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**HABERMAS, DEMOCRACY, RIGHTS,
AND EUROPEAN SUPRANATIONAL INTEGRATION:
OBSERVATIONS FOR NORTH AMERICAN CRITICAL THEORISTS**

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**A thesis submitted to the Faculty of Graduate Studies in
partial fulfilment of the requirements
for the degree of
Doctor of Philosophy**

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Habermas, Democracy, Rights, and
European Supranational Integration:
Observations for North American Critical
Theorists

by Karl A. Henriques

a dissertation submitted to the Faculty of Graduate Studies of
York University in partial fulfillment of the requirements for the
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DOCTOR OF PHILOSOPHY

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Abstract

This thesis draws on Jürgen Habermas' new opus, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) in which he attempts to bridge the conceptual gap between formal institutions, and less formal political actors and their ethical need interpretations, and justifying expanded and authorable citizenship rights based on an intersubjective paradigm rather than on the more juridifying liberal and (liberal) welfare legal paradigms. The difficulties and opportunities in attempting to practically implement these democratic and rights issues at the increasingly relevant *supranational* level of systems of governance are considered in light of the emerging integration process that is occurring in the European Union.

The thesis makes three principal points for a contemporary critical theory. First, *in addition to* (a) "reinvigorating civil society" and the rather undifferentiated notion of "the political", critical theory needs to reconsider the importance of (b) *democratizing or taking back the power of the state* --its formal political, legal, and administrative realms--, especially from the (c) often irrational, socially and morally distorting effects of money. Second, critical theory needs to not only underline the usefulness of vigorously developing (a) a post-liberal, intersubjectivist *paradigm of law* as well as (b) the use of the "historically effective morality" embedded in the *category of rights*, but also (c) *justify* the need for economic, social, cultural, health and welfare rights as these rights help to motivate the *institutionalization* of the civic, political, *and* "economic" conditions for securing public and private autonomy. Third, it is suggested that critical theory needs to *reconceptualize* the new potentials and barriers of

achieving the above democratic and legal reconsiderations in light of the emerging *de facto supranational* (rather than simply local, subnational, or even national) level and sites of communication and coordination. This reconceptualizing of the new potentials and barriers of the supranational level is facilitated through the use of the historical and current movement towards European integration.

In sum, this thesis suggests that the viability of achieving the expanded and deepened democratic and rights issues raised above will require a shift in focus by critical social, political, and legal theorists to *include* (not one-sidedly focus on) the supranational and even "cosmopolitan" (Habermas 1997; Held 1995, 1997) levels of civil, economic, legal and political activity. The thesis essentially attempts to act as a "sluice" towards creating more *vigorous debate in North America* regarding the "European experiment" and reconciling a more democratic framework for securing private and public autonomy under emerging supranational political, legal, and economic forms of governance.

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First, I would like to thank Professor Brian Singer for his conscientious suggestions and the very high intellectual sources to which he directs all of his students. An example of the result of his high scholarly standards was his desire to have students (re)acquaint themselves with some of the foundational authors in sociology and, particularly, political theory. The course's review of some of the most important themes in political theory was catalytic in saving me from the intellectual and "political" themes which my studies had taken me. I am most grateful for Brian's determination to keep reviewing the history of the major themes in our politically charged lives. Also, his reputation as one of the most acute intellectual minds at York, as well as remaining an honourable and strong gentleman, is quietly rising.

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The support of colleagues and friends such as the confounding genius of Reza Rahbari, the subversive nature of Simon Threlkeld, and the political and scholarly integrity of Vappu Tyysk  are always important elements in any long journey, and their *camaraderie* was tremendously important.

Thanks to my mother, Linda Henriques, n e Wilen, who is the true author in the family and who helped provide encouragement through the writing process. The long

discussions and arguments which I had with her when I was a young critic in the more private sphere were no doubt of tremendous help in helping me become a self-reflective advocate in the more public sphere.

I have also written this project rather belatedly accompanied by the memory of my father.

Most of all, I owe a huge thanks to Jocelyne Praud for the tremendous patience that she has shown me throughout the conceptualization and endless re-writings of this project. Her reviewing of my material and, above all, her equal passion for issues of justice and injustice were the most important on-going sources of intellectual reflection and consideration for this difficult theoretic and practical project. Jocelyne's embodiment of the principles of her native France --a land from which I so ungraciously swept her rather long ago-- is a true testament to the validity of those principles. That is no small statement. It has always been a wonder for me to behold someone who embodies the spirit of an historical struggle for equality, justice, and solidarity.

Finally, I dedicate this work to all of those who continue to work for the cause of social justice and the protection of the integrity of the natural environment.

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Introduction to the Dissertation

[I]t has been reserved to our times above all to vindicate, at least in theory, those treasures which were formerly wasted by relegating them to the heavens; but which age will have the strength to enforce this right, and to take possession of it?

G.W.F. Hegel, quoted in Habermas'
"Hegel's Critique of the French
Revolution"

With the advent of radically relativist “criticism” on the one hand, and the growing hegemony of neo-liberal socio-economic and political discourse on the other, social and political theorists with practical and emancipatory interests are faced with the daunting task of attempting to reconstruct a constellation capable of recovering the promise of the French Revolution's vision of *liberté, égalité, fraternité*, without falling into the modern equivalent of Jacobinism or more subtle forms of domination. According to one of the most influential social and political theorists in Germany today, Jürgen Habermas, theorists with a practical interest must not abandon the counter-discursive and even emancipatory potential of modernity, but rather *highlight* its *dual* character: not only the loss of freedom and meaning stemming from the penetration of the logic of economic and administrative subsystems into the realm of the lifeworld which Weber (and the early Habermas) emphasized, but also its potential for developing, from itself, the norms and preconditions necessary to improve citizens' life chances for moral, civic, cultural, political, and material autonomy.

In addition to analytically highlighting the dynamic versus the logic of modernity, the scientization/technization versus the rationalization of the lifeworld via his theory of communicative action, Habermas has attempted to provide some theoretic direction for

moving beyond the often one-sided deconstructing, towards radically reconstructing the theoretic and practical bases of modern Western societies. Such societies are increasingly experiencing a loss of legitimacy in political and legal institutions in the face of a more critical (and understandably cynical) citizenry who see decisions made more on the basis of economic rather than communicative rationality (LC).

