The Inclusion of the Other

Studies in Political Theory

Jürgen Habermas

edited by Ciaran Cronin
and Pablo De Greiff

The Inclusion of the Other

The Inclusion of the Other

Studies in Political Theory

Jürgen Habermas

edited by Ciaran Cronin and Pablo De Greiff

Polity Press

First published in Germany as *Die Einbeziehung des anderen. Studien zur politischen Theorie,* © 1996 by Suhrkamp Verlag, Frankfurt am Main, Germany.

First published in Great Britain in 1999 by Polity Press in association with Blackwell Publishers Ltd.

Reprinted 2005

Polity Press
65 Bridge Street
Cambridge CB2 1UR, UK

Polity Press
350 Main Street
Maldon, MA 02148, USA

ISBN 0-7456-3046-4

A catalogue record for this book is available from the British Library.

The book was set in New Baskerville by Wellington Graphics
Printed and bound in Great Britain by Marston Book Services Limited, Oxford

Printed on acid-free paper.

For further information on Polity, visit our website: www.polity.co.uk

Contents

Editors' Introduction

The wide-ranging essays collected in this volume provide an overview of Jürgen Habermas's work in political philosophy over the past decade together with a number of important elaborations of its basic themes in connection with current political debates. One of the distinctive features of this work has been its approach to the problem of political legitimacy through a sustained reflection on the dual legitimating and regulating function of modern legal systems. Eschewing the revolutionary utopianism of traditional socialism while remaining true to its emancipatory aspirations, Habermas has focused on the claim to legitimacy implicitly raised by the legal and political institutions of the modern constitutional state and has asked how this claim can be grounded in an appropriate theory of democracy. Extending his discourse theory of normative validity to the legal-political domain, he defends a proceduralist conception of deliberative democracy in which the burden of legitimating state power is borne by informal and legally institutionalized processes of political deliberation. Its guiding intuition is the radical democratic idea that the legitimacy of political authority can only be secured through broad popular participation in political deliberation and decision-making or, more succinctly, that there is an internal relation between the rule of law and popular sovereignty.[1] In the present volume Habermas brings this discursive and proceduralist analysis of political legitimacy to bear on such urgent contemporary issues as the enduring legacy of the welfare state, the future of the nation state, and the prospects for a global politics of human rights.

Habermas's political philosophy is marked by a dual focus that mirrors a duality inherent in modern law itself. Modern legal orders are distinguished, on the one hand, by the "facticity" of their enactment and their enforcement by the state (i.e., by their positive and coercive character) and, on the other, by their claim to "validity."[2] Thus a political philosophy that attaches central importance to the legal system must approach the legal and political institutions of the constitutional state simultaneously from two distinct though interrelated perspectives. In the first place, it must address the question of legitimacy: What is the ground of the validity of the principles of justice that form the core of modern democratic constitutions?[3] This is, of course, the central question of modern political philosophy in both the liberal and civic republican traditions. Habermas's theory of political legitimation is deeply indebted to both, but he takes his immediate orientation from a discursive analysis of questions of normative validity. He first developed this approach in his discourse theory of morality and now extends it to the legal domain in a way that is sensitive to the formal features of legality that set it apart from morality. This general approach to normative questions is based on the cognitivist premise that certain kinds of action norms admit of reasoned justification in practical discourse and that their validity can as a consequence be elucidated by an analysis of the forms of argumentation through which they are justified.

However, this normative approach to law and politics is in need of supplementation by an analysis of the functional contribution that positive legal orders make to the stabilization and reproduction of modern societies. Modern legal systems developed in response to the problems of social order created by accelerating processes of modernization; the formal features of legality are dictated by this regulative function of modern law. Moreover, Habermas claims that these two approaches to law, the normative and the functional, are inseparable. The problem of the basic principles of a constitutional democracy cannot be addressed in abstraction from the positive and coercive character of the legal medium in which they are to be realized; and these formal features of modern law are conditioned by the problems of social integration and reproduction to which modern legal orders respond. It is crucial for the analyses of human

rights and popular sovereignty that form the core of Habermas's theory of democracy that the parameters of the problem they are intended to solve are laid down by history. If, following Habermas, we approach the problem of legitimacy by asking what rights free and equal citizens have to confer on one another when they deliberate on how they can legitimately regulate their common life by means of law, then the medium or language in which they must answer this question is not something they are free to choose but is imposed by the constraints of the task they are trying to solve. There are no functional alternatives to positive law as a basis for integrating societies of the modern type.

It is not our aim to offer an exhaustive analysis of this wide-ranging theoretical project here. Instead, by way of introduction we will outline the relevant features of Habermas's discourse theory of normative legitimacy as they bear on his theory of legal rights (section 1), before turning to his proceduralist conception of deliberative democracy (section 2). We will then consider the implications of this project for the problems of the future of the nation state, of a global politics of human rights, and of corresponding supranational political institutions (section 3). This will provide the background for some concluding remarks on Habermas's contributions to the debates currently raging on multiculturalism and the rights of cultural minorities (section 4).

