

Florence, 16-17 May 2008

Workshop on “Global Transnationalisation and Democratisation Compared”

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Hosted by the European University Institute

In cooperation with, and supported by, the **Network of Excellence CONNEX**, Mannheim

The Discourse Theory of Law and the European Constellation*

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I. Introductory remarks

Jürgen Habermas’ Discourse Theory of Law is more than just a famous contribution to the vast field of legal theory, as that notion is usually understood. His works on law continue the tradition of the grand theories of society (*Gesellschaftstheorie*), which sought to analyse and define the specifics of modern law in the context of the development of state and society. The importance of law within such wider contexts is certainly a German legacy. The law was of crucial importance in the works of so many of Germany’s *maîtres penseurs* such as Kant, Hegel, Weber. It is therefore unsurprising that Habermas’ most important critical interlocutor, Niklas Luhmann, whose systems theory rejects the idea of any hierarchical ordering among the subsystems of modern societies, has paid particular attention to the law and its functioning.

* This paper is part of a more comprehensive essay on the tensions between Jürgen Habermas’ Discourse Theory of Law and the postnational constellation, which will include a discussion of Habermas’ contribution to international law.

Even though Jürgen Habermas represents a great tradition, his works display unique features. Two of such are clearly visible in his writings on both Europeanization and globalisation. One such feature is his effort to reconcile the tradition of social critique of the Frankfurt School with a theory of legitimate governance – his theory of deliberative democracy.¹ This reconciliation builds upon the integrative potential of law in capitalist societies under democratic conditions. The second specificity is the exposure of German anti-liberal traditions in social theory to Western counterparts, in particular to Anglo-American philosophy and theories of democracy. True, a broad interest in American law, has been an important characteristic of Germany's post-war *Rechtswissenschaft* since the early 60s;² however, it was Habermas who also paved the way for an intense reception of the theoretical foundations of American jurisprudence and constitutionalism. A third dimension of Habermas' work, which he pursued via this focus on the West, is his deep concern for Germany's history. Throughout the many decades of his presence as a scholar and public intellectual, Habermas has continued to examine critically Germany's *mentalités*, the origins of its anti-liberal intellectual traditions and their impact; throughout the history of the Federal Republic he contributed prominently and intervened in public debates on the *Aufarbeitung*³ of the German past.

II. Europe's "Bitter Experiences"

Hardly any book on European integration and hardly any solemn talk at a public event concerning European matters fails to mention it: European integration symbolised peace after two devastating world wars; it made possible the re-admission and supervision of the defeated and divided Germany into the civilised world ; the commitment to an opening of Europe's national economies implied a not so trivial shift of national aspirations, namely the replacement of national power by national prosperity as a societal value (*Sinnstifter*).⁴ At present, post-1989, this type of memory and reconstruction no longer represents Europe's

¹ See John P McCormick, "Habermas' reconstruction of West German Post-War Law and the *Sozialstaat* Controversy, in Jan-Werner Müller, (ed.), *German Ideologies since 1945. Studies in the Political Thought and Culture of Bonn Republic*, New York: Palgrave Macmillan, 2003, 61-75.

² See Ch. Joerges, "The Science of Private Law and the Nation-State", in Francis Snyder (ed.), *The Europeanization of Law. The Legal Effects of European Integration*, Oxford-Portland: Hart 2000, 47-82, at 63 *et seq.*

³ "*Aufarbeitung der Vergangenheit* (working through the past)": Theodor W. Adorno' coined this term in his famous critique of *Vergangenheitsbewältigung*; see his "The Meaning of Working Through the Past", in Theodor W. Adorno, *Critical Models: Interventions and Catchwords*, New York: Columbia UP 1998, 89-103.

⁴ See with particular emphasis on Germany as *Wirtschaftswunderland* Michel Foucault, *Naissance de la biopolitique*. Cours au Collège de France, Seuil/Gallimard 2004, in particular the lectures of 7 February 1979, at 105-134 and of 14 February 1979 at 135-164.

self-perception comprehensively; the presence of the past modifies its form.⁵ The past of the first post war decades no longer suffices as a basis for the promotion of the European project after enlargement and in the political environment of the 21st century.⁶ However this is not to say that Europe would have by now, come to terms with its bitter past. Even its self-presentation can be Janus-faced. One side of the face was presented in the Preamble of the Draft Constitutional Treaty as elaborated by the European Convention.⁷ The other side of the face constitutes a confrontation of Europe's history and its disquieting presence in Europe's presence which surfaced somewhat briefly and only for a historical, albeit unconstitutional moment after the signing of the Draft Constitutional Treaty. This face re-emerged when, following a Polish initiative, the Intergovernmental Conference changed the Preamble to the Draft Constitutional Treaty of the 18 July 2003 quite considerably.⁸ The first two somewhat ostentatious passages⁹ were dropped and the reference to "re-united Europe" was replaced by a "Europe, re-united after bitter experiences". More realism, to be sure, but still embarrassing. The "bitter experiences" do not make references to the European Jewry. As Tony Judt has put it in the concluding sentence of *Postwar*: "The new Europe, bound together by the signs and symbols of its terrible past ... remains forever mortgaged to that past... 'European Union' may be a response to history, but it can never be a substitute".¹⁰ What he is referring to is clear. His *monitum* implies that Europe's identity can indeed be more clearly defined in a negative way, namely by the *Shoah*, the attempted genocide of the Jews of Europe. Judt knows of course that this diagnosis does by no means capture the conscience of the first year after World War II, during which as he notes in a recent essay, Europeans were doing their best to forget the atrocities that had just been committed.¹¹ Today however, as a