Along with the focus on Habermas' contribution to critical theory, there are three main theoretic themes in this work:

1. that *in addition to* [a] "reinvigorating civil society" and the rather undifferentiated notion of "the political", critical social theorists need to reconsider the importance of [b] *democratizing, or taking back the power of the state* --its formal political, legal, and administrative realms--, especially from the [c] often irrational, socially and morally distorting effects of money;
2. underlining the usefulness of vigorously developing [a] a post-liberal, intersubjectivist *paradigm of law* as well as [b] the use of the "historically effective morality" embedded in the *category of rights*, but beyond that to [c] *justify* the need for economic, social, cultural, health and welfare rights towards motivating the *institutionalization* of the civic, political, *and* "economic" conditions for securing public and private autonomy;
3. and *reconceptualizing* the new potentials and barriers of achieving the above democratic and legal reconsiderations in light of the emerging *de facto supranational*, rather than simply local, subnational, or even national level and sites of communication and coordination. This reconceptualizing of the new potentials and barriers of the supranational level will be facilitated through the use of the historical and especially current state in the movement towards European integration.

The *main argument of this project* ultimately suggests that the viability of achieving the issues raised in 1. and 2. above will require a shift in focus by critical social, political, and legal theorists to *include* the supranational level of civil, economic, legal and political activity. In this introductory Chapter I will first introduce the critical (largely Habermasian) theoretic,

and then the empirical (European Union) dimensions of the project which point towards these emerging new tasks for critical theorists. This is followed by methodological considerations and, finally, a detailed outline of the project.

The Habermasian and European Dimensions of the Study

The purpose of the Habermasian dimension of this dissertation is to consider the *political* usefulness of Habermas' attempt to not only overcome what he sees as the theoretic aporias of postmodernist criticisms of the Enlightenment project, but more particularly, to determine the usefulness of his (Kuhnian) paradigm shift from subject-, to intersubjective-centered theory. The adequacy of this attempted paradigm shift and, above all, *how* it could be usefully applied to contemporary democratic and social struggles will be considered predominantly in the crucial domains of democratic and legal rights theory with a view to retrieve the meaningfulness of these fields from the deformations of the logic of the subsystems of money (Marx) and power (Weber).

Depending on the relevant discipline and domain of interest, the secondary literature on Habermas is (to put it mildly) extensive. In fact, the influence of his paradigm is so pervasive that it eludes specific documentation (Blaug 1997). However, in pursuing a critique of an author's usefulness for one's contemporary socio-political context, there is no substitute for his or her original material.

While the two primary dimensions of this dissertation are the contributions of Habermas' discourse theories of democracy and rights, both necessarily rely on his theories of society and morality (see Appendix for some elaboration). With regards to his discourse

theory of law, his intellectual *tour de force*, *The Theory of Communicative Action*, is instructive in providing a more *sociological* overview of the development of the democratic *Rechtsstaat* (constitutional state) stemming from the ambiguous results generated by the uncoupling of the systems from the lifeworld, and the increasing incapacity of the latter's horizon to stabilize and orient social integration (Deflem 1994).

However, the focus of the current project draws on what Rasmussen (1996) considers Habermas' new opus, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996; *Faktizität und Geltung* in German). This work provides a more contemporary application, and reflective reworking of his critiques of modern natural law (which he tackled initially in *Strukturwandel*, but most notably perhaps in several essays in *Theory and Practice* (1974) and in "The Tanner Lectures" (1988)). BFN contains some important clarifications on his theory regarding the relation between morality and law which has changed "even as recently as the Tanner Lectures." In particular, he specifies what he sees as the necessary interpenetration of ethics into legal and even moral discourses (BFN, Preface; see also chap. 4, esp. p. 155, and SR). More importantly for those who wish to supplement their critical perspective with a normative-pragmatic understanding of the *implications* of his theory of communicative action, Habermas' latest major work helps to *bridge the gap between his abstractly conceived theory of communicative action, and its institutional possibilities for contemporary Western liberal democratic states*.

Facts and Norms orients itself towards bringing *precision* (through his two-track theory) to attempts to [1] *bridge*, without collapsing the gap, between formal institutions,

and less formal political actors and their ethical need interpretations, and [2] *justifying expanded and authorable* citizenship rights based on an intersubjective paradigm, rather than on the more juridifying liberal and (liberal) welfare legal paradigms.¹

Whereas the argument to justify the deliberative and proceduralist preconditions for valid and legitimate law capable of protecting the communicative conditions of citizens in Western capitalist societies is made in Habermas' legal work cited above, a more basic question remains: is **democracy** in modern, complex societies possible? As the predominant translator (and sometimes critic (1993)) of Habermas' work, Thomas McCarthy, notes in the introduction to *The Structural Transformation of the Public Sphere* that

one could do worse than to view Habermas' work in the twenty-five years since *Strukturwandel* through the lens of [the] question: [...] can the public sphere be effectively reconstituted under radically different socioeconomic, political and cultural conditions [to achieve a post-liberal conception of democracy]? (1991, xii)²

According to Habermas, the public sphere must be reconstituted, for its very character helps *constitute* or shape the possibility and quality of public debate and hence individuals, and even a society's self-understanding and future direction. Again in the complex *Between Facts and Norms*, Habermas begins to fill in some of the "interplay deficit" to his hitherto largely abstract arguments in favour of a more procedural, deliberative and participatory conception

¹ Habermas' (SR) response to Charles Taylor's (1994) Rousseauist "Politics of Recognition" provides a strongly abridged and *post hoc* Canadian version of his attempt to elaborate on the justification for a radically proceduralist and constitutionally-embedded basis for civic, political, and (of most interest to this author) social and economic rights.

² Alternatively put, McCarthy notes that "Habermas's farflung writings can be viewed as a sustained reflection on the historical, psychological, social, and cultural preconditions of institutionalizing moral-political discourse" (MCCA xiii, n.7).

of politics within a robust and undistorted public sphere.³

The twin topics of democracy and citizenship rights find a mutually strengthening "fit" between Habermas' abstract, critico-normative postnational theory, and the nascent democratic institutions, procedures, and the citizenship rights emerging at the supranational level in the European integration process. The *European Union (EU)* example locates itself "on the continuum" and *also* provides a bridge between the more abstract level of conceptualizations of postnationality and "world citizenship" on the one hand, and the increasingly suspect conception of state citizenship on the other (BFN 514-5).

