Demultilateralisation: A cognitive psychological perspective

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Abstract
This contribution seeks to illuminate the looming phenomenon of demultilateralisation and the return of and to the nation state, i.e. closure. Whereas many reasons for opening and closure have been discussed by Habermas in his eminent essay, we aim at providing an additional dimension, taking a psychological point of view and analysing this proclivity from a behaviourally informed perspective. Following a short recapitulation of the evolution towards postnationalism, we briefly sketch the current phenomenon of demultilateralisation and renationalisation. We then contribute to the current debate by providing cognitive psychological insights drawing on well-researched biases that offer the greatest potential to explain the current outbreak of closing tendencies, namely prospect theory, including the endowment effect, framing, the availability bias and so-called hawkish biases. This may add an explanatory dimension to why nationalistic politics have become again the beguiling sanctuary of the people. We attempt to define scope conditions of closure.

1 | INTRODUCTION: HABERMAS’S POSTNATIONAL CONSTELLATION REVISITED.

Jürgen Habermas’s eminent essay "The Postnational Constellation" is emblematic for his feisty engagement as a public intellectual as well as a committed European, but also displays his visionary power and remarkable skills of early diagnostics. Before many others, he understood that globalisation is not a given and that “familial bonds, religious communities, urban municipalities, empires, or states can all open and close themselves in relation to their environments.” Currently, it may be reasonably argued that we are experiencing a time of re-closure, but it is a different form of closure than Habermas conceived and envisaged two decades ago. Habermas’s contribution correctly analysed that “[u]nder the changed conditions of the postnational constellation, the nation-state is not going
to regain its old strength by retreating into its shell”\(^2\) and yet this seems to be exactly the present course: the nation-state and even nationalistic politics have become again the beguiling but illusionary sanctuary of the people. Accordingly, his conception of a “potential global domestic policy”\(^3\) appears to be receding. The reason for this might be two-fold: First, besides its timeless nature, perspicacity and continuing topicality, Habermas’s essay originates from a highly specific context. It was written on the cusp of the unique historical situation of increased multilateralisation, and maybe even the constitutionalisation of international law at the segue to the third millennium,\(^4\) perhaps resulting in too much optimism. Second, the political actors did not seriously regard his severe warnings that liberalisation may end in anomie and “lifeworlds that have disintegrated under the pressure of opening have to close anew”,\(^5\) requiring much more than neoliberal politics. Due to this unfortunate combination of unredeemed optimism and unheard pessimism (or rather realism), we are presently witnessing a fierce backlash against attempts at political globalisation and a deep crisis of multilateralism.

This contribution seeks to illuminate the looming phenomenon of demultilateralisation and the return of and to the nation state, and it analyses this proclivity from a behaviourally informed perspective. Whereas many reasons for opening and closure have been discussed by Jürgen Habermas, we aim at providing an additional dimension, taking a psychological point of view.\(^6\) Following a short recapitulation of the evolution towards postnationalism and multilateralism in Section 2, we briefly sketch the current phenomenon of demultilateralisation and renationalisation in Section 3. Section 4 enriches the current debate by providing cognitive psychological insights and an attempt to define scope conditions of closure. Section 5 concludes.

2 | TOWARDS POSTNATIONALISM AND MULTILATERALISATION: COORDINATION, COOPERATION, CONSTITUTIONALISATION?

The current multilateral, world order is a relatively novel feature in international law. Until the nineteenth century, international law was dominated solely by the concept of sovereign states, and treaties were of bilateral nature only. The Congress of Vienna (1815), recognised as the first multilateral treaty, several humanitarian law conventions in the second half of the nineteenth century, and the founding of international organisations such as the International Telegraphic Bureau (1868) gradually changed this order of mere coexistence. Although the inter-war period already introduced significant modifications, the paradigmatic shift of the character of international law did not come about before 1945. The United Nations, the proliferation of international organisations and their recognition as subjects of international law led to an unparalleled transformation. International law’s structure thus shifted from a mere *coordinative* to a *cooperative* system as Wolfgang Friedmann famously remarked.\(^7\)

Consolidation and densification advanced the perspective of an emerging “international community” as Hermann Mosler and Bruno Simma coined it.\(^8\) The end of the cold war led to yet another quantum leap for international law in the 1990s, prominently discernible in the multiplication of international courts and tribunals based on multilateral treaties. As they mimicked national institutions and instruments, and led to a certain value-oriented, verticalisation

\(^2\)Ibid., at 81.