⁵ "Italy's president, Giorgio Napolitano, has a vivid recollection of Mussolini's fascist regime. The president of the European Commission, José Manuel Barroso, grew up under Salazar's dictatorship in Portugal. The EU's foreign policy chief, Javier Solana, remembers dodging General Franco's police. Eleven of the 27 heads of government who [participating in June 2007 European Council], including the German Chancellor Angela Merkel, were subjects of communist dictatorships less than 20 years ago.", notes Timothy G. Ash („Europe's true stories“, in *Prospect Magazine* 131, 2007, available at http://www.prospect-magazine.co.uk/article_details.php?id=8214.

⁶ See on this debate Fabrice Larat, „Vergegenwärtigung von Geschichte und Interpretation der Vergangenheit. Zur Legitimation der Europäischen Integration“, in Stefan Seidendorf and Matthias Schöning, (eds.), *Reichweiten der Verständigung*, Heidelberg: Winter Verlag 2006., 240-262.

⁷ For the text cf. OJ C 310/2004, 1 of 16 December 2004, available also at <http://http://european-convention.eu.int/>.

⁸ OJ C 310/2004, 1 of 16 December 2004.

⁹ Namely, the reference to Thucydides and the praise of Europe as the herald of civilisation.

¹⁰ Tony Judt, *Postwar. A History of Europe Since 1945*, London: William Heinemann 2005.

¹¹ Tony Judt, "The 'Problem of Evil' in Postwar Europe", *The New York Times Review of Books* 55:2 (7 February 2008).

result of long and painstaking processes, the Holocaust has become omnipresent and this presence is not going away. The young great grandchildren and the adult grandchildren of the war generation in Germany interrogate about the involvement of their ancestors, Europeans in the old and the new member states of the EU question received heroic stories about national resistance against the occupier which cover collaboration and involvement. This quite intense presence of the past is a burden of unknown weight because the unfreezing of national memories occurs in very different ways and is full of temptations. A political instrumentalisation of European pasts by nations, minorities, populist politicians and movements, seems simply unavoidable -- memory politics has become a lucrative political business behind the facades and in the backyards doors of institutionalized Europe.

Why recall Europe's darker legacies in a reflection on Jürgen Habermas work on Europe's integration project? The trivial answer is that his work is more conscious of, and more responsive to, this problematic and its importance than that of any other proponent of European integration. Tellingly enough, Habermas' first systematic encounter with Europe, his essay on "Citizenship and National Identity"¹² does not simply contribute to the debate on the economic benefits and normative costs of the intensification of European integration, which was at the time dominated by the controversy surrounding the Treaty of Maastricht as agreed upon by the European Heads of States in 1991. It places these controversies in historical perspectives, addresses the historical accomplishments and failures of the European nation states,¹³ develops on that background a vision for the construction of a unified Europe,¹⁴ points to the most embarrassing failure in Europe's "*Vergangenheitsbewältigung*"¹⁵ and makes a proposal aimed at attracting the productive potential of the European project through a new concept which reflects historical failures. We will resume discussions on this proposal in the next section. Suffice it here to underline that Habermas has in his essay managed *en passant* to overcome a deficit which the mainstream discourses in law and political science are not even aware of, namely the failure to address adequately the presence of the past in European affairs and the construction of a new polity.

¹² *Staatsbürgerschaft und nationale Identität. Überlegungen zur europäischen Zukunft*, Zurich: Erker 1991, reprinted as Annex II to *Between Facts and Normes*, Cambridge MA: MIT Press 1999, at 491-516.

¹³ *Ibid.*, at 492-500.

¹⁴ *Ibid.*, at 500-507

¹⁵ See *ibid.*, at 507 *et seq.*; on the term see note 3 above.

