

# European Constitutionalism and ‘Retrospective’ Legitimacy

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*Abstract:* Habermas defends European federalism and the introduction of a European constitution whether there is a directly democratic mandate for it or not. In this paper I consider his theory of ‘retrospective’ legitimation with respect to the constitution that was rejected in 2005 by France and Holland, and the following reform treaty in 2007. I suggest that, in the case of the reform treaty, democratic credentials are undermined by such claims to legitimacy.

As one of the principle contemporary philosophical theorists of deliberative democracy, Habermas defends a political model where public discourse has the potential to arrive at rational agreement and hence transformatory and reconstructive strategies that are normatively valid responses to European modernity.<sup>1</sup> Habermas has supported European federalism on the grounds that the introduction of certain constitutional rights can both a.) secure the European heritage of human rights, cosmopolitanism and democracy and through doing so b.) initiate the processes through which the constitution can acquire legitimacy *retrospectively*. For him, “constitution expresses the idea of self-legitimizing democratic community”.<sup>2</sup> If they did not believe this to be the case, he argues, citizens would not take their opportunities to vote. However, the fact remains that many people do not exercise such rights, and when they do, as in the rejection of the proposed European constitution by Holland and France, they don’t necessarily vote for a particular kind of constitutional democracy. Where does this leave such a concept of collective self-legislation?

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<sup>1</sup> Prior to national referenda in 2005 he published a number of articles urging voters to embrace it. By way of example, see Jürgen Habermas, “Toward a Cosmopolitan Europe,” *Journal of Democracy* 14, no. 4 (2003) and “Le Non Illusoire De La Gauche,” *Nouvel Observateur*, 7th May 2005, where Habermas directly petitioned French voters to opt for the proposed constitution.

<sup>2</sup> Jürgen Habermas, *Time of Transitions*. p. 8

The principal historical aims of European union were the promotion of peaceful democracy, economic modernization and the rationalization of production. In the aftermath of World War II the determination to avoid further conflict in Europe led to the formation of the Council of Europe, the oldest institution working for European integration which took the defence of democratic practices as a central part of its institutionalist mandate.<sup>3</sup> From as early as 1950 (and the Schuman declaration) Europe has collectively managed its heavy industry (and therefore the ability to make war). From the very instigation of its being, the EU has conceived of itself as a response to globalization in politics and economics with a normative democratic component. The instinct of the union to democratize is perhaps most apparent in the removal of barriers to freedom of trade and movement in the 1993 'Treaty Establishing the European Community'.<sup>4</sup> Policies like these clearly attempt to reify the democratic impulse as a levelling, equalizing force that removes differences between citizens of different European nations and effectively treats them all as part of the same polity. Considering that the individual's relationship to the polis is the necessary starting point for any organised form of democracy, it is easy to see that this can be understood strategically as digging the preparatory foundations for European cosmopolitanism.

Standing in the way of a linear progress towards the European polity is the question of how such a change is to be mandated democratically. On the one hand, it is clear that EU legislation has been ratified in the parliamentary tradition, and so can claim a democratic sanction. This is at odds, however, with the widespread acknowledgement of a 'democratic deficit' in the union, which compromises the relationship between individual and state familiar from classical democracy. Simply stated, the European government does not have a polity in any straightforward sense. As Habermas puts it:

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<sup>3</sup> Article 1(a) of the Statute states: "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their *common* heritage and facilitating their economic and social progress." [RF's italics]

“In the European Union, the largely bureaucratic decision-making process of the experts in Brussels represents an example of the kind of democratic deficit that results from a shift away from national decision-making bodies to interstate committees comprised of government representatives.”<sup>5</sup>