1 The Discourse Theory of Morality and Law

Habermas starts from the assumption that in modern, pluralistic societies, social norms can derive their validity only from the reason and will of those whose decisions and interactions are supposed to be bound by them. He shares this starting point with John Rawls, who has emphasized that disagreement over conceptions of the good and questions of ultimate value is likely to be an enduring feature of pluralistic societies and could only be overcome through the repressive imposition of one belief system. Yet their responses to the challenge posed by pluralism differ in important ways. Rawls argues that citizens committed to different and incompatible "comprehensive doctrines" can nevertheless reach an "overlapping

consensus" on basic principles of justice which they justify separately within their own evaluative worldviews, assuming that they can draw on certain shared ideals of the person, of society, and of public reason rooted in the tradition of Western liberal democracy.[4] Habermas, by contrast, thinks that there exists a more universal basis for agreement on general normative principles even among members of pluralistic societies who differ on questions of value and the good life. This confidence is grounded in the central role his social theory accords communicative action—that is, that form of social interaction in which the participants act on, or try to reach, a shared understanding of the situation—in regulating and reproducing forms of social life and the identities of social actors.[5] Among the things on which communicative actors are committed to reaching a shared understanding according to this theory are the normative assumptions that inform their actions; hence they are implicitly oriented to practical argumentation concerning the validity of norms as a means of resolving practical disagreements. This leads Habermas to suggest that the grounds of the validity of norms can be elucidated through an analysis of the presuppositions that speakers unavoidably make when they engage in good faith in practical argumentation. Indeed he argues that these unavoidable pragmatic presuppositions of argumentation entail a general principle of discourse, (D), which specifies the conditions that any valid social norm must satisfy: "Just those norms are valid to which all possibly affected persons could agree as participants in rational discourses."[6]

The discourse principle forms the cornerstone of a theory of both moral and legal validity which is intended to rebut noncognitivist skepticism concerning the rational basis of moral and legal norms.[7] The discourse theory holds that at least a certain range of normative questions have genuine cognitive content. In particular, it claims that participants in an ideally inclusive practical discourse could in principle reach an uncoerced agreement on the validity of these kinds of norms on the basis of reasons that are acceptable to all. The idealizations to which this discursive approach appeals lend Habermas's theory a demanding, counterfactual character: the principle of discourse points to an ideal procedure of discursive validation which functions as a normative standard against which existing con-

ditions of discourse can be criticized. Although these idealizations are undoubtedly controversial, the suspicion that they are simply arbitrary, or reflect an idealistic conception of reason that has little practical relevance, can be allayed by noting that they are internally related to the conditions under which actors form and maintain their identities and regulate their interactions.[8]

This discursive analysis of normative questions allows for a sharp differentiation between moral and legal validity. The principle of discourse expresses a general idea of impartiality that finds different, though complementary, expressions in moral and legal norms. Habermas's differentiation between law and morality challenges the traditional assumption that morality represents a higher domain of value in which basic legal and political principles must be grounded. With the emergence of modern societies organized around a state and a positive legal order, the understanding of the basis of political legitimacy underwent a profound transformation: modern natural law or social contract theory broke with traditional natural law in arguing that political authority flows from the will of those who are subject to it rather than from a divinely ordained moral order. Nevertheless, the assumed priority of morality over law continued to play a central, if not always critically examined, role in both the liberal and communitarian traditions of modern political thought. Whereas classical liberalism in the Lockean tradition accords primary importance to prepolitically grounded rights of individual liberty, communitarian thinkers appeal to values rooted in inherited national, religious, or ethnic identities as the inescapable background against which all questions of political justice must be answered. Against both traditions, Habermas argues that law and morality stand in a complementary relation. The basic human rights enshrined in modern legal orders are essentially *legal* rights, not moral rights that are imposed as an external constraint on the constitution-founding practice of the citizens, though moral considerations enter into the justification of basic rights.

Habermas construes morality in broadly Kantian terms as a system of duties grounded in the unconditional claim to respect and consideration of all persons. Moral duties are binding on all beings capable of speech and action and hence have unrestricted or

universal scope.[9] However, the very nature of morality means that it is limited as a mechanism for regulating social interaction. The unrestricted universality of moral principles, their highly abstract, cognitive claim to validity, and the unconditional character of the duties they impose create a rift between moral judgment and reasoning, on the one hand, and motivation, on the other. Moral norms provide agents with weak cognitive motives grounded in the knowledge that they have no good reason to act otherwise, but provide them with no rational motives to act accordingly. Moreover, the justification and application of moral norms calls for practical discourses whose highly exacting conditions can at best be approximated by real discourses. Thus moral norms are unsuitable for regulating social interactions between strangers where the practical costs in time and effort of establishing and maintaining the relations of mutual trust required for practical discourses are too high.