The most dramatic of his interventions was the manifesto undersigned by Jacques Derrida and published simultaneously in leading European newspapers on 31 May 2003¹⁶ against the American intervention in Iraq. In this text Habermas evokes the European past more intensely than ever;¹⁷ however, the thrust of the manifesto is the divide within the Union between the “alliance of the willing” on the one hand, and the European wide mass manifestations of 15 February 2003 on the other. European unification is now portrayed as the heir to an endangered common Western heritage. This political vocation complements what Habermas had two years earlier in a lecture at the University of Hamburg outlined as the chance of a Europe unified by a common constitution “to counterbalance” the “undesired economic, social and cultural consequences” of globalisation and to defend European *Sozialstaatlichkeit*.¹⁸ Not only the divided loyalties of the governments of an enlarged Europe, but also and even more so, the socio-economic disparities within the European economic space, have rendered a realisation of such visions extremely complex and unlikely. Habermas is aware of all that¹⁹ and he has made it clear that in his view, the retreat of European “constitution building” to intergovernmental diplomacy in the aftermath of the failure of the Constitutional Treaty is irreconcilable with his hopes for a postnational European political culture – and nevertheless continues to defend his normative visions of a Europe united by a political constitution.²⁰ There is a gap between the diagnosis of divergent pasts filled with “bitter experiences” and the move towards a common polity. What else but a Europe working through its pasts can one expect to close this gap? Is it at all conceivable that such painful and

¹⁶ And subsequently in Jürgen Habermas, *Der gesplittene Westen*, Frankfurt a.M.: Suhrkamp 2004, 43-51 [“February 15, or What binds Europeans Together: a Plea for a Common Foreign Policy, Beginning in the Core of Europe”, (2003) 10 *Constellations*, 291-97].

¹⁷ “Contemporary Europe has been shaped by the experience of the totalitarian regimes of the twentieth century and through the Holocaust – the persecution and annihilation of European Jews, in which the National Socialist regime made the societies of the conquered countries complicit as well....A bellicose past once entangled all European nations in bloody conflicts. They drew a conclusion from that military and spiritual intellectual mobilization against one another: the imperative of developing new, supranational forms of co-operation after the Second World War.”, *ibid.* at 296.

¹⁸ “Braucht Europa eine Verfassung?”, in *Zeit der Übergänge*, Frankfurt a.M.: Suhrkamp 2001, 104-129 [Why Europe Needs a Constitution, in E.O. Eriksen, J.E. Fossum, A.J. Menéndez (eds.), *Developing a Constitution for Europe*, London-New York: Routledge 2004, 19-34].

¹⁹ See most recently his „Europapolitik in der Sackgasse. Plädoyer für einen Politik der abgestuften Integration“, in Jürgen Habermas, *Ach, Europa*, Frankfurt a.M.: Suhrkamp 2008, 96-130. („Seine Sprengkraft gewinnt der schwelende Konflikt über die Zukunft Europas freilich aus tieferliegenden Interessengegensätzen, die sich, wenn nicht schon aus Größe und Lage, aus den divergenten Entwicklungspfaden der Nationalstaaten und den kontrastreichen historischen Erinnerungen der Nationen ergeben.“).

²⁰ *Ibid.*

delicate confrontations with history could be shielded against instrumental memory politics?²¹ Habermas himself seems to consider such possibility:

“Why should a sense of belonging together culturally and politically not grow out of these experiences – especially against the rich background of shared traditions which have since long achieved world-historical significance as well as on the basis of the overlapping interests of these networks of communication which have most recently developed in the decades of economic success of the European Community”.²²

III. European Citizenship

Habermas has submitted quite elaborate suggestions on the design of the European polity, and on the steps that should promote its realisation.²³ Both the envisaged institutional configuration and the suggested steps leading to that end are informed by the discourse theory of law.²⁴ One constructive core element of Habermas’ visions, however, deserves particular attention, namely his idea of constitutional patriotism as the bond of a post national European citizenship. This category seeks to connect Habermas’ theory of democracy with the European constellation. It is an essential of this theory, that the European citizen must ultimately be the author of the law of the Union, since, in the last resort, “only the united and consenting Will of all – by which each decides the same for all and all decide the same for each – can legislate”;²⁵ and it is through the involvement of the citizen that the process of constitutionalisation can be accorded a legitimacy superior to the mix of bureaucratic routines, technocratic practices and intergovernmental bargaining that dominate European lower politics and the management of European affairs.

In his 1991 essay, Habermas discussed the notion of citizenship, their republican and communitarian variants fundamentally. European citizenship, he pointed out, can only be envisaged if the historical connection between republicanism and nationalism can be disjoined. That essay was based on a lecture held in Switzerland – a country, which lends particular plausibility to the argument:

²¹ Cf., on this issue, Jan-Werner Müller, *Constitutional Patriotism*, Princeton-Oxford: Princeton UP 2006, 93 et seq.

²² *The Inclusion of the Other. Studies in Political Theory*, Cambridge, MA: MIT Press 1998, at 152.

²³ Most important “Why Europe Needs a Constitution”, note 17 above.

²⁴ The most careful and comprehensive reconstruction is John P. McCormick’s *Weber, Habermas, and Transformations of the European State*, Cambridge: Cambridge UP 2007, esp. at 205-219.

²⁵ This reference to Kant’s *Metaphysical elements of Justice* is on p. 496 of *Between Facts and Norms* (note 12 above).