One of the purposes of this dimension of the current project is to signal the importance of the European experiment with reconstituting democratic "sluices" and rights of citizenship at a *supranational* level. This level of democratic and citizenship theory has been insufficiently broached by critical social theorists.

First in terms of the **supranational and democratic thesis** forwarded here, I will argue that there is a pressing need to orient research towards bringing more *precision* to *positive* alternatives in view of the changing supranational nature of democratic, legal, and economic decision-making processes. According to Held (1995) and Newman (1996), such an enquiry has been left largely to disciplines such as traditional international relations, which

³ Also of interest regarding Habermas' conceptualization of a revitalized deliberative public sphere with past (*Towards a Rational Society* (1971) and *Observations on the Spiritual Condition of Our Age* (1979)) and more contemporary examples are such texts as *The New Conservatism* (1989); the interviews in *Autonomy and Solidarity* (1992) and (with a more sceptical interviewer) *The Past as Future* (1994); and *A Berlin Republic* (1997).

tend to pay greater attention to intergovernmental and inter-elite relations rather than more sociological and civil society concerns, and which are often embedded in a narrow rational choice analytic framework. As a result of this lack of focus on the *supranational* level of analysis, North American critical theory, in particular, is decades behind understanding the "real existing" potentials towards better *securing* the conditions for public and private autonomy in the face of supranational changes.

The EU example is useful insofar as it provides increased clarity and analytic depth for critical social theorists regarding not only the historico-empirical dilemmas in struggles for recognition, but more contemporaneously, a normative model towards reconciling a *two-track* (or inside-outside, representative-direct democratic) *postnational* theory. More specifically, this theory maintains the twin requirements of radical *democratic* influence and even control (RPS), yet also remains *effective* through its institutions and democratic procedures in spite of increased postnational *complexity* and exposure of *illegitimate power* through an ambiguous, Janus-faced subsidiarity principle. (This is the treaty principle which limits action, in the EU example, to areas "where it may be more effective" to act at a supranational level, rather than at the level of an individual Member State.)⁴

In the concluding chapter of Habermas' *A Berlin Republic* (1997), he asks whether it is even possible for democratic interchange to occur in the more complex supranational public sphere. How promising are some of the efforts to move the EU from becoming "a mere

⁴ Brown (1995) has unceremoniously declared this a principle of straightforward *decentralization*.

free trade zone" (Delors, in Ross 1995) to a nascent supranational system of interchange attempting to develop democratic procedures and rights that resonate with the public?

I argue that the various bodies, institutions and mechanisms in the emerging EU operate as the nascent "sluices" for the communicative action envisioned in Habermas' democratic theory. Nevertheless, these sluices --for instance, the various subnational- and national-level institutions, parties and governments, elites and rank and file members, and their own mass media, lobbies, interest groups, new social movement, and direct action pressures-- have not been clarified by either Habermas or other like-minded deliberative theorists.⁵ Yet, these emerging European institutions and their mechanisms for interchange provide us with a clearer understanding of the *Habermasian radically two-track* deliberative and procedural democratic model, and of the emerging EU-level model that is attempting to handle the ostensibly dilemmatic twin requirements of complexity and efficiency.

Habermas' *analytic* theory proves far superior to that of the ("naive") liberal representative democratic model towards unmasking the predominance and *illegitimacy of current power* relations in the European integration process. It is these power relations, particularly the predominance of economic rationality in the form of what the French call a *libéralisme sauvage* that are most endangering the capacity to develop any citizen-level enthusiasm for European Union and postnational citizenship identity. This term refers to the

⁵ Gorges (1996) argues that a form of expanded "Euro-corporatism" is emerging. This emergent constellation has some of the characteristics of the corporatism more familiar particularly in Germany, but with added processes for access to political opinion, and in some cases will-formation at the EU level.

one-side *economic* austerity, rather than complementary *social* visions that come with the convergence criteria for monetary union with its "economic imperatives [that] have become independent of everything else" (BFN 503; RG 261). This analysis belies many contemporary analyses which suggest that such solidary motivational problems stem largely from a matter of the "inevitable complexity" or efficiency problems stemming from administrative coordination.⁶

On the other hand, Habermas' procedural paradigm is useful in beginning to outline the *normative legitimacy and motivation* requirements for complex democratic public spheres and relations generally such as those of the EU. While such requirements are targeted against rational choice and elite theories, Habermas' normative model also recommends itself as an important balance to the radical democratic models that may one-sidedly vaunt direct and especially "local democracy" approaches. The problematic outcome of these ideal democratic approaches becomes clearer given the empirically verifiable complexity of supranational interchanges. They are even more problematic given the urgent, deepening and widening societal and economic forces and actors that democratic institutions and critical actors need to confront in a more immediate fashion, such as issues of reversing the trend towards increased poverty and environmental degradation.⁷

⁶ See Luhmann (1990; 1992) for the paradigmatic expression of this "neo-functional" view.

⁷ No less a radical than Saul Alinsky in his work *Rules for Radicals*, published just a year before his death and the distillation of a lifetime of grassroots organizing, emphatically noted that future action "must begin from where we are if we are to build power for change" (1971, 185). He was also for individual rights and against centralized power. He usually found

Nonetheless, what clearly emerges from an *overall* analysis of the more factual democratic capacity of institutions and a vibrant public sphere in general vis-à-vis the resources of power, money, and solidarity is the *relative* lack of emphasis which Habermas' analysis has paid to the catastrophic distorting effect that money at the *international level* has begun to wreak on his constitutional, deliberative, procedural, democratic model. While he has made this analysis at the national level, this project will highlight the effects of emergent transnational corporate rationality and its policy preferences, for monetarism, in particular, on his deliberative project for converting the communicative power of citizens into an administrative form, at subnational, national, regional, *and* international levels.

However, and positively for Habermas' democratic model, and critical social research generally, there is a relatively robust struggle occurring in Europe between those in favour of a more social constitutional orientation and those favouring a *purely* economic orientation. There is a recognition of the potential *appropriateness* of a supranational system of truly democratic coordination and regulation, with a separation of economic and political powers (Held 1995; Newman 1996; Habermas 1997), improved with transparency, and a two-track principle of economic and social and environmental public policy-making and implementation.

himself defending local rights against federal usurpations of power.