As a mechanism for regulating interactions between strangers, modern law has a number of important structural advantages over morality. Modern legal systems secure a space of individual liberty in which citizens are free to pursue their private purposes by conferring actionable individual rights on all citizens: whereas in the moral domain duties are prior to rights and entitlements, in the legal domain individual rights are prior to duties in accordance with the Hobbesian principle that whatever is not prohibited is permitted. In addition, whereas morality must rely on the weak sanctions of a guilty conscience, the enforcement of legal norms is ensured by the police and penal power of the state. Though the content of basic legal norms may sometimes be indistinguishable from that of universal moral principles, the fact that legal norms must be enacted and that all legal norms are in principle subject to revision means that their domain of application is limited in the first instance to a particular jurisdiction and its citizenry.

If we are to do justice to the distinctive mode of legitimacy of positive legal orders, Habermas argues, we should begin by asking what basic rights free and equal citizens must confer on one another if they are to regulate their common life by means of positive law. Once the goal of the constitution-founding practice is appropriately characterized, the formal features of the medium in which it must

be accomplished—that is, positive, coercive law—set strict limits on the possible outcomes of the procedure. In particular, since legal rights presuppose that citizens have the status of legal subjects, the citizens must first confer on one another certain basic *liberty rights* which guarantee them this artificial status, including rights to the greatest possible measure of equal individual liberties, rights of membership in the political community, and rights guaranteeing individual legal protection.[10] Without these rights of *private autonomy,* which create a space for citizens to pursue their private ends free from interference, morally responsible agents could not reasonably be expected to submit themselves voluntarily to a coercive legal order. But in addition they must grant one another basic *rights of political participation* or rights of *public autonomy* through which the laws that give effect to all of the basic rights, including the political rights themselves, are formulated and enacted. Contrary to classical liberalism, which treats liberty rights as prepolitical endowments and interprets them as negative rights of noninterference, Habermas argues that liberty rights cannot be implemented without broad popular participation in the processes of political opinion-formation of an inclusive public sphere, through which the citizens can influence the definitions of their needs and interests that are embodied in the law.[11] Viewed from this perspective, political rights can be represented as necessary conditions for the realization of the artificial status of legal subject as bearer of rights, because they regulate the implementation of the liberty rights. However, the relation between private and public autonomy can also be interpreted in light of the conception of legitimacy expressed in the principle of discourse. This principle stipulates that laws derive their legitimacy from the presumed rationality of the decisions reached through appropriately regulated procedures of deliberation; thus the legitimacy of a legal order ultimately depends on the institutionalization of the forms of political communication necessary for rational political will-formation, and the liberty rights can be justified as necessary conditions for the institutionalization of the corresponding forms of political communication. Thus neither the liberty rights nor the political rights can be accorded priority but must be regarded as co-original. The principle of the essential

interdependence of private and public autonomy or, alternatively, of the co-originality of the rule of law and popular sovereignty, forms the cornerstone of Habermas's proceduralist model of deliberative democracy.

But before turning to this, we should note a number of important features of Habermas's theory of rights. In the first place, it avoids the problems generated by the fiction of the state of nature in social contract theory, problems that arguably still bedevil Rawls's device of the original position. Habermas need not appeal to controversial prepolitical conceptions of human nature and of practical reason, nor need he appeal to conceptions grounded in specific constitutional traditions; on his account, the decision to found a political community is not itself in need of normative justification. The nature of the constitution-founding task and the medium in which it is to be accomplished need only be justified in functional terms—that is, in terms of the regulative functions of modern legal systems—and then the general shape of the theory of rights follows automatically, in conjunction with the discursive account of normative validity. The normative principle on the basis of which participants must decide which rights to grant one another is not grounded in transcendent ideals of reason and the person but is implicit in the presuppositions of communicative action and practical discourse. Thus rights are not treated as moral givens which are imposed as an external constraint on the citizens' political deliberations but are represented as the result of a process of construction, and hence as an expression of the reason and will of the citizens themselves.

However, although he argues that the theory of rights for the constitutional state need not draw on controversial questions of value and the human good, Habermas does not exclude ethical questions from the purview of politics altogether.[12] Political questions of what values and ideals of the good should be politically realized do not admit of rational resolution in the unrestricted sense of questions of justice because they are inseparable from the cultural traditions and historical experiences that shape the identities of groups, and hence can only be answered within the context of an *already constituted* political community. This does not mean that questions of the collective good cannot be rationally debated and re-

solved; but in pluralistic societies deliberations and decisions concerning what values and ideals of the good should be politically implemented must take place within a constitutional framework that guarantees individual liberty and the right of minorities to dissent from the values of the majority culture and to cultivate their distinctive identities. On the other hand, each political community must realize the system of basic rights within a political culture that reflects shared traditions and historical experiences, though this political culture must not be assimilated to the majority culture.

