

Habermas and the Preservation of European Modernity: Defining the Challenge For a European Constitution

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[1] In his "Hamburg Lecture" of 26 June 2001 Jürgen Habermas outlined his answer for the question "why Europe needs a constitution" (1). As the overarching challenge for the constitutional debate, he sees the need to preserve the achievements of European modernity beyond the borders of the nation-states. In his analysis, Habermas first defines which ideas could be a focal point for "an ever closer Union" and which challenges counsel the continuation of the European project. In a second step, he lays down the premises the EU needs to fulfill if it wants to become a political union. At last, he discusses some institutional questions. [2] In Habermas' view, the original ideas behind European integration, *i.e.* the preservation of peace and the entanglement of Germany, have been largely achieved and could thus hardly justify a further deepening of the integration process (2). Instead, he argues that the EU is more suitable for implementing the values of justice and solidarity in the context of a post-national constellation (3). Consequently, Habermas does not hide his sympathy for the ideas brought forward by the French Prime Minister Lionel Jospin who has pointed to the historical development of Europe's societal model and its rich cultures (4). Additionally, the divergence between economic integration and political union as well as the democratic deficit have to be dealt with and seem to beg for a continuing integration process. [3] Habermas then turns to the empirical requirements for a federation of nation-states. But first he convincingly criticizes a common argument by Eurosceptics, that is, that there were no European demos and consequently no European constitution could exist. He primarily underlines that the formation of identity and solidarity in the nation-states was a slow process of abstraction. Consequently, this process need not stop at the historical borders of the nation-states. [4] Habermas does, however, call to attention that there are some prerequisites for such a building of solidarity and identity, namely a European civil society, a European public sphere and a common political culture. Concerning the creation of a European public sphere, his essential insight is that one has to refrain from an overly simplistic projection of national structures on a larger scale. In other words, it would be hardly desirable to superimpose a centralized European public sphere. What Habermas envisages is, consequently, an even wider and steadier opening of the existing national media for European issues and their perception in other Member States (5). In such a setting, linguistic plurality would not be a decisive obstacle but could be seen as an essential feature for guaranteeing the integrity of national cultures. [5] This leads to a central requirement in Habermas' concept of post-national democracy: a common political culture while accepting the differences between national cultures. As a possible nucleus for a political culture, he envisions the similar processes Europeans developed in their nation-states for dealing with various social conflicts arising out of change. Mutually accepting reasonable disagreements and a broad cultural spectrum has made it possible to deal with the two dimensions of change: loss of tradition and the chances of innovation. Consequently, European societies have learned to create increasingly abstract forms of solidarity between strangers. Political culture then defines itself more in procedural terms than in material outcomes. In light of this learning experience, Habermas sees the possibility to continue along the path to a post-national democracy. [6] This procedural approach puts Habermas' remarks on the Charter of Fundamental Rights, proclaimed during the Nice Summit, into perspective. In his view, the Charter is an expression of the shared values of the European citizens. And there is already evidence, that the Charter will influence the case-law of the ECJ and even national courts. One should, however also point to the centralizing effects that a fundamental rights jurisprudence very often has for a polity (6). An activist application of the Charter could thus well conflict with important national traditions and cultural peculiarities. [7] Looking at their institutional proposals, one seems to find considerable parallels between Habermas' ideas and Foreign Minister Fischer's perspective on the future of European integration. The suggestions for a future composition of the European Parliament, a restructuring of the Council, the utilization of variable geometry as well as possible elements of direct democracy are examples. In Habermas' speech, however, the institutional questions appear to be an annex describing possible models rather than defining elements of the concept itself. As the elections to the European Parliament are arguably one crucial element for constituting European identity and solidarity, one institutional aspect is nevertheless worth a comment. [8] In order to strengthen the legitimacy of the European Parliament, Fischer has suggested that a certain number of its Members should automatically hold a mandate in their respective national parliaments. It is, however, highly questionable if such an arrangement would truly enhance democratic legitimacy. Not only would it undermine the innovation of the 1979 direct election Act. One would also create two classes of parliamentarians within a single body. Similar election systems providing for two independent elections to a single parliament have been known a long time in theory and are even practiced in Member States of the EU (e.g. Italy). With good reasons, however, they are considered to be a "perversion of a democratic election" (7). Not only does such a system endanger the fairness of competition between the political parties, but more importantly, the link between the choice of the electorate and the decision making process within the parliamentary body becomes less transparent. [9] And even only allowing a certain number of parliamentarians to sit in the European Parliament as well as their national parliament arguably does not enhance legitimacy. Instead, one might suspect that somebody trying to be present on both levels would

hardly be able to handle the workload of both Parliaments in a professional way, not to speak of the critically important contact to their respective constituencies. [10] The main focus of Habermas' contribution, however, is not on institutions but on an earlier step. He elaborates on the complex fundamental questions and requirements for a democratic Europe that Fischer did not touch or only hinted at, although they are essential for any institutional design of the European Union. Habermas' ideas and analysis thus provide a needed theoretical framework for the continuing constitutional debate.

(1) J. Habermas, "Warum braucht Europa eine Verfassung?", *Zeit* 27/2001, www.zeit.de.

(2) Habermas acknowledges, however, that the preservation of peace has become relevant in a different context. A better coordination of security policy might thus be desirable but this aspect is not at the center of the constitutional debate.

(3) See, J. Habermas, *DIE POSTNATIONALE KONSTELLATION*, 1999.

(4) L. Jospin, Speech of 28 May 2001, *Zukunft des erweiterten Europa*, *Zeit* 22/2001, www.zeit.de.

(5) Analysing such phenomenons is the focus of an ongoing research project by K. Eder/H.-J. Trenz/C. Kantner, *Transnationale Öffentlichkeit und die Strukturierung politischer Kommunikation in Europa*.

(6) A. v. Bogdandy, *The European Union as a Supranational Federation*, 6 *COLUMBIA JOURNAL OF EUROPEAN LAW* 27 (2000) at 30; For a discussion of the Charter, see A. v. Bogdandy, *The European Union as a Human Rights Organization?*, 36 *COMMON MARKET LAW REVIEW* 1307 (2000).

(7) E. G. Mahrenholz, Über den Satz vom zwingenden Grund, in: *DER VERFAßTE RECHTSSTAAT, FESTGABE FÜR KARIN GRAßHOF*, 1998, p. 69, at 81.