However, he knew that "local rights" --or, as the term has become known, "States rights" and "localism" "have been the star-spangled Trojan horse of Tory reaction" (1971, 16-17). Therefore, this project, while acknowledging the utmost importance of local and direct and individual action orientations and autonomy, recognizes that a one-sided inclination to local, subnational, or even national autonomy over (undifferentiated) notions of "central power" (read "government") often plays too neatly into the hands of those who already have sufficient informal, direct and indirect access to political, legal, and economic power.

Secondly, in terms of the broader **citizenship rights** dimension, as a potentially "postnational" union, I will consider how the EU conceives maintaining the relatively high level of social *acquis communautaires* of certain nation-states and generalizing those protections to the *supranational* level. We shall see that the main constitutional rights models (proffered, for example, at Intergovernmental Conferences) stem rather directly from contending economic and social frameworks. There is still a lack of "constitutional constituent assemblies" which may attempt to generate a broader consensus for such constitutions from a wider public, these conferences tend to be highly charged and ideological moments (Ackerman 1992), rather than the results of broader attempts at postnational consensus formation in a supranational public sphere (cf. Chambers 1996). As Professor of Law and Jean Monnet Chair at Harvard, J.H.H. Weiler puts it, it is not a matter that Europeans do not have a constitution, but that they have not had enough constitutionalism, that is, constitutional debate (Weiler 1997, 265).

I consider the enormous implications of this new supranational frontier for critical social theorists and investigate the features of the struggle for economic, cultural, and moral norms and "resources" (Preuß & Offe 1991) for the regulation of mutual recognition. In particular, I examine critical European arguments that *postnational identity formation and the legitimacy of the supranational system of governance* could be strongly enhanced with the interpenetration, and more particularly, making constitutionally justiciable the *sittliche* norms of the European civil society that is calling for "*a more social Europe*". In other words, that there would be a binding/bonding effect stemming from the rule of a more socially and

democratically accountable supranational legal, democratic, and economic paradigm.

The recent history of European integration is one which can be viewed as a move from its self-understanding as a purely *Economic* Community (the former EEC) to a European *Union*, a supranational union with entrenched social and democratic rights. Certainly, within the EU forms of *de facto* postnational citizenship, blurred borders, interdependent identities, cultures, environments and economies are emerging. Nonetheless, the broad sets of *de jure* rights for the proper exercise and understanding of that postconventional orientation continue to remain insufficiently "visible" and debated by North American critical theorists and thus by their civil and political societies. As a partial consequence, the national and supranational rights, or even political commitments to statutory provisions --particularly bodily/environmental, economic, social, and welfare-- are under considerable and growing threat from purely economically oriented regional and global models of society.

These models and their threats come from vulnerabilities to "globalized" and too often publicly unaccountable and administratively *unregulated* transnational capital --both money and productive facilities. The latter is currently *steered largely via "autopoietic," technological, market and financial systems and elite* logics rather than democratically accountable procedures (BFN 500).

Therefore, the question is not simply *whether* the move to a *supranational* system of coordination is possible, for it is occurring. Rather, the question is *how*, more precisely, could we establish procedures which, *pace* Hayek, simultaneously respect democratic, social, and economic rights? To hold oneself to an even higher standard of relevancy, we must ask not

only how is it *democratically, administratively, and legally* possible, but how is it to be made *financially* possible to ensure the conditions for democratic and legal autonomy?

This case exemplifies, and heightens the debates regarding *complexity and legitimacy* issues raging in political and sociological theory with a vengeance. Held has suggested that the challenge is

to think through the meaning of citizenship without falling prey to some serious objections arising from oversimplified and lazy conceptions of the 'state' or 'democracy' [...]. Although there is a need to formulate and give institutional expression to the demands of citizenship and democracy as closely-related issues, *it is also important to keep these questions distinct*. Democracy can only really exist on the basis of 'free and equal citizens', but citizenship requires some specification, and some institutional and political protection, separate from and beyond the simple extension of democracy. In short, in the relationship between citizenship and democracy a new balance is entailed, a new settlement between liberty and equality. (Held 1991, 23)

And the attempt at this new settlement is an old one to political theory. Nevertheless, *beginning to conceptualize the potential supranational and productive conditions* for a tentative settlement is the challenge of this project.

Such a challenge first requires that one redefines the normative bases of *political and legal legitimacy* via new "*interdependent*" *citizenship rights* which stem from, and would be justified by democratic requirements, both transcendently and pragmatically determined. Habermas' discourse theories of law and democracy are well-suited to this task (Rehg 1996).

Methodological Considerations, and the Contribution and Limitations of the Project to North American Critical Theory

Why has this project's *theoretic* dimension chosen to focus on the works of Habermas, and, by implication, critical theory? In some of his final interviews published in *Remarks on*

Marx, Michel Foucault (1991), one of the most influential theorists of what became French anti-normative theories, admitted to the interviewer that he assigned great importance to the Frankfurt School's critique and *separation* of "rationality from the mechanisms, procedures, techniques, and effects of power that determine it" (118). Indeed, "[w]hen I recognize all these merits of the Frankfurt School," Foucault notes, "I do so with the bad conscience of one who should have known them and studied them much earlier than was the case. Perhaps ... I would have avoided certain errors" (119). Nonetheless, Foucault justifies his self-admitted considerable intellectual oversight by suggesting that if he had encountered the School earlier on, he would have been "seduced to the point of doing nothing else in life but the job of commenting on them" (119-120).

It should be noted that Foucault's earlier work on power and his later work on ethics remain powerful, and are well-respected by second and third generation critical theorists (see NC chap. 7; PDM, and Honneth 1991). However, one cannot but be impressed with the integrity, in light of Foucault's above "confession", with Habermas who, as the inheritor of the earlier Frankfurt School's systematic and rigorous critique of modern Western capitalist society, not only confronted the daunting task of "commentator" to the innumerable themes and lines of inquiry (Freudian, Marxian, Hegelian, Weberian, etc.), but went beyond their enormous studies and (arguably one-sided) *critiques* of Western rationalism and capitalism, to actually suggesting *creative and practical ways out* of the paradoxes of modernity.⁸

⁸ Regarding his capacity to go beyond being a "commentator," see Lawrence's introduction to *Philosophical-Political Profiles* in which he characterizes Habermas' textual

Consequently, the *contribution* I wish to make with this dissertation regarding Habermasian scholarship is (as Foucault feared for himself) rather modest: through a

method. See also Baynes (1990), Dryzek (1995), or Blaug's (1997) review of the various uses of Habermas' communicative method more generally, but particularly regarding their *political* implications.

