See above nn 63 and 64 and accompanying text.

striking revelations of this definition is that certain parts of classical public international law should best be understood as exercises of private authority – at least from an *international* viewpoint. This includes all international legal acts which do not derive from an actor acting for a community, but by which rational actors pursue their egoistic interests. Declarations of war are an obvious case, and a large amount of bilateral agreements might also fall in this category – the gravel of the law of coordination.<sup>172</sup> Of course, international treaties are authoritative. They bind the parties legally and create obligations for them which constrain their freedom. States parties may not easily discard them, even if their preferences change, unless they are ready to bear the consequences, such as reputational losses, court procedures, or any kind of countermeasure. However, bilateral treaties are not necessarily public – at least from the perspective of international law. From the perspective of *domestic law*, such acts may very well be classified as exercises of public authority, since they oblige the entire community which constitutes the state.

Equally striking might be the insight that certain acts of private non-profit corporations are to be considered as exercises of public authority *from the internal viewpoint of their members*. However, this does not mean that the law governing non-profit corporations should be taught in classes on constitutional or administrative law. From the perspective of *domestic law* as applied by a domestic court, internal acts of non-profit corporations are acts of private authority because they are not adopted in the name of the state. Again, the classification hinges on the perspective. The same considerations might apply to some legal relationships in family law.

Some cases are quite hard to classify. The distinction between *acta iure gestionis* and *acta iure imperii* evokes the private/public law divide. Indeed, one might argue that in the case of the former, the state acts as a rational egoist, whereas in the latter, it acts on behalf of a community, even though the addressee of such acts does not have to be a member of that community, but I am not certain whether this leads to practical solutions.

Another hard case is immigration. Immigrants and refugees are often exposed to forms of authority which I hesitate to qualify as private. Certainly, from the viewpoint of *domestic law*, all government acts concerning immigration are clear cases of public authority since they are exercised in the name of the community. Naturalisation touches upon the self-definition of the community.<sup>173</sup> However, I doubt whether they should

<sup>172</sup> JHH Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547.

<sup>173</sup> Cf. C Möllers, *The Three Branches* (Oxford University Press, Oxford, 2013) 74.

be qualified as *public* authority vis-à-vis the immigrant. That would have the paradoxical consequence that the decision about immigrant status would need to derive democratic legitimacy from a community which includes the immigrant, although the question at stake is exactly whether the immigrant should be included in that community. This is the result that follows *descriptively* from the application of the above definition. Whether this result is *normatively* satisfactory is an entirely different question.<sup>174</sup> Such decisions create huge externalities for the immigrant. In this respect, the Refugee Convention provides at least a few, perhaps insufficient, external constraints on this exercise of private authority ('private' only from the viewpoint of the immigrant). In any case, once a certain status has been accorded to immigrants, such as a residence permit, further elements of democratic inclusion might be required (such as a right to vote, which might be limited to certain specialised assemblies like councils of immigrants, or territorial assemblies like town councils). In that respect, one and the same government may act on behalf of different communities – the community of its citizens, the community of all residents, and even looser communities held together by only rudimentary traits of shared identity.

## V. Conclusion

I conclude on a note of caution. This is a tentative proposal. Some of its ramifications might appear as counter-intuitive. However, its core is quite simple: public authority exists only in the relation between a community and its members. By contrast, extrapolations of domestic notions of publicness create a conceptual muddle. Substantive definitions of 'public interest' or prescriptions regarding community membership are illiberal and incompatible with the reality of a pluralistic international order. Approaches relying on 'affectedness' would undercut the idea of collective self-determination. Granted, this approach associates public authority with islands of hierarchical relationships. But that relationship is much more flexible and amenable to new constellations compared to the approaches of 'capital-C' constitutionalism. Certainly, one might reject the distinction between communicative and strategic action. But it should be kept in mind that scholars of international relations turned to the concept of communicative action when their rationalist theories turned out

<sup>174</sup> Satisfied with the current approach: E Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295, 300ff.

to be insufficient for the explanation of certain international phenomena.<sup>175</sup> Also, one might accuse the line of reasoning advanced in this article of attempting to bridge the unbridgeable and divide the indivisible, exposing some genetic deformations inherited from the Hegelian idealist ancestry of Habermas' discourse theory. But if one discards the distinction entirely, one risks discarding two further, innately connected ideas: freedom and democracy.

### Acknowledgements

My sincere gratitude goes to the anonymous reviewers whose observations have been extremely helpful. For comments on earlier versions I am indebted to Jürgen Bast, Jochen von Bernstorff, Armin von Bogdandy, Ignacio Borrajo Iniesta, Lorenzo Casini, Sergio Dellavalle, J Ben Heath, Felix Lange, Oliver Lepsius, Nico Krisch, Evangelos Liaras, Christoph Möllers, Kalypso Nicolaidis, Sabrina Ragone, Arie Rosen, Jens Steffek, Richard Stewart, Ingo Venzke, and Joseph HH Weiler. Time and again, Silvia Steininger provided invaluable research assistance. Thanks to Julia Hammelehle for editorial assistance.

<sup>175</sup> H Müller, 'Internationale Beziehungen als kommunikatives Handeln' (1994) 1 *Zeitschrift für Internationale Beziehungen* 15, 24.