“A liberal political culture is only the common denominator for a *constitutional* patriotism (*Verfassungspatriotismus*) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society”.²⁶

The notion of Constitutional Patriotism has constituted the forum for contentious discussions. According to a good number of critics, this notion is too abstract and thin to provide the type or degree of embeddedness on which constitutional concepts must build. Such comments often do not consider the very specific context of *Verfassungspatriotismus*. Political theorist Dolf Sternberger who coined this concept in 1982²⁷ did so just because he sought to identify and define the difference between the democracy of the Federal Republic and the nationalist patriotism in Germany’s past. In Habermas’ adaptation, *Verfassungspatriotismus* became an integral element of his deliberative theory of democracy, which he retains as the normative yardstick for the institutionalisation of the European polity. It is exactly on the overcoming of ethnic and substantive notions of identity that his suggestion is founded.²⁸ One can of course still ask whether a concept designed for Germany’s transformation into a constitutional democracy²⁹ is too “thick” to become a European concept, or, if deprived of its German connotation, too “thin” to represent Europe’s *unitas*. Constitutional patriotism was never intended to be a fully elaborated theory of European multiculturalism and political pluralism,³⁰ and it is hardly useful to inquire empirically into the pertinent mindset of Europeans.³¹ It seems instead more reasonable to understand European citizenship as a procedural notion meant to underline an evolution. The European *finalité* cannot be defined conclusively in advance; it seems neither likely nor desirable that the Europeans would replace their national identities by a new European post-national one. Habermas’ notion seems perfectly reconcilable with such provisos. He has only recently given a restatement in which he underlines on the one hand that constitutional patriotism is not so “thin” as to assume that citizens will identify with abstract constitutional principles.

²⁶ *Between Facts and Norms*, 500.

²⁷ “,Verfassungspatriotismus’. Rede bei der 25-Jahr-Feier der “Akademie für Politische Bildung” in Tutzing am 29.6. 1982, in Marie-Luise Recker (ed.), *Politische Reden 1945-1990*, Frankfurt a.M.: Deutscher Klassiker Verlag 1999, 702 et seq.

²⁸ *Ibid.* See also Jürgen Habermas, *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?*, Frankfurt a.M.: Suhrkamp 2004, 124.

²⁹ On the “militancy” and its credentials in this process cf. Günter Frankenberg, “Der lernende Souverän”, in *id.*, *Autorität und Integration. Zur Grammatik von Recht und Verfassung*, Frankfurt a.M.: Suhrkamp 2003, 46-72; this example illustrates perfectly how problematic it would be to try to transmit social learning into another society – and how useful inter-societal observation and critique can be; see V.2 *infra*.

³⁰ See Jan-Werner Müller, *Constitutional Patriotism* (note 21 above).

³¹ But see Mattias Kumm, “Why Europe will not embrace constitutional patriotism”, 6 *International journal of Constitutional Law* 6 (2008), 116-136.

Verfassungspatriotismus, he explained, is a conscious affirmation of political principles as citizens *experience them in the context of their national histories*.³² He emphasises this point in his discussion on the meaning of culture and also, the idea of guaranteeing cultures through collective rights which in his view, is misconceived: culture is of an intrinsic importance for our lifestyle; the human mind (*Geist*) is culturally constituted³³ – and culture is perpetuated only through an acceptance by those to whom it is addressed and their convictions that it be worthwhile to maintain this tradition.³⁴

A European concept of citizenship which seeks to achieve deeper integration through some form of intentional “identity politics” would then be fundamentally misconceived. European citizens are not expected – by Habermas – to forget their national histories and cultural traditions. They cannot escape from them anyway, they should develop them further – and they should learn to live with this variety. These clarifications need not be interpreted as a deviation from his position. Back in 1991, Habermas opined: “By and large, national public spheres are still culturally isolated from one another....In the future, however, a common *political* culture could distinguish itself from the various *national* cultures.”³⁵

Is this a conceptually all-too-artificial and, sociologically speaking, unrealistic suggestion?³⁶ Answers to these questions have to vary according to the disciplinary background in which they are examined. Amongst the controversies surrounding the existence and functions of a European public opinion, a suggestion has been made to understand mutual observation and critique as specific qualities of that sphere.³⁷ Lawyers can, I submit, resort to the discipline,

³² Jürgen Habermas, „Vorpolitische Grundlagen des demokratischen Rechtsstaates?“, *inid.*, *Zwischen Naturalismus und Religion*, Frankfurt a.M.: Suhrkamp 2005, 106-118, at 111 (italics mine): „Entgegen einem verbreiteten Missverständnis heißt ‚Verfassungspatriotismus‘, dass sich Bürger die Prinzipien ihrer Verfassung nicht allein in ihrem abstrakten Gehalt, sondern konkret aus dem Kontext ihrer jeweils eigenen nationalen Geschichte zu Eigen machen“.

³³ “Kulturelle Gleichbehandlung – und die Grenzen des postmodernen Liberalismus”, *ibid.*, 279-323, at 306.

³⁴ *Ibid.*, at 313.

³⁵ “Citizenship and National Identity“, (note 13), at 507.