Secondly, we should always consider his critical method and his method for going beyond *critiques* of Western rationalism and capitalism to actually suggesting *creative and practical ways out* of the problems of modernity. In his critical theory, Habermas sees no sacred institutions or ideologies, cultures, or strong preferences. Instead, he puts his faith, if you will, in critical, openly communicating and always changing autonomous publics. Rather than viewing freedom and meaning for all residing in one group or institution, Habermas prefers to believe in autonomous, constantly reorganizing publics, communicating with one another, and at times communicatively or strategically struggling for recognition with other groups and institutions in civil society or the state, but with their background horizon in the recognition of human dignity, freedom through independent autonomous and solidary organizations.

Habermas' critical theory is characterized first, by "a reconstructive/synchronic (time independent) axis, along which lie the theories of communicative action, rationality and discourse ethics. Second, it has an empirical/diachronic (time dependent) axis, upon which we find the critical theory of society (including theories of colonization, crisis tendencies and cultural modernity) and the theory of social evolution. The practical intent of theory then expresses a function mapping the synchronic onto the diachronic" (Blaug 1997, 101).

According to McCarthy, one of the defining tasks of a critical social theory is to overcome the empirical/normative or fact/value split and the consequent separation of theory from practice. At its best, critical theory is also not simply interested criticism, but also concrete reconstruction. This notion develops from Horkheimer's *Zeitschrift* essays oriented towards a dialectical form of critique. Critique is distinguished from mere scepticism by the use of Hegel's concept of concrete negation. "In recognizing the dependence and limitedness of any finite truth or isolated perspective, that is, in rejecting its claim to unlimited truth, Hegel does not simply dismiss it out of hand. Instead, he finds for this kind of knowledge -- limited, one-sided, isolated-- its place in the total system of truth. Thus critique, in the Hegelian sense, does not result in mere negation, in the simple assurance that all determinate knowledge is transitory and worthless ... " (McCarthy in LC x). However, whereas Hegel understood the dialectical method of critique as part of, both empirically and normatively stemming from an *idealist* system, Horkheimer attempted to ground his critique *materially*. One must not forget that one's own categories stem from a definite experience and time-bound interests which influence even the dialectic of thought, the choice of material, names, and words to describe the facticity or normativity of worlds (Honneth 1995).

respectfully close reading and interpretation of Habermas' original works, I evaluate their usefulness for critical democratic and rights theory in the emerging supranational context.

The list of *limitations* of this project regarding Habermas' work are more extensive than its positive contributions. I do not, for instance, pretend to make an original *interpretation* of Habermas' work, and particularly to "settle" the largely *philosophical* debate regarding the "ultimate" viability of the linguistic turn in political, legal, and moral thought.⁹ Nonetheless, counter to certain poststructuralist positions, I concur with Fraser (1989 13, n.2) that a distinction needs to be made between totalizing metanarratives and narratives which offer a "big diagnostic picture" that are empirically and politically useful, and thus counter the dominant (neo-liberal and non-reflectively neo-conservative culturalist) trend towards "small picture elites" (Saul 1995).

Secondly, one is certainly tempted to follow Habermas back to some of his original, philosophic interlocutors, particularly Kant and Hegel, or in terms of his political sociology, to Marx and Weber, in order to compare and contrast their conceptions of, for instance, autonomy, publicity, civil society, the social contract, judgement, etc. However, while certain distinctions between these *maitres penseurs* will be made in order to indicate the "improvements on theoretical insights" that Habermas has attempted to make, *the primary*

⁹ In accord with Habermas, I consider questions of "ultimate foundations" (of truth, for instance) a largely philosophic issue which is, for the purposes of this dissertation oriented more towards a practico-theoretic intent, unanswerable. The issue of "*Letztbegründung*" is, however, an unavoidable and recurrent issue in any even theoretic discussion of the relation between theory and practice (see his definitive statement on the issue in "Philosophy as Stand-In and Interpreter" in MCCA).

purpose of this dissertation is to evaluate and apply what is useful in Habermas' normative theory of communicative action, especially as elaborated in *Between Facts and Norms*, to the domains of legal and political theory for contemporary democratic politics (cf. Benhabib 1992, 89).

Following Fraser (1989), I take seriously Habermas' contention that his work is oriented towards a "practical intent" with emancipatory potential. I will therefore compare the adequacy of Habermas' work, not so much for its internal coherence or interpretive fidelity of the canon, but largely for its apparent *theoretic, political and empirical ability to provide a coherent, compelling politically and motivationally effective basis for social criticism and creative action* against rhetorically egalitarian and liberal pluralist approaches. In so doing, he will be compared to often "utopian," or more problematically, non-normative, radical democratic, anti-foundationalist, or anti-foundationalist poststructural strategies. Although I argue and defend a moral, economic, and political position against currently rampant agendas of *libéralisme sauvage* and the reckless effects of its social and environmental devastation, I am less polemical in my rendition of the contribution of non-normativist strategies. Nevertheless, I am often as critical as Habermas regarding the often unintended (one would hope) consequences of their anormative, even anti-normativist and one-sidedly anti-institutionalist and anti-universalist orientations¹⁰ (PDM; NC; Honneth 1995).

¹⁰ As McCarthy notes in the introduction to Habermas' MCCA, "Postmodernist critiques of moral universalism too often simply ignore the fact that it is precisely notions of fairness, impartiality, respect for the integrity and dignity of the individual, and the like that undergird respectful tolerance of difference by placing limits on egocentrism. Typically, such

In addition, I both uphold Habermas' wish for his theoretic work to be "tested" along a "reconstructive/synchronic" as well as an "empirical/diachronic" axis by referring to the *European* context (see below) to *illustrate* and exemplify his theoretic insights. Admittedly, there are necessary limits to the depth which such a case study can "test" the workability of his democratic project.¹¹ The twin challenge of this project --to tame the theoretic abstractness and complexity of his works and "apply" it to the emerging postnational forms of power-- requires a "powerful synthetic effort", consolidating aspects of sociology, law, political theory and political economy (Offe 1997). Due to this challenge, it is difficult, as Habermas himself

notions are simply taken for granted in anti-universalist invocations of otherness and difference --which are, it evidently goes without saying, to be respected, not obliterated" (MCCA xiii, n. 12).