\(^3\)Ibid., at 62.

\(^4\)Considering, for example, the then recent fall of the wall, the preparation of the EU enlargement to the East, and the founding of novel institutions like the WTO and the International Criminal Court.

\(^5\)Habermas, above, n. 1, 83.

\(^6\)We use psychology and behavioural economics interchangeably. While a psychologist, Daniel Kahneman won the Nobel Prize for Economics. Both cognitive psychologists and economists are using ever more the same methods and cooperate with one another.

\(^7\)W. Friedmann, *The Changing Structure of International Law* (Columbia University Press, 1964), 60 et seq.

\(^8\)See, e.g., H. Mosler, ‘The International Society as a Legal Community’ (Volume 140), in The Hague Academy of International Law, Collected Courses of the Hague Academy of International Law (Brill, 1974); B. Simma, ‘From Bilateralism to Community Interest in International Law (Volume 250), in The Hague Academy of International Law, Collected Courses of the Hague Academy of International Law (Brill, 1994).
of international law, the international order arguably became increasingly *constitutionalised* or at least "judicialised". It was against this background and at this peak of multilateralism that Habermas unfurled his hopeful vision of a global domestic policy to tame the economically driven, disempowering globalisation. Two decades later, we observe a still unabated economic globalisation and even more pressing, postnational difficulties as diagnosed by Habermas, but we are dismayed that the dominant political response and the alleged will of the people appears to be renationalisation and demultilateralisation, as if Leviathan would provide a place of shelter and could master the contemporary challenges in isolation.

3 | THE PHENOMENA OF DEMULTILATERALISATION AND RENATIONALISATION.

The development from coordination to cooperation towards partial constitutionalisation was far from linear and unfractured. However, the current, boisterous contestation of these achievements seems to be unirred. Already in the context of the financial crisis we have witnessed the return of the State, but not to "catch up" with global markets nor to end "self-dismantling" due to neoliberal imperatives, as Habermas suggested in his essay, but rather to prevent financial collapse and enduring social eclipse. The political response to the challenges of the postnational constellation did not take the form Habermas envisaged in his essay—a "renewed political "closure" of this global society"—but rather the opposite. We are currently witnessing a toxic amalgam of repatriation, nationalism, populism and ill-conceived sovereignty, leading to a binary distinction—"us" versus "them"—evoking the venomous "Freund-Feind" mindset described by Carl Schmitt, sparking strong identity politics. Doxologies of nationalism and a devolution towards "a world of independent and self-determining nations, each pursuing interests and aspirations that are uniquely its own," unconstrained by international law, are on the rise. Pre-eminent examples are the United Kingdom’s "Take Back Control" politics leading to "Brexit", the so-called "Self-determination" initiative "Swiss law, not foreign judges" in Switzerland, and, most prominently, US President Trump’s "America First" policy, entailing various announced or actual revocations such as the withdrawal from the Paris Agreement (August 2017), UNESCO (October 2017) and NAFTA, the unsigning of the TPP (January 2017), and the withdrawal from the "Iran Nuclear Deal" (May 2018), UNHCR (June 2018), UNRWA (announced in August 2018), and recently from a nuclear arms control treaty. All these phenomena indicate that cooperation and multilateralisation are increasingly being superseded by ill-conceived competition among nations and a move towards a world of geoeconomics, with far-reaching detrimental effects, especially concerning global public goods such as climate change and international adjudication, but even for reciprocal relationships, such as in trade. Both of President Trump’s speeches to the UN General Assembly in 2017 and 2018 bear witness to this fierce rejection of "the ideology of globalization" while praising the reign of patriotism.