³⁶ Cf. Bernhard Peters, “Public discourse, identity, and the problem of democratic legitimacy”, in Erik O. Eriksen (ed.), *Making the European Polity. Reflexive integration in the EU*, London: Routledge 2005, 84-124. See Jürgen Habermas, “Does Democracy Still Enjoy an Epistemic Dimension?”, (2006) 16 *Communication Theory*, 411-426.

³⁷ Cf. Klaus Eder’s intensive work on the Europeanization of public spheres, in particular Klaus Eder, “Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issue-spezifischen Kommunikationsgemeinschaft“, (2000) *Berliner Journal für Soziologie* 167-184; Klaus Eder and Cathleen Kantner, “Transnationale Resonanzstrukturen in Europa. Ein Kritik der Rede vom Öffentlichkeitsdefizit in Europa“, in Maurizio Bach (ed.), *Die Europäisierung nationaler Gesellschaften; Die Europäisierung nationaler Gesellschaften*, Wiesbaden: Westdeutscher Verlag 2000, 306-331 See also Hans-Jörg Trenz, „Einführung: Auf der Suche nach einer europäischen Öffentlichkeit“, in Ansgar Klein *et al.* (eds.) *Bürgerschaft, Öffentlichkeit und Demokratie in Europa*, Opladen: Leske und Budrich 2003, 161-168. – It is hardly necessary to underline that the conflict-of-law methodology does not pretend to offer ready-made recipes. “Diversity” is precious; but so are the

which is dealing with the challenge of bridging different legal systems, namely conflict of laws. To argue that European citizenship creates a bond committing Europeans to respect their various identities and to tolerate differences is to postulate a type of legal supranationalism which does not presuppose the emergence of some European homogeneity but seeks to realize what the Constitutional Treaty had foreseen as the “motto of the Union”: unity in diversity.³⁸ As I have argued elsewhere: this motto can adequately be reconstructed in well-defined, if not so well known legal notions, namely in the language of conflict of laws. A conflict-of-laws approach would allow the differences persist, but subject these national communities to rules and principles which ensure mutual respect and co-existence.³⁹ European citizenship would at the same time serve as a concept mirroring and promoting the transformation of the European “market citizen” (Hans Peter Ipsen) who enjoys private autonomy in the great European economic space into a political citizen who actively participates in the integration process – thereby stepping out of the protective and restraining umbrella of his or her nation state.⁴⁰ It should be added that this type of attitude and readiness could be a way, and maybe the only chance, of coming to terms with Europe’s darker pasts.

Habermas’ own views seem more demanding and optimistic.⁴¹ There is, however, one *problématique*, which requires more caution, namely the survival of Europe’s welfarist traditions under the pressures of globalisation and growing socio-economic disparities within the enlarged European Union.

IV. Social Europe

The discourse theory of law endorses the legitimacy of constitutional democracies. However, Habermas has not severed ties with his origins. The strength of his discourse theory exists in

advantages of communication and living together. Cf. on the particularly sensitive language problem Bruno de Witte, “Language law of the European Union: Protecting or Eroding Linguistic Diversity?”, in Rachel Crawford Smith (ed.), *Culture and European Union Law*, Oxford: Oxford UP 2004, 205-241.

³⁸ See for an elaboration Ch. Joerges, „Working through ‘Bitter Experiences’ towards a Purified European Identity? A Critique of the Disregard for History in European Constitutional Theory and Practice”, in Erik O. Eriksen, Christian Joerges and Florian Rödl (eds.), *Law, Democracy, and Solidarity in Europe’s Post-National*, London-New York: Routledge 2008, 173-193.

³⁹ See the instructive study of Claudia Schmidt, *Das Staatsangehörigkeitsprinzip in Europa. Die Vereinbarkeit der kollisionsrechtlichen Staatsangehörigkeit mit dem gemeinschaftsrechtlichen Diskriminierungsverbot*, Baden-Baden: Nomos 2008

⁴⁰ For an exemplary discussion of this vision see Ch. Joerges, “The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline” (Herbert Bernstein Memorial Lecture 2003), *Duke Journal of Comparative and International Law*, 24 (2005), 149-196; also at <http://www.iue.it/PUB/law04-12.pdf>.

⁴¹ See, e.g., Jürgen Habermas, “Why Europe Needs a Constitution” (note 19 above) at 29-31.

the fact that it remains aware of the fragility of its sociological preconditions. It was the successful balancing of the dynamics of market economies on the one hand and the quests for welfare on the other which constituted the basis of what is in hindsight widely perceived as the “golden age” of the nation states of the OECD world.⁴² The discourse theory takes this basis neither for granted nor does it attribute the success of welfare state to fortunate, albeit contingent, historical circumstances. The welfare states “deserved recognition” because they ensured through the guarantee of political freedoms and democratic procedures, the legitimacy of national compromises over the tensions between economic efficiency and social justice. Habermas of course, does not assume that democratic freedoms and their exercise would carry with them some inherent guarantees like Adam Smith’s invisible hand or the taming of discretionary policy by the imposition of some pre-existing *ordo* via some decision of a strong state. Democratic constitutionalism remains instead linked to, and dependent upon, a political culture which is not only strong enough to defend itself but also inventive in finding appropriate responses to practical exigencies. It is not by chance that Habermas has underlined so often the epistemic dimension of deliberative processes in a constitutional democracy.