¹¹ Michael Pusey (1991) in *Economic Rationalism in Canberra: A Nation Building State Changes Its Mind* produced a social scientific application of Habermas' TCA and concerns an analysis of Australian politics. It empirically studies the aggressive economic and market-oriented rationality of members of the senior executive in the federal government in the late 1980s and their influence over policy-making.

Pusey analyses these findings via Habermas' framework of rationalization and modernization. With these glasses the economic rationalism in Canberra manifests the increasingly one-sided rationalization of Australian society, in which the "systemically co-ordinated behavior" of the market displaces "communicatively co-ordinated action."

Pusey compares this development with the more discursive and participatory political style that characterized national politics just a decade earlier in Australia. In addition, *he contemplates a future of restituted communication between civil society and the state, with the particular example of European-style social democracy* (Dryzek 1995, 103).

My example looks not so much at social democracy in individual European countries, but rather at the success that the newly minted European Union and its countries, particularly that of France and the strong socially- and environmentally-oriented parties' presence have in the EU parliament to introduce a social charter with rights that somewhat reflect the rights configuration envisaged by Habermas. This represents not only an approximated empirical example of the normative constitutional model of rights, but also an example of what could be attempted in the North American environment beyond the current, narrowly economic, free-market model.

admitted in the first preface of his own *Habilitationsschrift*, to "master several, let alone all, of these disciplines," never mind apply these insights to an in-depth (and technically satisfactory) study with the complexity of the EU.¹²

Methodologically and politically, one may look towards Habermas for the comprehensiveness and depth of his general empirical and normative social theory: comprehensive in terms of looking *across* the philosophic, legal constitutional, democratic, and social approaches and conditions for justice. Habermas supports the "critical-reconstructive" method (LC 141) with an empirico-normative theory not imprisoned by the status of the one or the other. I join Habermas in his move in BFN to balance his work with the *reconstructive* project (as opposed to "shifting" it from the critical *aspect* which informs the normative options). Nonetheless, he still has not balanced his highly abstract, normative framework with

¹² On two stylistic notes, since this project is attempting to bring to the *general* critical theorists' attention the more recent, "applied" and perhaps unfamiliar work of Habermas' (particularly his work concerning rights) as well as the European integration process (with which many North Americans are unfamiliar), I have made extensive use of *endnotes*. This aims at improving the flow of the *main* arguments and the accessibility of the material generally. Therefore, the reader is invited to read the Endnotes where indicated as a *supplement* to gain more in-depth information on some of the theoretic and political issues raised.

Secondly, despite the tremendously rewarding nature of Habermas' complex work, owing to the (in)famous difficulty (McCarthy 1973, viii) and density of his writings, they lay themselves open to varying interpretations. In order for the reader to benefit from Habermas' *own* formulations of his culminating thoughts on the often contentious issues offered here, I often allow for full and extensive quotations from his work. I believe that although my own interpretation on the wide themes of his work is significant, I do not pretend to be able to provide the reader with a formulation of the *meaning* of his work better than Herr Habermas can himself. These extended quotations offer the patient reader some additional idea of the rewarding nature that delving into the complexity of his thought can provide.

empirical-analytic work as he had begun with in, for example, the STPS.¹³ But again even there, it was largely a *critical*, rather than a reconstructive effort. Instead, he has spread these dimensions --critico-reconstructive, and empirico-normative-- out over his thirty years. I will attempt to dialectically synthesize these approaches, favouring a *balance* of the normative as from BFN *with* the historical-empirical theory of STPS.

On the other hand, the synthetic and visionary work of *David Held* (who, along with John Keane, may be considered a member of the British second generation critical theory school) has usefully put the pieces for a reconstructed democratic *Rechtsstaat* into somewhat clearer view in his work entitled *Democracy and the Global Order* (1995). Even more critically however, Held brings systematic treatment to *the changing supranational nature of the conditions of democracy and rights, such as the international character of political, economic, legal, and cultural systems, clarifying the implications of those international changes on democratic projects* (1995, 136). Significantly in this regard, Held explicitly views his democratic project as having a "parallel conception" to Habermas' rather more broadly cast project (1995, 157). Nevertheless, Held goes beyond what appears to be recently one-sided emphases (even in Habermas, but in critical theory generally) on culture and identity questions.

¹³ See his lamentation regarding this point in the second preface to the German (1990) edition of STPS, reproduced in English as "Further Reflections on the Public Sphere" (RPS). Nonetheless, owing to the fact that I have come to consider Habermas "ein Meister Denker" of comprehensiveness with a practical intent, I somewhat, indeed very reluctantly followed Johann Wolfgang von Goethe's (1983, 203) admonition: "*Willst du dir aber das Beste tun,/So bleib nicht auf dir selber ruhn,/Sondern folg eines Meister Sinn,/Mit ihm zu irren ist Gewinn.*"

These have culminated recently in "the ethical turn" and critiques of administrative, bureaucratic, and governmental ("monarchical") power in general, at the expense of *appropriately situating* these important analyses and resources of solidarity and power among the awesome but nonetheless tameable resources of international money.

In keeping with the more practical intent of Habermas' original project, yet maintaining the fruitful tension between the "transcendental-pragmatic", philosophical-empirical, or ideal-attainable (Held 1995) dimensions, my work prefers to focus on attempts to retain the richness of these two methodological dimensions without falling into one or the other. For instance, in Chapter One, there is a preference for highlighting Habermas' attempt to bridge "ideal" conditions of popular sovereignty and deliberation with the needs of a complex and effective state. This may be contrasted with many Habermasian works (for example, Dryzek 1991; Fishkin 1992; Chambers 1996; Benhabib 1996) that continue to emphasize the *ideal or abstract procedures*, or more generally, the ideal type of "the political" towards the achievement of democratic legitimacy, rather than complementing this (a) with *complex, actually existing* possibilities --and hence perhaps (b) more plausible conceptions-- for influential interchange which do not set up unattainable, unbridgeable conceptions of the democratic process.¹⁴

¹⁴ See Cohen and Roger's (1995) "associational" project and Nancy Fraser's critique of it in the same volume.