One strategy for ratifying this democratic shortfall would be to extend greater executive authority to the EU legislative, something which member governments have been quick to obstruct while arguing that “the democratic deficit could only be remedied if the allegedly closed and secretive nature of Commission deliberations were made more open and ‘transparent’”.<sup>6</sup> Although the extent to which transparency of this sort would rectify the deficit remains contestable, the EC has responded affirmatively to these requests. The Laeken declaration of December 2001 committed the EU to improving democracy, transparency and efficiency, and set out the process by which a constitution could be arrived at. In a recent white paper, the EC set out the principles of ‘good governance’ which “underpin democracy and the rule of law in the Member states” and “apply to all levels of government – global, European, national, regional and local”.<sup>7</sup> These principles – which form a systematic, integrated strategy – are openness (publicly accessible language), participation (consultation from conception to implementation), accountability, effectiveness and coherence (policies must be easily understood). In addition to a general commitment to democracy, these principles emphasise both free access to information and inclusive deliberation with the intention that the continuing legitimacy of the Union is dependent on the active “involvement and participation”<sup>8</sup> of all affected/interested parties in developing “more effective and transparent consultation at the heart of EU policy shaping”.<sup>9</sup> The recent Constitution attempted to address the deficit by unifying the legal basis for the protection of human rights and rendering the operations of EU institutions more transparent.

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<sup>4</sup> See Sections 3c, 14, 18, 23 and 24. [http://europa.eu/pol/singl/index\\_en.htm](http://europa.eu/pol/singl/index_en.htm)

<sup>5</sup> Jürgen Habermas, *Time of Transitions*. p. 8

<sup>6</sup> Svein S. Andersen and Kjell A. Eliassen, eds., *The European Union: How Democratic Is It?* p.195

<sup>7</sup> “European Governance: A White Paper,” (Brussels: Commission of the European Communities, 2001). p.10

<sup>8</sup> *Ibid.* p.11

Articles I-47.1-3 of the proposed Constitution specifically reiterate the principle of deliberative democracy as a principle of good governance, and are directed towards providing the conditions under which citizens of the EU take the initiative in establishing an institutionally-mediated relationship with their policy-makers.<sup>10</sup>

For Habermas, the democratic deficit is a feature of European modernity. Habermas says that the existing social order perpetuates itself both through ‘communicative action’, which is oriented toward achieving mutual understanding about practical matters, and through bureaucratic, economic and other complex organizational systems that, under his analysis, have taken on an uncontrollable or repressive character under modernity.<sup>11</sup> In order to protect the communicative lifeworld (*Lebenswelt*) from the encroachment of instrumental rationality in the form of ‘systems’, Habermas contends, we must develop a sphere of public political discourse that transcends traditional national boundaries. Europeans, Habermas has argued, “must abandon the mind-sets on which nationalistic and exclusionary mechanisms feed” by embracing “the communicative network of a European-wide political public sphere embedded in a shared political culture”.<sup>12</sup> To this effect, Habermas has directly emphasised the “urgent need”<sup>13</sup> for a trans-national constitution that will form the basis of a ‘post-national constellation’ common to all Europeans. Habermas takes this to be an essential prerequisite for creating the kind of political climate that can eventually redress the ‘democratic deficit’ through an appropriately discursive public sphere.

“[F]rom a normative perspective, there can be no European federal state worthy of the title of a European democracy unless a European-wide, integrated public sphere develops in the ambit of a common political culture... in short, this entails

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<sup>9</sup> *Ibid.* p.15

<sup>10</sup> D. Wallis and S. Picard, *The Citizen's Right of Initiative in the European Constitution: A Second Chance for Democracy?* (EU Monitoring and Advocacy Program (EUMAP), 2005.

<sup>11</sup> For a detailed account of the relationship between European modernity and the democratic deficit, see Jürgen Habermas, *Time of Transitions*. pp. 75, 80, 93, 84, 95 & 105.

<sup>12</sup> Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*. pp.152-3

<sup>13</sup> *Ibid.* p.177

public communication that transcends the boundaries of the thus far limited national public spheres.”<sup>14</sup>

Habermas places a premium on the political importance of a free and openly accessible public sphere that will transcend national boundaries.<sup>15</sup> Like John Rawls, Habermas works from the assumption that in modern societies norms can only derive their validity from the collective consent of those people to whom they pertain. Unlike Rawls, who argues that even citizens with radically different moral and political worldviews can reach consensus when starting from egalitarian ideals derived from the tradition of liberal democracy, Habermas maintains that an even more universal basis for agreement is provided by the forms of communicative interaction that are used to arrive at agreement about the regulation and propagation of social life. He understands this as a form of collective self-legitimation.