The dependence of the *Sozialstaat* on a specific political culture does by no means imply that the political system is powerful enough to cope with the challenges of social and economic change. This threat was a subtext not only of Habermas’ early work, but also of his writing during the “golden age” of the democratic nation state in which he elaborated his legal theory. This subtext had a twofold agenda. One is of course Germany’s historical experience, the downfall of the Weimar Republic, which proved to be unable to defend its democracy against anti-liberal political traditions, demagogic National Socialism, economic and social crises. This latter threat, was not, however, specifically German; in the tradition of the Frankfurt School whose leading exponent Habermas was to become in the 60s, economic and social crises were understood as an inherent “quality” of capitalist societies. Habermas’ sociological analyses led him to distance himself from the type of crisis scenarios Neo-Marxism in the Federal Republic and elsewhere in the West continued to produce and believe in. However, his sensitivity for, and interest in, the non-philosophical preconditions of his social philosophy remained very much alive. Small wonder, hence, that he did not content himself with praising the greatest merit of the European project, namely its contribution to the overcoming of the militancy of the nation states; he also examined the challenges posed by the integration

⁴² See Stephan Leibfried and Michael Zürn (eds.), *Transformation of the State?* Cambridge, Cambridge UP 2005.

process to the functioning of national democracies *and* its impact on the social achievements of European welfare states.

When Habermas introduced into the European arena in 1991, the essay cited above,⁴³ he immediately addressed all of these dimensions – and this quality of his work stands out amongst the literary mountains and molehills that have since then been produced by the students of European integration. This literature responds to the complexity of the European project by disciplinary differentiation – a reaction that is bound to disregard the interdependencies, which Habermas continues to reconstruct.⁴⁴ Historians study either national histories or the history of institutionalized Europe; Political theorists and philosophers enquire into citizenship and discuss the theoretical premises of constitutionalism. Political scientists analyse the techniques of governance etc. All of these disciplines are becoming aware of their “methodological nationalism”, i.e. the difficulty of capturing Europe’s post national constellations with the categories and methodologies they have at their disposal.⁴⁵ Habermas addresses all of these challenges – and an additional one. Like everybody else, he is aware of the tensions between Europe’s commitment to democracy and the functional needs of the integration project. He remains concerned with the survival of the core of his discourse theory of law, the idea of law-mediated legitimacy of political rule (politische Herrschaft). Because of this latter concern, Habermas’ writings on Europe’s “integration through law”, the legalisation tendencies in the international system and the constitutionalisation of international law differ so markedly from mainstream political *and* legal science.

One short and illuminating restatement of his trans-disciplinary approach can be found in an essay of 1994⁴⁶ where Habermas characterises the typical division of labour between legal and political science in the treatment of the rule of law and democracy:

⁴³ Note 12.

⁴⁴ Ever since *Zur Logik der Sozialwissenschaften*, Frankfurt a.M. Suhrkamp 1982.

⁴⁵ See Michael Zürn, „Politik in der postnationalen Konstellation“, in: Christine Landfried, (ed.), *Politik in einer entgrenzten Welt*, Opladen: Westdeutscher Verlag, 2001, 181-204.

⁴⁶ „Über den inneren Zusammenhang von Rechtsstaat und Demokratie“, in Ulrich K. Preuß (ed.), *Zum Begriff der Verfassung*, Frankfurt a.M.: Fischer, 1994, reprinted in Jürgen Habermas, *Die Einbeziehung des anderen*, 1996, 293-305, at 83-94. (‘Social scientists take a distinct view of the legal system. They tend to perceive law from external perspectives. They do not engage in the business of a *lege artis* application of rules, but explore their impact on society, their effectiveness, or analyse processes of implementation. They thus tend to avoid the prescriptive dimension of law in general; normative issues, as dealt with by lawyers, are an aliud to truly scientific operations’. This observation can be well illustrated by the independence which exists between mainstream legal and social science and their international sub-disciplines).

Wir haben uns “daran gewöhnt, das Recht, den Rechtsstaat und die Demokratie als Gegenstände zu betrachten, die verschiedenen Disziplinen zugehören: die Jurisprudenz behandelt das Recht, die Politikwissenschaft die Demokratie, und die eine behandelt den Rechtsstaat unter normativen, die andere unter empirischen Gesichtspunkten”.

In the light of the discourse theory of law, this kind of mutual neglect is bound to what modern law is all about, namely the mutual interdependence of law and democracy, a co-originality which complements and support the interdependence of private and political autonomy. How can this transdisciplinary quality be maintained in the postnational constellation, which Europe has embarked upon?