The objectives of both Habermas and Held's different models of democracy point us in the right direction. However, Habermas' articulation remains at a highly abstract philosophic level. On the other hand, Held's is oriented towards a radically reconstructed *United Nations* as the (beginning) site for a more truly global-level model. The usefulness of

In an attempt to fulfill the above two demanding requirements, the **European example**¹⁵ is most useful insofar as certain actors within and many outside of it have made it the only "actually existing" and hence plausible *supranational action system* which has made any real attempt to integrate a *communicative rationality* into its system's functioning. This contrasts, must we emphasize, with the other *competing* model of supranationalism (or, more accurately, intergovernmentalism and globalism, regionally set in NAFTA and ASEAN, and globally within the looming threat of normative agreements such as the MAI, the Multilateral Agreement on Investment) which use not so much *nationalist*, but increasingly purely *economic reasoning* as the basis for both economic and political decisions which affect the roles, values, and vision of members of civil society.¹⁶

this project, which uses the EU model, is that one does not have to reach so far into a utopian future as Held's UN socio-structural dynamic, although his work still adds something useful to the rather highly abstract philosophic-theoretic critiques that Habermasian works often find themselves oriented towards. Rather, the EU example is useful in order to understand the more tangible possibilities and dangers of a postnational systems-lifeworld constellation. The EU example is *emerging*, and it is emerging from a vibrant and self-reflective political culture which provides us with some of the philosophic, sociological, and political tools to deepen our understanding of possible responses to the dangers of the likewise competing, powerful, and hegemonic neo-liberalism that has rolled over some other previously well-embedded welfare-state systems.

¹⁵ Methodologically, I use a downgraded (in the terms of the more empirical social sciences) notion of the EU as an "example" rather than a "case study." The latter suggests more empirical rigor than has been attempted due to the nature of this project. See my comment below on Habermas' approach to his *Habilitationsschrift* regarding, for example, his use of "the model case of British development" and its "continental variants," especially revolutionary France, in the structural transformation of the eighteenth century public sphere (STPS, sec. III).

¹⁶ For instance, citizens are encouraged, and in some countries have only the option of learning technical forms of knowledge which are useful for the functional needs of the

Although Habermas has certainly signalled the need for a supranational (not merely postnational) level of analysis, he also lamented the fact that such attempts tend to lead to abstraction (BR 168). Given already the difficulty in *theoretically conceiving* the complexity of the interchange relations between the state and civil society proposed in Habermas' work, the inclusion of *another level of complexity*—the supranational, in addition to the national and subnational levels-- calls for a heuristic tool. This is again provided by the European Union.

Therefore, the decision to refer to the EU case and the analysis of Habermas' work at a supranational level is not a gratuitous academic act to increase the complexity of critical thinking in these theoretic and empirical dimensions. In fact, it is based on *de facto* changes, changes which Habermas has recognized are the frontiers that critical theory must face if it is to remain *relevant* and maintain its analytic and normative *power* today.

In addition, the EU case is used, not so much for an analysis of the *nature* of the supranational changes, for this has been foreseen since even before Marx.¹⁷ Rather, the EU case is used for a better consideration of the critical *options* deriving from these new regional and international forces and their implications on Habermasian democratic projects. And most importantly, I focus on *how* critical democratic and social theorists in *North America* can translate the lessons for these struggles to their context.

By concentrating on the "actually existing" democratic procedures and rights in this

economic system, rather than a complementary civic education necessary for understanding the importance of democratic struggle, institutions, principles and procedures.

¹⁷ For example, Kant referred to the necessity of conceiving affairs in a *cosmopolitan order* due to the limited size of the world (Kant 1996, 6:311).

new supranational democratic environment, I am suggesting two things. First, this is not a merely philosophic and "naively normativist" investigation since, as the EU example helps *empirically* show us, these democratic and citizenship rights are *attainable*. Secondly and consequently, this empirical reality provides critical *theory* generally with a useful antidote against arguments, particularly of the recently ascendent "*laissez-aller*" school that global forces of economic and financial competition preclude nation-state and certainly supranational-level regulatory and democratic reasoning for its effective functioning.

This is important for those with not only an "interest" in emancipatory knowledge (KHI), but also for those wishing to restimulate a *passion* for social justice, reject the "false necessity" of certain dominant points of view (Unger 1987), and instead develop a more civic, less juridifying, but nonetheless essential form of the social, economic, and environmental responsibilities of the state and *all* social actors who benefit from its rule of law (BFN 407). The dissertation attempts to retrieve the *notion that such a reconstructed welfare state*, with its Social Chapter protections is possible and highlight what such "postnational" state-society relations would look like from a Habermasian, and renewed T. H. Marshall perspective.

Methodologically, this offers "an occasion," as Habermas puts it, "for the conceptual clarification of some normative perspectives from which we can gain a better understanding of" the complex empirical internationalizing trends, and Habermas' normative democratic theory (BFN 492). Habermas' *Habilitationsschrift* analyzed the structural transformation of the public sphere in Europe from the eighteenth to the second half of the twentieth century. This study continues this analysis of the structural transformation, not so much at the level of

nation-states and their internal public spheres, but at the level of an enlarged, intertwined supranational public sphere, and the challenges to the new levels and forms of interchange, and governance, particularly between the supranational level and the European civil society context.

Due to a still incomplete bridge-building between European and North American critical social theory there has not been sufficient *social visibility* (Rosanvallon 1988) of the European experiment and of the practical implications of the Habermasian model's postnational character. This dissertation is meant to *help* provide a theoretic and empirical basis for building further bridges between North American and European critical theory, especially highlighting the latter's diverse, historically and philosophically nourished and nourishing conceptualizations of struggles for recognition. This research project attempts to act as a "sluice" towards creating more *vigorous debate in North America* regarding the "European experiment" and reconceiving a more reflexively Kantian democratic framework for securing private and public autonomy under emerging supranational political, legal, and economic forms of governance.

The struggle over the forms of governance in the Union represents what can only be described as an extraordinary world historical "moment" in the effort towards actualizing or *bridging the gap* between Kant's moral cosmopolitanism and Hegel's *sittliche* sensibilities. The mapping of the historical and emerging characteristics of some of this political culture in contemporary Europe, reconceived to the North American context, could offer an *important politico-philosophical normative impetus towards reversing the currently dominant, and yet one-sided, Hayekian conception of the basis for democratic legitimacy and the rule of law.*

This Hayekian conception is moving from its hold over national-level political, legal, and economic thought to supranational forms of governance (Held 1995; BFN).