A further noteworthy feature of Habermas's approach, one with far-reaching implications for issues of international justice, is that the hypothetical procedure of a mutual conferring of rights can be conceived as being performed by groups of different scopes, ranging from the local and the national to the regional and the global.[13] While the basic human rights that must be conferred in order to establish a legitimate constitutional regime are essentially the same in each case, the political institutions required for their implementation would have to reflect the different scope of the practical matters to be regulated and the different composition of the populations subject to the laws enacted. Thus, as we shall see, Habermas's general theory of human rights points to the possibility of a global political order in which sovereignty would be divided and dispersed among local, national, and regional regimes, with a global regime assuming responsibility for the implementation of human rights at the international level.

2 Public Reason and Deliberative Democracy

Habermas's theory of human rights and popular sovereignty calls for the creation of political institutions in which discursive processes of opinion- and will-formation play a central role. This follows from the radically proceduralist orientation of the discourse theory which places the whole weight of political legitimation on informal and legally institutionalized procedures of opinion- and will-formation. On this account, the legitimacy of legal norms is a function of the formal features of procedures of political deliberation and decision making which support the presumption that their outcomes are

rational. The resulting requirement that the enactment of legal norms be tied to discursive processes of rational political will-formation applies in different ways to basic constitutional principles and to enacted legal norms and statutes. At the constitutional level, the principle of popular sovereignty requires that the citizens must be able to affirm the basic rights as ones they would confer on one another in a constitution-founding practice. Because in most cases the citizens are born into an already existing state and never actually participate in such a practice, the requirement of their voluntary consent must be given effect through procedures by which existing constitutional principles can be challenged and changed if sufficient political will to do so can be mobilized. In the case of enacted laws, the principle of popular sovereignty requires that the citizens should play an active role in the elaboration and defense of the criteria in accordance with which the basic rights are implemented, most importantly in shaping the definitions of their needs and interests which become incorporated into law. In neither case can the content of legal norms be determined independently of the popular will as expressed in a critical public opinion. Thus the internal relation between the rule of law and popular sovereignty calls for a proceduralist model of deliberative democracy in which all political decision making, from constitutional amendments to the drafting and enactment of legislation, is bound to discursive processes of a political public sphere.

Habermas has specified the basic shape that political institutions would have to take in order to realize this model of deliberative democracy. It calls in the first place for a public sphere of informal political communication whose institutional basis is provided by the voluntary associations of civil society and which depends on inputs of expert information and on open access to the print and electronic media. The informal character of public political discussion, and the fact that it must be responsive to problems as they arise in the lifeworld of everyday interaction, mean that the associations in which it is conducted cannot be directly regulated by law; however, the basic political rights guaranteed by the constitution, such as freedom of association, freedom of speech, and freedom of conscience, are specifically designed to secure the background condi-

tions that make possible a flourishing civil society.[14] The public sphere has as its complement the legally regulated government sphere composed of the legislative, judicial, and administrative branches. The specific tasks of each of these branches call for a complex division of labor in which each branch plays both an enabling and a limiting role vis-à-vis each of the others. For example, the professional judiciary must not preempt the political function of the legislature by creating law; conversely, the institution of judicial review enables the judiciary to restrain the legislature from programming specific legal judgments by enacting laws to that effect.[15]

While this model conforms to the basic institutional arrangements of modern constitutional democracies, Habermas provides an original rationale for these arrangements in terms of the legitimating function of public reason. This he construes in terms of a model of the circulation of power: on the input side, influence generated in the public sphere is transformed through the democratic procedures of elections and parliamentary opinion- and will-formation into communicative power, which in turn is transformed through the legal programs and policies of parliamentary bodies into administrative power; at the output end, administrative programs create the necessary conditions for the existence of civil society and its voluntary associations, and hence of a vibrant political public sphere.[16]

Habermas claims that this proceduralist model of deliberative democracy captures the principle of the interdependence of the rule of law and popular sovereignty better than rival theoretical proposals. The rival position that is perhaps closest to Habermas's is the political liberalism of Rawls, which is discussed at length in the two essays that comprise Part II of this volume. In the first, Habermas outlines three basic criticisms of political liberalism: first, that the devices of the original position and the veil of ignorance do not adequately model the idea of impartiality that informs deontological conceptions of justice; second, that the idea of a public justification of a political conception of justice in terms of an "overlapping consensus" is not commensurate with the epistemic or cognitive validity claim such a theory must raise if it is to claim legitimacy; and, third that Rawls's conception of the political implies a rigid division

between the public and nonpublic identities of citizens which leads him to accord the negative liberty rights priority over the rights of political participation.[17] In a reply to this essay Rawls argued forcefully that Habermas's criticisms did not do justice to the complexity of his position, revealing in the process that his position is in some respects closer to Habermas's than the latter may have appreciated.[18] However, in the next essay Habermas reiterates and further clarifies his basic criticisms.