“Rather than displaying the facticity of an arbitrary, absolutely contingent choice, the positivity of law expresses the legitimate will that stems a presumptively rational self-legislation of politically autonomous citizens.”<sup>16</sup>

For Habermas, citizens obey the law not just because of fear of repercussion, but because they believe it expresses moral legitimacy. In his earlier works (notably in *Legitimation Crisis*, but also in the *Theory of Communicative Action*) legality was understood as in some way dependent on, or secondary to, moral authority, but in his major writings on political theory Habermas revises this view, arguing that it results from taking law (as Kant does) as the purely formal legitimation of universalisable moral norms. This, in turn, necessitates evaluating standards of legal validity with reference to something ‘outside’ of law, which for Habermas conveys unwelcome metaphysical and Platonic undertones. Thus, according to Habermas, morality and law cannot be separated from each other, and the structure of ‘communicative action’ ensures their mutual legitimacy. Deliberation improves the quality of political decision making and of political justification, and

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<sup>14</sup> *Ibid.* p.160

<sup>15</sup> Jürgen Habermas, *Time of Transitions*. pp. 102-3

public reasons “will be more public in the sense that they reflect the broader interests of all the deliberators who are affected”.<sup>17</sup> Rather than reducing legal norms to moral norms, Habermas argues that legitimate laws reflect norms that have been arrived at through ‘valid’ reasoning; meaning through uncoerced, rational public debate.

In order to reach this kind of agreement about the validity of a particular moral or legal claim, Habermas contends, participants must be committed to achieving a shared understanding of the normative assumptions which inform their respective viewpoints. As such, they are therefore also committed to a wider (practical) debate about the validity of norms in general. Contemporary forms of life open up new possibilities for public and private debate, and so for reaching agreement and restructuring social life along communicative, rather than instrumental, lines. The discursive interconnection of morality and law finds its expression in the reassessment of the discourse principle (D). In the *Theory of Communicative Action* Habermas presented this as the foremost principle of intersubjective morality: it has subsequently been reconceived in such a way as to unite law and morality impartially so that they can develop into a system of institutional rights.<sup>18</sup> The principle of discourse (D) suggests that moral/legal axioms must be validated in actual discourse and that those affected by a particular norm must be able to participate in the discussion through which its validity is generated. In traditional societies, established institutions could represent a fusion of ‘facticity’ and normative ‘validity’, a link sustained and reinforced by legitimated forms of authority. In secular modernity, however, as social differentiation leads people to distinguish between forms of social interaction law emerges as a mode of integration stabilising the separation between ‘facticity’ and normative ‘validity’. Whereas traditional institutions represented a fusion of ‘facticity’ and ‘validity’, in modernity relations of mutual

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<sup>16</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. p.33

<sup>17</sup> James Bohman, *Public Deliberation - Pluralism, Complexity and Democracy*. p.27

<sup>18</sup> William Rehg, “Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas”. p.260

understanding function as the mechanism for mediating the spheres formerly regulated by monarchical power and religious custom.

Although Habermas has admitted that many of the conclusions he drew about the sphere of public discourse in his early work were incorrect,<sup>19</sup> the model of ‘uncoerced’ agreement about pragmatic considerations based in free and rational debate has remained paradigmatic in his work. He maintains that only through adherence to ‘enlightened’ political discussion can social progress be made:

“I was always convinced that if things are to ‘move forward’ at all, they have to go forward where productive forces and legal democracy are the furthest developed, and that’s in the West... a Europe that has learned from its own history can help other countries emerge from *their* nineteenth centuries.”<sup>20</sup>

There is an unusual element of historical teleology in Habermas’s reasoning here, with the latent assumption that Western Europe has made a relatively high degree of ‘progress’. This is of particular importance with respect to the so-called accession states and those who have yet to join the EU, since the suggestion is that only the currently existing understanding of what is politically acceptable carry gravitas. Arguments about whether Turkey should join the union, for example, often center on the issue of whether Turkey’s (secular) Islamic society could possibly accept the ‘European’ tenets of democracy, sexual tolerance, free speech and human rights. Poland’s revived Catholicism and resistance to Western economic systems among former Communist nations pose similar conundrums. Habermas argues that “the enlargement of the EU will increase the complexity of interests in need of coordination, which cannot be achieved without further integration or ‘deepening’ of the Union,”<sup>21</sup> yet seems to presuppose the constitutional form that this integration should take. Habermas seems to suggest that a common

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<sup>19</sup> See Jürgen Habermas, “Further Reflections on the Public Sphere,” in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge: MIT Press, 1992).