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10 T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (Springer, 2011).

11 N. Tate and T. Vallinder, ‘The Global Expansion of Judicial Power: The Judicialization of Politics’, in N. Tate and T. Vallinder (eds.) *The Global Expansion of Judicial Power* (New York University Press, 1997), at 1; A.S. Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000), 1, 19 et seq.; A. Follesdal and G. Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, 2018).

12 A. Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law*, 579.

13 J. Delwaide, ‘The Return of the State?’ (2011) 19 *European Review*, 69.

14 Habermas, above, n. 1, 62.

15 Ibid., 61.

16 P.D. Blackwill and J.M. Harris, *War by Other Means: Geoeconomics and Statecraft* (Harvard University Press, 2016), 20, define geoeconomics as the ‘use of economic instruments to promote and defend national interests, and to produce beneficial geopolitical results.’

17 Remarks by President Trump to the 72nd Session of the United Nations General Assembly (19 September 2017), available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-72nd-session-united-nations-general-assemble/ (last accessed 19 September 2019); Remarks by President Trump to the 73rd Session of the United Nations General Assembly (25 September 2018), available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assemble-new-york-ny/ (last accessed 19 September 2019).
DEMULTILATERALISATION: BEHAVIOURAL EXPLANATIONS.

The potential reasons and explanations for the present backlash and the prevailing demultilateralisation are multifarious and imbricating. They range from the alleged democratic deficit of international law, its overly liberal and maybe too pluralistic nature, to the assault of being an elitist project by a global elite and an “invisible college of international lawyers” dovetailing with Jürgen Habermas’s warning to "keep in mind the balance between the opening and the closure of socially integrated forms of life". Dani Rodrik describes the delicate balance between democracy and processes of globalisation as a fundamental “trilemma”, observing that we cannot simultaneously pursue democracy, national self-determination and economic globalisation. He argues for smart globalisation, not maximum globalisation. Habermas problematised this paradox much earlier and focused more on the “aspects of globalisation [which] could potentially degrade the capacity for democratic self-steering within a national society.”

Some of his concerns, on which we will focus, are the following: the degradation of the social welfare state due to a tax-cutting spiral caused by locational competition (Standortwettbewerb), the “hardening of national identity as different cultural forms of life come into collision”, and the potential loss of solidarity as “the status of citizenship has to maintain a use-value: it has to pay to be a citizen, in the currency of social, ecological, and cultural rights as well.”

Some fundamental basis of reason and communicative rationality needs to exist for democracy—be it on the national, regional or global level. At the core of the problem seems to be what also forms a core building block in Habermas's oeuvre: communication and discourse. His theory of communication is closely connected to the disintegration of lifeworlds. According to Habermas, if communication is to be rational, 'communication must be freed from external and internal coercion so that... participants... are motivated solely by the rational force of the better reasons.'

Of course, ‘communicative rationality is not supposed to be an attainable ideal, but rather a critical principle... All [social] practices are going to be in violation of precepts of communicative rationality to [a] greater or lesser degree.’ This somehow rational basis of communication may be fundamentally disturbed by the concerns Habermas describes and which are enhanced by biases and heuristics to which we now turn.

Those (cognitive) psychological kinks in rationality are systematically substantiated by scientific experiments in cognitive psychology. Several biases and heuristics are particularly relevant to understand this closure through a behavioural lens. We focus on voters in Western countries, that is, the citizens who need to choose the degree of openness they want for their country and who currently seem to prefer closure. Although this is certainly not an alternative explanation to Habermasian thought, we submit they illuminate and enhance some phenomena which have led to the current closure and result in demultilateralisation.