Habermas’ response lends support to so many proponents of the intensification of European integration, lawyers, political scientists, and political actors. This, however, is a superficial if misleading convergence, because Habermas anchors his plea in a framework that the professional protagonists are rarely aware of. He set out this position back in 1990, defended it, developed it further but never changed the core argument. Having summarized the ambivalences of the nation state foundation of constitutional democracies and their historical failures, which European integration is to overcome, he commented on the new European *problématique*, taking up the dichotomy between systems integration and social integration which he had used in the Theory of Communicative Action.⁴⁷ Integration has moved forward through systems integration while the form of social integration which national democracies have accomplished lag behind.⁴⁸ This is an analysis, which is very close to what political scientists like Fritz W. Scharpf have called the decoupling of economic integration from their social policy complements at national level. Habermas concluded: “For the citizen, this translates into an ever greater gap being passively affected and actively participating. An increasing number of measures decided at a supranational level affect the lives of more and more citizens to an ever greater extent.”⁴⁹ The validity of the diagnosis is unquestionable and the logic of the cure recommended by Habermas seems irresistible: Europe needs a constitution, which is able to rescue the democratic accomplishments of its nation states.

The ensuing debate with Dieter Grimm^{50/51} has become famous and deserves attention: Even if we establish at European level the type of institutions which we have at national level, a

⁴⁷ *The Theory of Communicative Action. Vol. 2: Lifeworld and System. A Critique of Functionalist Reason*, Boston: Beacon Press 1987.

⁴⁸ *Between Facts and Norms* (note 12), at 501.

⁴⁹ *Between Facts and Norms*, at 503.

⁵⁰ Grimm, „Does Europe need a Constitution?“, 3 (1995) *European Law Journal*, 282-302.

⁵¹ “Comment on the Paper by Dieter Grimm „Does Europe need a Constitution?“, 3 (1995) *European Law Journal*, 303-307.

European democracy cannot come into existence and it is therefore better to protect national democracies against further erosion through European governance – this is the sceptics’ *monitum*.⁵² Such a strategy does not accord with Europe’s postnational constellation. Democracy can no longer be institutionalised at national level; it needs to be rescued by a European federation, which aims at nothing more and nothing less than “unity in national diversity”.⁵³ The debate between Grimm and Habermas is less about normative issues than about the likelihood of factual developments. Both protagonists can readily admit that they operate under uncertainty – and their later interventions document their awareness of this contingency.⁵⁴ It seems striking, however, that both protagonist do not try to overcome the “methodological nationalism” that is mirrored in the categories they employ. Europe as a federation, as a state, as some *ensemble* of states on the one hand, and its counterpart, the nation state, remains the implicit reference point of this debate, its frame and contents.

The need to progress beyond that framework seems most obvious in the problematic of Social Europe. Even in his latest interventions which mirror his disappointment with the state of the European Union after the failure of the Constitutional Treaty, Habermas again restated, albeit somewhat cautiously, that the defence of Europe’s “social model” would have to be organised at the supranational level. Wouldn’t it be preferable, he asked his social democratic audience, to respond to the risks of economic globalisation by searching for co-ordinated responses within the whole European economic space rather than through the means of the national welfare state?⁵⁵ Two observations seem to conflict with this suggestion. One is the finding that the diversity of welfare system in Europe is such that the institutionalisation of one particular social model at European level is simply inconceivable.⁵⁶ The second concerns the type of co-ordination, which Europe practices increasingly. This co-operation is characterised by “soft” new modes of governance, which are no longer subject to the discipline of the rule of law. This is particularly obvious in the field of social policy. Here the 2000 Lisbon European Council has opted for an “Open Method of Co-ordination” as an alternative to the traditional Community Method.⁵⁷ Executive governance and the replacement of parliaments

⁵² See Dieter Grimm’s restatement: „Can the 'Post-national Constellation' be Re-constitutionalized?”, TranState Working paper 2/2004, Bremen, available at <http://www.sfb597.uni-bremen.de/>.

⁵³ See Jürgen Habermas’ response to Grimm (note 51 above).

⁵⁴ See Dieter Grimm (note 52) and Jürgen Habermas (note 19 above).

⁵⁵ *Ibid.* and “Erste Hilfe für Europa“, DIE ZEIT no.49/2007.

⁵⁶ Fritz W. Scharpf, “The European Social Model: Coping with the Challenges of Diversity”, (2002) 40 *Journal of Common Market Studies*, 645 et seq.