<sup>20</sup> Jürgen Habermas. *The Past as Future*. p.75



political culture must be brought about before national cultures can converge in cosmopolitanism.

“To date, in the member states the policy of the European Community is not yet an object of a legitimating public debate. By and large, national public spheres are still culturally isolated from one another. That is, they are rooted in contexts in which political questions become significant only against the background of each nation’s own history. In the future, however, a common *political* culture could differentiate itself from the various *national* cultures.”<sup>22</sup>

In Habermas’s theory of ‘post-national constellation’, the traditional unity of the nation and the polis in the state is transcended. However, this is not an unproblematic move, for disagreement between nations is not equivalent to disagreement among members of a polity, and it equally artificial to treat national (or international) states as unified, autonomous, self-legislating entities. Given that both countries were taken to be committed members of the Union, the popular rejection of the European Constitution by the people of Holland and France in May 2005 provoked something of a crisis for policymakers at the European Commission. The referenda results have caused a visible crisis in the European institutions, yet the rejection of the constitution in 2005 cannot be seen as anything other than a truly democratic outcome. It is tempting to explain the rejection of the proposed constitution was politicised, a protest vote against European integration in principle rather than the fine grain of what the constitution would enshrine in terms of democracy and human rights. This seems to be a somewhat reactionary view. In fact, there are substantial reasons to believe, conversely, that the accusation of partisanship runs in the other direction: the constitution was composed by a political elite on the basis of political and economic expert knowledge, but Brussels is heavily influenced by powerful lobbies from partisan political parties and international business. The most recent development – to bypass public referenda by including the substance of the proposed

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<sup>21</sup> Jürgen Habermas, “Why Europe Needs a Constitution,” *New Left Review* 11, September-October (2001). [webpage] <http://www.newleftreview.net/NLR24501.shtml>

<sup>22</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. p.507

constitution in a reform treaty that does not require ratification by public vote – clearly puts the onus for justification on expert knowledge rather than direct democracy. At the time of writing, for example, the Dutch parliament is considering adopting the reform treaty without the promised referendum since polls indicate that there is a good chance that it will be rejected if put to a popular vote. This is a pattern which has been seen in other countries that were previously committed to a referendum on the adoption of the Constitution, including the United Kingdom.

This is not to say that the constitution cannot claim some democratic foundation. Under conditions of representative democracy, the politicians who composed and agreed upon the constitution were themselves voted for. However, if politicians enact policies unpopular with their electorate, they can only do so on the basis that they have some greater insight into political matters than the electorate. They may have good reasons to think this, but there is a clear tension between legitimating sources of political authority here. Habermas, by contrast, does not think that this kind of specialist knowledge should pose a problem for democracy:

“There are no questions so specialized they cannot be translated when it is politically relevant to do so, and even adapted in such a way as to make it possible for the alternatives experts discuss to be rationally debated in a broader public forum as well. In a democracy, experts have no particular privilege.”<sup>23</sup>

Drawing on the Kantian notion that publicity acts as a test for the use of practical reason and imparts the unity of moral and political activity, Habermas argues that the simple fact of communicative activity indicates the potential of universally acceptable conclusions.

“Communicatively acting subjects commit themselves to co-ordinating their action plans on the basis of a consensus that depends in turn on their reciprocally taking positions on, and intersubjectively recognizing, validity claims. From this it follows that only those reasons count that all the participating parties *together* find acceptable.”<sup>24</sup>

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<sup>23</sup> Jürgen Habermas, “A Conversation about Questions of Political Theory” in René von Schomberg and Kenneth Baynes, eds., *Discourse and Democracy. Essays on Habermas’s Between Facts and Norms* p.246

<sup>24</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. p.119

The appeal to both deliberative democracy and transparency – with policy tempered by public debate and consultation – clearly indicates the strategic orientation of these attempts to address the democratic shortfall in parliamentarism through an inclusive public sphere. However, for a deliberative democracy to work, it must consist of effective deliberators. One common objection to the proposed EU Constitution was the highly technical and legalistic nature of the text which was largely incomprehensible to those it was directed at. It should not be surprising that meaningful debate about the future of Europe is usurped by those with other agendas given the baffling complexity of the structure of the EU and the documents it produces. Despite the best efforts of the EU, more than half the people of Europe have never even heard of the convention on the European Constitution.<sup>25</sup> If EU politics can only be conducted by professional politicians, its democratic credentials are clearly undermined.