Perhaps the key disagreement between them concerns the appropriate nature and scope of a philosophical conception of practical reason that would be sufficient to ground a theory of justice for a constitutional democracy. Although both take a broadly constructivist approach to practical reason—they represent principles of justice for a constitutional democracy as those that citizens would agree to as the result of an appropriate process of reflection or deliberation—Habermas believes that the conception of legitimacy implicit in modern democratic constitutions calls for a more comprehensive theory of practical reason than Rawls allows. Thus he reiterates his argument that Rawls's idea of reasonable overlapping consensus is not sufficient to ground the legitimacy of the basic constitutional principles because it does not allow for a shared perspective from which the citizens could convince themselves of the validity of the principles *for the same reasons.*[19] Such a perspective, he argues, is implicit in the presuppositions that speakers unavoidably make when they engage in practical argumentation, so that the appropriate normative principles can be grounded in a purely procedural manner. Rawls, by contrast, rejects this approach on the grounds that a political theory of justice must be freestanding, and hence can have no part of theories of reason grounded in comprehensive philosophical doctrines such as Habermas's theory of communicative action.[20]

The significance of their contrasting approaches to practical reason can be brought out by considering their respective analyses of the legitimating function of the public use of reason, an idea that is central to both of their positions. It has emerged from their exchange that public reason undergoes a problematic split in Rawls's political liberalism. In the first place, there is the unrestricted ex-

change of ideas in the "background culture of civil society" in which all practical and theoretical proposals are open to debate; here participants are free to appeal to whatever considerations they find compelling, including their own comprehensive views, in an attempt to convince their fellows. This is the forum in which justice as fairness and rival political conceptions of justice must prove themselves. However, a much more restricted conception of public reason informs Rawls's idea of the "public justification" of a political conception of justice by "political society" and the related notion of public reason as an *ideal* to which participants in public political life should conform when debating matters of political concern. In public justification of a shared political conception, reasonable citizens, who have already justified the political conception "privately" by embedding it in their various comprehensive doctrines, take account of *the fact* that others have reasonable comprehensive doctrines that likewise endorse the political conception, though for different reasons. What is gained by this "mutual accounting" are not further supporting reasons for the political conception—since the express *content* of comprehensive doctrines plays no normative role in public justification—but a shared recognition that different citizens endorse the same conception for different reasons that must be respected.[21] This mutual recognition finds expression in the ideal of public reason and the corresponding political virtue of civility: when addressing political issues, especially ones that bear on constitutional essentials, citizens, candidates for office, officeholders, judges, and legislators must limit themselves to adducing reasons that their fellow citizens could reasonably accept and hence must refrain from appealing to their own comprehensive doctrines.

Habermas is highly critical of this restricted conception of public reason. The consensus that results from public justification as depicted by Rawls is not "rationally motivated" in a sense that is consonant with the deontological meaning of the basic principles of justice on which modern constitutional regimes are founded. The problem is that the overlapping consensus is not based on shared reasons: citizens simply *observe* that their fellows accept the political conception for their own reasons but cannot judge whether this acceptance has a genuine rational basis. This attenuated conception

of public justification means that Rawls must restrict the validity claim publicly associated with the basic constitutional principles to the weak claim to "reasonableness." But this leaves him in the—for Habermas, highly paradoxical—position of holding that publicly defensible reasons can only support a weak claim to "reasonableness," whereas the private reasons mobilized in defense of comprehensive doctrines can ground the stronger claim to "moral truth." Habermas, by contrast, holds that the values and ideals of the good associated with religious and metaphysical worldviews cannot claim the universal validity of basic principles of justice, though they do shape the cultural context within which basic principles must be interpreted and applied. Moreover, he argues that a consistently proceduralist conception of the public use of reason entails that informal political discussion in civil society (i.e., in the "public sphere") and public deliberation bearing on constitutional essentials in legislative and judicial contexts are subject to essentially the *same* rational constraints. In both cases the rationality of outcomes ideally should be solely a function of the reasons adduced, the only difference being that in the public sphere the rationality of debate is assured by a vibrant political culture that facilitates open participation, whereas in the constitutionally regulated governmental sphere it is assured through legally prescribed procedures of judicial and parliamentary deliberation and decision making designed to ensure sufficient approximation to ideal conditions of discursive openness under limitations of time and information. On this account, the legitimacy-conferring function of political deliberation does not have to rely on the civility of citizens, legislators, and jurists who voluntarily refrain from adducing reasons that they think would not be acceptable to their fellow citizens; it can and must be left to the procedural constraints of discourses themselves to determine which reasons ultimately win out.