Political psychologists have shown that citizens' judgements and choices are deeply affected by the limitations on their ability to acquire, recall and process information, and are mostly determined by implicit attitudes and automatic reactions that they are not necessarily aware of, as well as by the interplay of affect and cognition. While we draw on this general research, our focus is on those biases that offer the greatest potential to explain the current

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18 P. Kahn, Putzing Liberalism in Its Place (Princeton University Press, 2008).
19 O. Schachter, 'Invisible College of International Lawyers' (1977) 72 Northwestern University Law Review, 217; see also A. Roberts, Is International Law International? (Oxford University Press, 2017).
20 Habermas, above, n. 1, 62, 68 et seq.
21 D. Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy (W.W. Norton & Company, 2011).
22 Habermas, above, n. 1, 67.
23 Ibid., 72.
24 Ibid., 77.
25 J. Habermas, The Inclusion of the Other: Studies in Political Theory (MIT Press, 1998), 44.
26 J.S. Dryzek, ‘Critical Theory as a Research Program’, in S. White (ed.), The Cambridge Companion to Habermas (Cambridge University Press, 1995) 97–119, at 104.
27 Generally, see L. Huddy, D.O. Sears and J.S. Levy (eds.), Oxford Handbook of Political Psychology (Oxford University Press, 2nd edn, 2013).
outbreak of closing tendencies and renationalisation, namely prospect theory, including the endowment effect, framing, the availability bias and so-called hawkish biases.

Prospect theory posits that people ordinarily perceive outcomes as either gains or losses, rather than as final states.28 Gains and losses are defined in relation to some reference point, usually (but not invariably) the status quo or an entitlement. A loss counts more than a gain (loss aversion). Empirical estimates of loss aversion are typically close to two, meaning that the disutility of giving something up is twice as large as the utility of acquiring it. What counts as a loss or as a gain depends on the reference point. Mostly, the status quo is taken as the reference point and changes from this point are viewed either as losses or gains. But it can also be influenced by expectations, which in turn be influenced by envisaged prospects or entitlements. The reference point is also influenced by the status of other people.29 In the domain of gains, people exhibit risk aversion, whereas they are risk-seeking in the domain of losses.

We submit that the middle-class citizens of the rich world—the part of the world where closure is most prominent—are in a double loss frame. Their reference points seem to be the promised participation in the gains of globalisation which did not take place within their respective social strata as well as their perceived entitlement to social security, especially in comparison with immigrants. Indeed, it is only the middle class in the rich world who lost or at least did not gain from globalisation; most others have benefited and billions were lifted out of (absolute) poverty.30 In addition, the home countries of these middle-class people are also losing their status against other new powers, most prominently China, which converged in economic and military power. This is most pointedly the case with the loss of hegemonic status of the United States. Thus, inequality within Western countries combined with the absolute rise of equality between countries may be perceived as a double loss by the middle-class citizens of the rich world.

Closely connected to but with further implications far beyond prospect theory is the framing of decisions. A framing effect exists when different ways of describing the same choice problem change the choices that people make, even though the underlying information and choice options remain essentially the same.31 Many experiments investigate those effects.32 It has also been studied in the political context, including studies of voting and public opinion, campaigns, policy-making and foreign policy, and a variety of other topics relevant to the postnational constellation.33 The particular category of issue framing is especially important for our purposes. Issue frames focus on qualitatively different yet potentially relevant considerations. Issue framing effects refer to situations where, by emphasising a subset of potentially relevant considerations, a speaker leads individuals to focus on these considerations when constructing their opinions. For example, describing a trade policy issue as a security issue may cause people to base their opinions on security threats instead of the trade implications of protectionist policies and induce loss aversion.34 Focusing on security issues and using economic tools for political strategy in a new geo-economic world order also induces other so-called hawkish biases. The term “hawkish” denotes a propensity for suspicion, hostility and aggression, and for less cooperation and trust in the resolution of the conflict. Actors who are susceptible to hawkish biases are not only more likely to see threats as more dire than an objective observer would perceive