The European Union is, historically speaking, a governmental structure that is based on voluntary co-operation between nation states which coinciding interests. These forms of co-operation originally found their orientation pragmatically as attempts to find solutions to commonly-shared problems. However, through these attempts to resolve issues through collective effort, a number of established programs and rules have developed, providing a legal structure for the exercise of executive, legislative and judicial powers.<sup>26</sup> These norms can be seen as operating in lieu of a formal constitution as they provide a common arena within which agents can strive to reach agreement. The French and Dutch referenda have clearly demonstrated the lack of authorisation for any attempt to legislate before there is a reasonable democratic mandate to so do.

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<sup>25</sup> Ulrike Guérot, “A Continent Reinvents Itself” *Deutschland Magazine* November (2003). [webpage]

<sup>26</sup> See J. Weiler, “Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision,” *European Law Journal* 1, no. 3 (1995). Trans-national institutions like the European Court of Justice are not undermined by the co-existence of national institutions.

From comments made by Habermas about the future of Europe, it seems that he does not agree. Habermas considers civic solidarity to be the *sine qua non* for any European polity, and argues that this can essentially be brought into being in the same way that national consciousness was brought about in the 19<sup>th</sup> century by the development of mass communication. “Peoples first come into being with their state constitutions”, he argues, though a constitution alone is not enough to create solidarity since “it can only initiate the democratic processes in which it must take root”.<sup>27</sup> Habermas concludes that democracy and the nation state develop by tandem, in a circular relationship where each comes to justify the other; national consciousness and democratic citizenship stabilise each other.<sup>28</sup> Habermas therefore considers the introduction of a constitution acceptable as long as it contains the kind of universalistic guarantee of democratic freedom and solidarity that surpasses the traditional boundaries of the civic state. Thus, he thinks that by establishing the conditions conducive to public discourse a constitution can acquire its legitimacy through this discourse retrospectively.

I argue that Habermas’s theory is informed by an overly juridical understanding of democracy. If the framework is imposed, so to speak, from above, it undermines the claim that it is founded on a truly democratic principle. Until something like a trans-European political public sphere emerges, then any attempt to hasten the progress of this vision of deliberative democracy through the introduction of unpopular constitutional law seems bound to be self-defeating. This provokes a further question, since if what I have said is true then what means *should* be taken to bring such a state about? In fact, it seems to me that if Habermas’s thesis about what is inherently political desirable is correct then any constitution, regardless of the extent to which it fosters democratic impulses, must be allowed to develop organically from within a polity and not imposed upon it by a transnational government. While legitimacy for a particular policy may be

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<sup>27</sup> Jürgen Habermas, *Time of Transitions*. p. 87.

<sup>28</sup> *Ibid.* p. 100.

acquired retrospectively – as Hegel said, the owl of Minerva “spreads its wings only with the falling of dusk”<sup>29</sup> – it is clearly undemocratic to impose a treaty that is unpopular with its demos on the basis that they will come to see its legitimacy after the fact. For what Habermas seems to forego is that it would not be in principle undemocratic for a nation to democratically endorse a different political system, such as a theocracy. As political ‘experts’, parliamentarians derive their authority only from their representation of people in general, irrespective of their knowledge or good judgement. According to the most fundamental principles of democracy, their judgement should not over-ride popular sentiment. This may well lead to poorer collective decision-making; but so much the worse for the decisions made under democracy. I think Habermas is right to align himself with the deliberative tradition, but underplays the fact that countries like France and the Netherlands already have sophisticated public spheres, the deliberative outcomes of which cannot be ridden over roughshod without compromising the democratic principles the reform treaty is intended to defend. If Europe has a democratic heritage worth preserving it can neither be neatly controlled nor its outcomes assumed. The national debate must come first, and *when* there is a democratic mandate this can be made into law.

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<sup>29</sup> Preface to *Philosophie der Rechts* (1820)

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