⁵⁷ See the Conclusions of the Presidency, available at http://www.europarl.europa.eu/summits/lis1_en.htm#c, in particular para. 37; for a critical examination cf., Armin Schäfer, “A New Form of Governance? Comparing the

and administrations by governmental political rule are well known in national political systems.⁵⁸ It is of more dramatic importance at transnational level because it “outlaws” constitutional democracies irrevocably. The debate on the soft modes of governance focuses mainly on empirical issues, namely the effectiveness of the new techniques. The prospects are good, argue many; the new method will be effective – not in the rescue of European *Sozialstaatlichkeit*, but in the destruction of the non Anglo-Saxon models, argue others. The issue presents a challenge for Habermas’ constitutionalism, in particular where these efforts are undertaken outside a rule of law framework. The tensions between “the social” and the rule of law are not new in principle. They have been the object of heated debates ever since Max Weber’s warning that the intrusion of values of social justice into the legal system (the turn to substantive rationality) will threaten the law’s formal rationality and the rule of law as such.⁵⁹ Habermas has been an extremely important contributor to the pertinent constitutional debates in post-war Germany. What is new, however, is that in the postnational constellation the means that the nation state had at its disposal to manage those tensions are no longer available.

V. A Brief Epilogue: Europeanization in the Shadow of Globalisation

The challenges of Europeanisation had been addressed by Habermas prior to the publication of *Between Facts and Norms*; the challenges of globalisation “only” in 1998 in the seminal essay on “The Postnational Constellation and the Future of Democracy”,⁶⁰ which Habermas had written in preparation of an encounter with Gerhard Schröder, then Chancellor of the Federal Republic, on 5 June 1998.⁶¹ There he deals with both issues. He examines the eroding potential of the nation state in its “golden age” to establish a well-ordered society (“wohlgeordnete Gesellschaft”) discussing first the globalisation process and the project of European integration only thereafter. The “postnational constellation” is hence to be

Open Method of Co-ordination to Multilateral Surveillance by the IMF and the OECD”, (2006) 12 *Journal of European Public Policy*, 70-88.

⁵⁸ Armin von Bogdandy, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik*, Tübingen: Mohr Siebeck 2000.

⁵⁹ Max Weber, *Economy and Society*; Berkeley: University of California Press, 1978, 873-874; on socialism see his „Socialism“, in Max Weber, *Political Writings*, Cambridge: Cambridge UP, 1994, 272-303.

⁶⁰ In his *The Postnational Constellation. Political Essays*, Cambridge: Polity Press 2001, 58-112.

⁶¹ “Die postnationale Konstellation und die Zukunft der Demokratie”, in Jürgen Habermas, *Die postnationale Konstellation. Politische Essays*, Frankfurt a.M.: Suhrkamp 1998, 91-169. (Cambridge, MA: MIT Press 2001).

understood as a concept, which comprises both dimensions. In Habermas' account, globalisation is the much more problematic one. In his most recent work, he addressed its challenges and the prospects for rule bound governance and law-mediated legitimacy ever more intensively.⁶² The framework which Habermas develops is again comprehensive and multifaceted: it is multidisciplinary, historically informed, descriptive and prescriptive, reflecting the present state of the international system, contrasting his theoretical considerations with ongoing developments and avoiding conjectures about admittedly contingent developments and political uncertainties. When contrasted with the challenges he identifies at international level, Europe presents the much easier case. Its deepened legalisation seems easier and more comprehensively accessible to an analysis in terms of the discourse theory of law. Europe is a hope and has a vocation: Its further integration may be an indispensable prerequisite for the taming of globalisation.⁶³ It would be futile to try to discuss all this *en passant*. I restrict myself to one suggestion: The discourse theory of law needs to defend the constitutional democracy as institutionalised in nation states as a site of legitimate governance. It cannot envisage a reconstitution of European democracy in terms of the national constellation. It will have to live with non-juridified spheres of transnational governance. I respectfully submit that the conflict of laws approach mentioned above⁶⁴ has the potential to respond to these queries.⁶⁵

⁶² See already his „Kants Idee des Ewigen Friedens: aus dem historischen Abstand von 200 Jahren“, in Jürgen Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt a.M.: Suhrkamp, 192-236 and thereafter in particular: „Das Völkerrecht im Übergang zur postnationalen Konstellation“, in Angelika Pfoerl and Natan Sznaider, (eds.), *Ulrich Becks kosmopolitisches Projekt. Auf dem Weg in eine andere Soziologie*, Baden-Baden: Nomos, 159-168; „Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?“, in Jürgen Habermas, *Der gesplittene Westen*, Frankfurt a.M.: Suhrkamp, 113-193. „Eine politische Verfassung für die pluralistische Weltgesellschaft?“, in Jürgen Habermas (ed.): *Zwischen Naturalismus und Religion*, Frankfurt a.M.: Suhrkamp, 324-365. On all this see the analyses in Peter Niesen and Benjamin Herborn (eds.), *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, Frankfurt a.M.: Suhrkamp 2007 and the reply of Habermas therein („Kommunikative Rationalität und grenzüberschreitende Politik: Eine Replik“, at 406-459).

⁶³ See „Europapolitik in der Sackgasse. Plädoyer für einen Politik der abgestuften Integration“, in Jürgen Habermas, *Ach, Europa*, Frankfurt a.M.: Suhrkamp 2008, 96-130.

⁶⁴ Text following note 36.

⁶⁵ For an outline see Ch. Joerges, „Conflict of Laws as Constitutional Form“, contribution to Workshop: RECON models applied, Oslo, 25 April 2008.