28D. Kahneman and A. Tversky, ‘Prospect Theory: An Analysis of Decisions under Risk’ (1979) 47 Econometrica, 312; D. Kahneman and A. Tversky, ‘Advances in Prospect Theory: Cumulative Representation of Uncertainty’ (1992) 5 Journal of Risk and Uncertainty, 297; J.S. Levy, ‘Prospect Theory and International Relations: Theoretical Applications and Analytical Problems’ (1992) 13 Political Psychology, 283.
29E. Zamir and D. Teichman, Behavioral Law and Economics (Oxford University Press, 2018), 45 et seq.
30F. Alvaredo, L. Chancel, T. Piketty, E. Saez and G. Zucman, ‘The Elephant Curve of Global Inequality and Growth’ (2018) 108 AEA Papers and Proceedings, 103 and C. Lakner and B. Milanovic, ‘Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession’ (2016) 30 The World Bank Economic Review, 203.
31R. Cookson, ‘Framing Effects in Public Goods Experiments’ (2000) 3 Experimental Economics, 55, 55 and T. Ellingsen, M. Johannesson, J. Mollerstrom and S. Munkhammar, ‘Social Framing Effects: Preferences or Beliefs?’ (2012) 76 Games and Economic Behavior, 117, 118 for different theories about framing.
32Ellingsen et al., above, n. 33.
33J. N. Druckmann, ‘Political Preference Formation: Competition, Deliberation and the (Ir)relevance of Framing Effects’ (2004) 98 American Political Science Review, 671.
34For a similar example based on experiments, see ibid., 672.
35A. Roberts, H. Choor Moraes and V. Ferguson, ‘Toward a Geoeconomic Order in International Trade and Investment’ (2019), available at https://ssrn.com/abstract = 3389163.
them, but are also likely to act in a way that will produce unnecessary conflict. They are mostly also overconfident. Overconfidence is the tendency of actors’ subjective confidence in their judgements, which is reliably greater than the objective accuracy of those judgments, in being able to “win” the conflict, and actors are risk-seeking.36 Connected to this is the “illusion of control", which is an exaggerated perception of the extent to which outcomes depend on one’s actions.

Another common cognitive blinker is the availability bias, which leads decision makers to rely on examples and evidence that come immediately to mind. It is connected to the assessment of probabilities. Often, the estimated likelihood of an event and the frequency of its occurrence is based on ease of recalling similar events or occurrences.37 This bias results because people's attention is more readily drawn to emotionally salient and easily recalled events, e.g. terrorism threats or immigration waves, even ahead of objectively more likely and impactful events such as climate change. Media plays an enormous role in shaping this bias, including social media such as Twitter, ever more used by politicians and not necessarily in a benign manner. President Trump, for example, uses Twitter to induce loss aversion (“making America Great Again", insinuating it has lost out). He also tweets more on the (economic) security threat by China, as well as immigration. Adding to this, experiments have shown that individuals display a limited ability to evaluate the truthfulness of short video clips containing either true or false news.38 They are, however, overconfident in their absolute ability, believing to correctly identify more truthful videos than they actually do. Even absent motivated beliefs, that is, in brief, the idea that people believe what they want to believe,39 individuals think they are much better at detecting lies than they actually are. This suggests that, even without motivation to be biased, false news may spread and wrongly shape individuals’ beliefs. If this is the case, deliberative communication and sharing lifeworlds (based on very different “facts") will be difficult to sustain.

Grossman and Helpman, leading proponents of the classic, rational choice-based political economy account of trade,40 now candidly acknowledge that voters’ preferences over trade policy reflect not only their material self-interest but concerns for members of those groups in society with whom they identify.41 Individuals predominantly care about the well-being of those they perceive as being similar to themselves. Interestingly, Grossman and Helpman find that populist revolutions in which the working class repudiates its identification with a broad national group that includes the elites and opts instead to identify more narrowly (only with other non-elites) leads to an increased demand for protectionism, that is, closure.42 Critically, under their model, the trigger event in this shift in identification is a widening of income distribution, "no matter whether that has been caused by globalisation, by technological change or by some other mechanism"43 connecting back to loss aversion. Grossman and Helpman confine their analysis to the national realm and only discuss in passing cross-border social identification (e.g. via religion or gender). Identification is based on similarity, and with respect to socio-economic status, foreign citizens do not seem similar enough to allow identification.