Although it must be left to the reader to unravel the threads of this intricate debate further,[22] we would like to draw attention to a divergence between Rawls's and Habermas's approaches to issues of international justice, which has a bearing on Habermas's broader concerns in this volume. Rawls's theory of justice is tailored from the beginning to a view of the state as a more or less self-sufficient system

of social cooperation that is assumed to exist in perpetuity; hence, it presupposes the conception of the nation-state as exercising exclusive sovereignty over a territory and people enshrined in modern international law. This orientation is reinforced by Rawls's more recent idea of a political conception of justice as one that draws on ideas latent in the political culture of Western liberal democracies. When he turns to the question of how liberal democracies should behave toward nonliberal regimes whose political cultures are not structured by such liberal ideas, the principle of toleration itself dictates that a liberal regime must not insist unilaterally on liberal standards as the basis for judging which regimes it should recognize as legitimate. In other words, Rawls is compelled to apply much weaker standards of political legitimacy to the international domain, and his theory of international justice, at least as currently formulated, seems to allow for only limited protection of the human rights of citizens of authoritarian states.[23]

On Habermas's approach there is no such theoretical break between the application of liberal principles of justice to the national and to the international domains. Rather than accepting the framework of traditional international law which views states as the sole legitimate representatives of their citizens, Habermas advocates a model of *cosmopolitan* law which would supersede international law, confer actionable legal rights *directly* on individuals, and mandate the creation of supranational political agencies and institutions to ensure the implementation of human rights on a global scale. While nation-states would retain limited sovereignty, their citizens would be able to appeal to the coercive legal authority of regional or global agencies, against their own governments if necessary. This extension of the theory of rights and procedural democracy in a cosmopolitan direction raises far-reaching questions concerning the future of the nation-state, to which we now turn.

3 The Future of the Nation-State in an Era of Globalization

The essays collected in Parts III and IV of this volume represent some of Habermas's most significant interventions in the ongoing debates about the nature and future of the nation-state. In contrast

to most arguments for cosmopolitanism, however, Habermas's point of departure is neither an attack on the nation-state nor a repudiation of nationalism, but a normative and empirical analysis of their successes as well as their limitations. Briefly, Habermas argues that the nation-state emerged in response to a dual crisis of legitimation and integration that arose with the demise of the old European feudal order and deepened with the acceleration of processes of modernization. After the wars of religion and the emergence of credal pluralism, authority had to be legitimated in a secular fashion. Modernization left in its wake isolated individuals and dislocated communities.[24] The achievement of the nation-state consists precisely in addressing the problems of legitimation and integration at once. By forming states and incorporating democratic constitutional procedures, communities gain a measure of legitimacy for their authoritative political institutions. At the same time, it is precisely the (in most cases deliberate) adoption of the idea of nationhood that creates bonds of mutual solidarity between former strangers and motivates the extension of democratic citizenship, thereby addressing the problem of disintegration.[25]

But if the idea of the nation was historically important in the formation of democratically ordered societies, for Habermas it seems to have outlived its usefulness, at least as traditionally conceived and enshrined in international law. It is not just that the increasing pluralism and relentless processes of economic globalization are rendering obsolete the notion of internally homogeneous and externally sovereign states; in addition an inherent tension between nationalism and republicanism is coming to a head. Whereas nationality depends primarily on ascriptive criteria such as ethnicity, a common language, or a shared history, republicanism is founded on the ideals of voluntary association and universal human rights. Despite the importance of the historical convergence of nationality and republicanism in the formation of the nation-state since the French Revolution, Habermas argues, this was only a contingent link: republicanism is neither conceptually nor practically dependent on nationality, and the twentieth century in particular has provided grotesque examples of the dangers of emphasizing the relationship between ethnos and demos.

Habermas's main target in this discussion is the position that regards a culturally or ethnically homogeneous population as a necessary condition of the effective operation of a constitutional democracy.[26] For Habermas, insisting on this condition implies a failure to acknowledge the importance of legal institutions in the formation of national identities. He reminds us that modern consciousness is not merely a result of membership in prepolitical ancestral communities based on kinship, but is at least in part a function of politics, of the active enjoyment of the status of citizen within a political community.

Attention to the role of legal structures—as opposed to inherited loyalties—in the constitution of national identity helps Habermas to meet one of the objections raised against supranational regimes such as the European Union. According to some critics, in the absence of a genuine supranational identity such regimes suffer from an irresolvable legitimacy deficit: they will inevitably be antidemocratic both in origin and in operation. Habermas, of course, acknowledges that a European identity will not come about merely through legal fiat; but he argues that the genesis of such an identity depends on the institutionalization of supranational democratic procedures. Just as the identity of the French, for example, is based not merely on a shared cultural identity but also on the shared legal-political institutions and practices that are part of the legacy of the Revolution, the identity of Europeans will be at least in part a function of a legal framework that allows for the development of a genuinely European identity. Habermas's model here is that of the slow historical process through which, in the course of the nineteenth century, inherited local and dynastic loyalties became subordinated to the more abstract and legally mediated political identity of citizens of particular nation-states.