Viewing those aspects through a behavioural lens allows us to formulate some scope conditions for re-closure (by no means exhaustive) which are enhanced by the aforementioned and discussed cognitive biases and heuristics. First, the decline of the welfare state in some European countries or only weakly developed welfare states in the United States is likely to provoke loss aversion, especially after a crisis—a powerful bias likely to lead to political reactions, including anti-immigrant sentiments. The status of citizenship loses its use-value. A loss of solidarity in redistributional constellations is to be expected—also across borders as we witness within the EU. Second, changing geopolitical

36D. Kahneman and J. Renshon, ‘Hawkish biases’, in T. Thrall and J.K. Cramer (eds.), American Foreign Policy and the Threat of Fear: Threat Inflation Since 9/11 (Routledge, 2009), 79–96.
37A. Tversky and D. Kahneman, ‘Availability: A Heuristic for Judging Frequency and Probability’ (1973) 5 Cognitive Psychology, 207.
38M. Serra-Garcia and U. Gneezy, ‘Mistakes and Overconfidence in Detecting Lies’, on file with authors.
39For details, see Nicholas Epley and Thomas Gilovich, ‘The Mechanics of Motivated Reasoning’ (2016) 30 Journal of Economic Perspectives, 133.
40G. Grossman and E. Helpman, ‘Protection for Sale’ (1994) 84 American Economic Review, 833.
41G.M. Grossman and E. Helpman, ‘Identity Politics and Trade Policy’, NBER Working Paper No. 25348 (2018), at 1.
42Ibid., at 28.
43Ibid.
constellations in which the richer countries “lose” their (hegemonic) status, be it militarily, technologically or economically, due to the convergence with formerly poorer and weaker countries (e.g. China and India) will also evoke loss aversion with the said consequences. Third, if political discourse and policy are based on and framed as security issues (be it against terrorism, immigration, military prowess or economic security), hawkish biases will easily be evoked with the consequence that closure takes place and zero-sum games are played (overconfidently). National identity will harden against perceived external threats. Fourth, if populist politicians communicate directly via social media (without deliberation in the sense of Habermas), they can use the availability bias and direct citizens’ attention to certain issues and influence them accordingly, including with fake news. Fifth, if identity becomes focused only on people like oneself, this weakens solidarity within a nation and across nations, facilitating foreign policies that are not welfare enhancing for a whole country but may benefit some groups only. All of this may lead to lifeworlds that have disintegrated—speechlessness between groups of different identities and different political views—and ultimately result in anomie, closure and, finally, demultilateralisation.

5 | CONCLUSION

Considering the more than 1,300 multilateral treaties currently deposited with the UN Secretary-General, the recent phenomenon of departure by some states from some treaties appears almost insignificant. And yet, we witness withdrawals by powerful parties from important covenants. Mindful of a signalling effect and even the danger of a bandwagon effect, this is not only lamentable but may result in an increasing process of demultilateralisation, reversing the hard-won level of cooperation or even elements of constitutionalisation of the international arena. While unilateralism and even “unfriendly unilateralism” 44 certainly have their merits (in many cases unilateral action is favourable over no action at all), regression towards unilateralism driven by misunderstood political realism, fallacious framing and exploitation of cognitive biases as analysed above, would be detrimental. Globalisation has created the utter need for a “Weltinnenpolitik” and respectively calls for an ever closer and intensified cooperation among States to meet the challenges of the “postnational constellation” as the jubilarian in his unparalleled ingenuity analysed and claimed two decades ago.

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44 M. Hakimi, ‘Unfriendly Unilateralism’ (2014) 55 Harvard International Law Journal, 105.