In mounting this argument, Habermas makes use of a pair of related distinctions that are becoming important in discussions not just about nationalism but more generally about political justification in multicultural contexts. He distinguishes, on the one hand, between a *civic* and an *ethnic* sense of the nation, and on the other, between a *political* and a *majority* culture. The idea, of course, is to restrict the object of politics so as to make agreement more feasible.

Citizens do not have to agree on a mutually acceptable set of cultural practices but must come to a to more modest though still demanding agreement concerning abstract constitutional principles. As with national identity within pluralistic states, Habermas thinks that a supranational identity might evolve around an agreement about political principles and procedures rather than about culture more generally. The agreement in question amounts to an identification with basic constitutional principles and practices which Habermas (among others) calls "constitutional patriotism." As within the nation-state, inherited regional loyalties could be subordinated to, but not completely replaced by, constitutional patriotism, so a similar process might take shape at the supranational level, provided that the different constitutional traditions of the member states embodied the same set of basic rights.[27]

But Habermas's interest in cosmopolitan structures goes beyond the approving observation that the different republican traditions converge on the same constitutional principles. After all, the classical system of states, up to and including the League of Nations, also included a set of principles that all member countries were supposed to follow.[28] But that system did not give anyone the authority to intervene in defense of the shared principles. In this respect, Habermas's cosmopolitanism is more demanding than Kant's idea of a federation of sovereign states, which is in some ways reflected in the classical conception of international law.[29] On Habermas's view, there is an inconsistency in Kant's dual aspiration to preserve the sovereignty of the associated states, on the one hand, and to maintain peace in the long run, on the other. The tension lies in the fact that the proposed federative scheme exists only insofar, and as long as, the member states *will* to remain in it. However, if peace is to be promoted, Habermas argues, states must be under the *obligation* to act in harmony with the principles of the federation.[30] Although Kant envisaged the possibility of a "universal federal state" (*Völkerstaat*) "based upon enforceable public laws to which each state must submit,"[31] in fact he advocated a "federation of peoples" (*Völkerbund*), a more modest structure whose aim is not to constitute a legal order to increase welfare and justice, but rather only to further the abolition of war.[32] This voluntary association does not give rise to any actionable rights, and hence its permanence remains unexplained.

Moreover, the concern to leave intact the sovereignty of its member states will, predictably, conflict with the need to obligate unruly members to subordinate their own *raison d'état* so that peace may be perpetuated.[33] Thus there is an inherent tension in the dual aim of establishing a regime of enforceable human rights, on the one hand, and of making consent the sole source of obligation of international law, on the other.

An appropriate reformulation of classical international law is in order, then. The thrust of Habermas's proposal is that republicanism needs to be preserved at the supranational level if it is to survive at all. The nation-state suffers three sorts of weaknesses, which are unlikely to be overcome by the nation-state alone. First, individual nation-states do not have the necessary resources to deal with risks on a global scale, including ecological problems, economic inequalities, the arms trade, and international crime. Second, states are becoming helpless in the face of the globalization or denationalization of the economy. It is not only the increased magnitude of the economic activity across national borders but also the rapid mobility of capital that leads to the loss of a large measure of individual states' control over their own economies. This weakness is not merely a pragmatic matter but threatens to undermine the integrative achievements of the nation-state. One of the dangers of the denationalization of economies is a race between several countries to dismantle their welfare systems in the search for competitive advantages. This in turn would accelerate the formation of underclasses even in developed countries, with three fateful consequences: an increasing recourse to repressive politics in a vain attempt to contain the anomic effects of a large underclass; the decay of the infrastructure of expanded areas; and, as a consequence of the foregoing, the collapse of the bonds of social solidarity and political legitimacy, two achievements of the democratic nation-state.[34] Finally, the inherent tension between nationalism and republicanism makes the sovereign state a less than reliable guarantor of the rights that individuals are supposed to have qua human beings, and not only as citizens of particular states.

Supranational regimes, according to Habermas, are more likely to succeed where sovereign states fail. For this reason, he supports supranational institutions with greater executive and judicial powers,

so long as these institutions are also more democratic than present international organizations. The aim of these regimes is to constitute an international legal order that at the very least would bind individual governments to respect the basic rights of their citizens, if necessary through the threat or the implementation of sanctions. While increased judicial and executive functions would be necessary to make international institutions effective in the protection of individual rights, for this very reason they would also have to embody greater democratic openness in order to prevent selective and unfair uses of international force.

The same democratic, cosmopolitan orientation can be seen in Habermas's position on the future of Europe. Critics allege that the Union suffers from a serious "democratic deficit" on at least three grounds.[35] First, the Union rests on international treaties, a seemingly shaky basis for institutions and legal precedents that increasingly play a federative role.[36] Second, critics aver that structural impediments to democracy such as the increasing power of the Commission,[37] the poorly developed democratic procedures of the Council,[38] and the relative structural unimportance of the Parliament,[39] make Union decisions appear as impositions on the part of a bureaucratic body that has become dangerously autonomous. Even if member states could "lend" their legitimacy to the institutions of the Union, over time a democratic gap has allegedly opened up, for the overloaded Council has delegated decisions to the European Commission, whose members are not accountable to the particular member states but to the Union itself. Finally, some critics dispute the democratic character of the Union, asserting that a stronger Union would have an even more severe legitimacy deficit because of the nonexistence of a European public.

Habermas's response to the democratic deficit of the Union parallels his suggestions concerning the United Nations. He defends "[n]ew political institutions such as a European Parliament with the usual powers, a government formed out of the Commission, a Second Chamber replacing the Council, and a European Court of Justice with expanded competences."[40] In short, Habermas advocates "a transition of the European Community to a democratically constituted, federal state."[41] For him, the way to make good the

democratic deficit of the Union is precisely to strengthen its political institutions while giving it the character of a federal government. To those (like Grimm) who think that a stronger Union would have an even more severe legitimacy deficit because of the nonexistence of an European public, Habermas offers the reminder that the identity of persons as citizens is shaped, at least in part, by the legal and political institutions within which they conduct their lives. It is not unreasonable, then, to expect that "the political institutions that would be created by a European constitution would have a catalytic effect"[42]—that is, that they would contribute to the formation of an authentic European identity, which would in turn promote the democratization of European institutions.

The suggestions for international institutional reform that Habermas offers are provocative, but the focus of his work lies on the normative dimension of cosmopolitanism. At this level, what makes his defense of cosmopolitanism particularly compelling is that it follows from an argument that seeks to reconcile particularism and universalism, *Sittlichkeit* and *Moralität,* by giving each its due. The guiding idea is that cosmopolitan political institutions can be seen as the result of the application of the very same hypothetical construct in terms of which he elucidates the legitimacy of legal rights within the nation state. Just as within states rights are necessary in order to mediate social interactions by means of laws, certain rights become necessary in order to achieve the same goal when the interactions take place across national borders. Since for Habermas the legitimation of law requires sensitivity both to the concrete context of application and to the universalistic thrust of impartial reason, the universality of basic rights, far from thwarting the expression and development of concrete forms of life, actually promotes them, as will become clear in the next section.

4 Multiculturalism and the Rights of Cultural Minorities

Habermas's discussion of multiculturalism serves to illustrate the advantages of his differentiated approach to moral, legal, and political issues and to the complex relationships between them. Both liberals and communitarians charge one another with insensitivity

toward difference and hence with difficulties in dealing with some of the pressing issues of contemporary identity politics. Communitarians charge that the liberal emphasis on equal treatment amounts to "an abstract leveling of distinctions, a leveling of both cultural and social differences."[43] Liberals, in turn, claim that many of the characteristic features of communitarianism lead to an exclusion of difference. These include the communitarians' willingness to grant primacy to collective over individual rights and their construal of rights as an expression of values contained in the traditions of particular communities. The strong link between the notion of collective identity and rights is particularly problematic in pluralistic societies, where conflicts inevitably arise concerning the rights of minority groups whose identities and traditions differ from those of the majority group.

The peculiar power and originality of Habermas's theory of political legitimation consists in part in its ability to deal with a broad range of issues within the framework of a single unified theory of human rights and of popular sovereignty. However, it is not immediately evident that his approach is better able to account for politically significant differences between ethnic, religious, and national groups than either communitarianism or classical liberalism. For one thing, the highly abstract theories of human rights and of popular sovereignty on which he proposes to ground democracy at both the national and supranational levels seem to ignore the cultural values that shape the identities of groups. We shall conclude with a few brief remarks on these matters.

(1) The assumption that ethnic and cultural homogeneity are necessary conditions for the proper functioning of a democratic community creates obvious difficulties for justifying equal treatment of minority groups. Habermas's defense of the distinction between ethnos and demos, as we saw above, is directed precisely against this assumption, and this enables him to argue that there is no a priori reason why a constitutional democracy should find itself challenged by ever-increasing ethnic and cultural pluralism. Critics will predictably complain that this very argument underestimates the importance of cultural identities. They will point out that modern constitutional democracies emerged for the most part from struggles for self-determination by groups who saw their political destiny