The EU action systems are an example of an emerging social model which, although with important reservations, is developing not so much a postnational identity perhaps (Matustik 1993), but rather *supranational*-level democratic sluices and institutions as well as a constitutionally embedded Social Charter. The EU provides, I argue, both the potential precedent and the *more appropriate level*—in terms of funding, coordination, regulation, etc.—for securing not simply the negative liberties of political and civic rights, but also positive, social and environmental and bodily rights. In addition, the EU model allows us to "apply" the attempt by Habermas to dramatically *democratize* what should be the *institutions* of democracy and law for the improvement of the *autonomy of the lifeworld* in the sense of universalizing the preconditions for equal participation in their *Sittlichkeit*, their ethical-cultural communities. Lastly, this model can make Habermasian radical *democratic* and citizen *rights* theory *expand* ("*Drittwirkung*" BFN 247) by forcing critical democratic and rights theorists to actually consider whether the paradigmatic, intersubjectivist theory which claims sociological as well as normative validity in fact works in this increasingly relevant supranational --potentially *interdependent* rather than "*globalist*" (Dewandre 1992)—environment.

The *contribution* to democratic and legal theory by critical social theorists through research on the emerging EU could be significant. However, a reluctance to *engage* in "beyond power" debates are still hanging over the collective memory of many critical social theorists.

Critical and, now more than ever in the past half-century, *normative* social science research is necessary to facilitate the dialogue on multiperspectival cultural, social, economic and legal **alternatives** and make a difference for all the citizens in the North and South, East and West caught in the alienating, massifying, immiserating, privatizing, consumerist spell of a *particular*, but *unfortunately, currently dominant* form and logic of modernity (Held 1994). Habermas' extensive works are useful in attempts to normatively justify, and empirically legitimize,¹⁸ giving *Europa* a "second chance" towards the *deepening of the ideals of the French Revolution*, and discredit the McDonaldization (Barber 1994) or increased steering of European social and environmental public policy via one-sided culturally embedded, technological systems and perhaps most significantly *economic* "rationality" orientations.

Critical social theorists have tended to remain with the original image of such institutions as the EU as largely dealing with "foreign relations" and obscure "financial affairs". Indeed, these were the original foci of European integration as reflected in the Directorates-General (DG) in the Commission. However, the enlargement of the *list* of the DG, its increased differentiation (Edwards & Spence 1994, 114-116), like that of the European Parliament's list of standing and ad hoc committees (2.1) highlight the differentiation of

¹⁸ Justification in democratic, social, regulatory and economic policy areas, according to Habermas, would be based on principles which reach beyond creeping one-sided neo-liberal, economic rationalist, rational-choice or realist politics and administration. He wishes to *balance* the functional requirements of economic, legal, administrative and political efficiency with social, civic and welfare rights of citizenship for the *legitimacy*, proper and continued autonomous functioning (BFN 78) of political subsystems. This work tends to emphasize perhaps more than Habermas has that this political functioning needs to be autonomous particularly from the influence of financially powerful interests.

possibilities which should be directly and creatively accessed by autonomous publics (see Nugent 1994, 167).

As Habermas' replacement as the Head of the Faculty of Philosophy at Frankfurt, Axel Honneth¹⁹ has noted, a "central problem of the critical theory of society" is that if "a theory is to do more than merely appeal to the ethical standards upon which its critique of society is based, then it must prove the existence of empirically effective forms of morality with which it can reasonably connect" (Honneth 1995, 205). Accordingly, this project attempts to uncover within the emerging EU an historically *situated* morality, instead of simply relying on references to the internal coherence of Habermas' *normative* theory. I will suggest that the EU model can act as an historically effective morality to link it to more ethically founded norms that can *combine* to act as a catalyst for a more *cosmopolitan* basis of justice.

These tentative solutions stem from a "reflective attitude" (BFN) on the EU supranational case that is itself conceived within the emergent international context. While

¹⁹ Most of Honneth's work on Habermas has entailed a "friendly" and indirect critique of Habermas' crisis theory (1995, 207). While I engage in a similar form of critique, I depart in two significant ways. First, as mentioned above, I focus more on Habermas' normative rather than crisis theory. Secondly, although I agree with Honneth that Habermas' "communicative theoretic" framework is most usefully complemented by a deeper understanding of a "recognition theoretic" dimension, I am more convinced that Habermas' culminating focus on theorizing means to reconceptualized and use the *institutional* discourses of *law* and *democracy* are more credible bases for social criticism in the medium- to long-term than the more open-ended road that has been signalled by much of the "recognition theory". However, if the *complementary* capacity of Honneth's theory towards providing a "macro-sociological analysis of potentialities for critical normative action" (Honneth 1995, 207) is kept in mind, unnecessary and academic divisions between the two normative bases for social criticism need not spill much ink.

Habermas' discourse theory is useful in terms of specifying some very particular means by which the system could be made more democratically legitimate, an at least equal contribution to knowledge is made by the application of the EU model to improve not only the empirical, but also the normative deficits of Habermas' theories of democracy and rights.

The purpose of the empirical dimension of this project is not so much to focus on how we could contemplate a more just *Europe tout court*.²⁰ Instead, my primary interest in the European integration process is to use its currently more advanced considerations and even implementation of a more *social and democratically*-based system to exemplify a struggle between the conflicting values (Weber) and interests (Marx; Parsons) of economic, versus more communicative rationality *models* for further *global* and *regional* integration.

An analysis of the current historical juncture demonstrates that there is a colossal, though rather muted, struggle occurring over the precise procedures and principles that will be *institutionalized* concerning global treaties of not only trade, and increasingly investment, but even the imposed limits of democratic accountability. As the current boundaries are being drawn, critical social theorists should be well aware that if the model being pushed for by those with considerable international economic resources have their way, the democratic and legal model which becomes the global normative framework with *legal power* will *not* be between (New Deal) liberal or communitarian, or liberal and social-welfare models, but rather between

²⁰ Even though this is a concern in Europe as well as the capacity to maintain socially and democratically just relations is coming under pressure with the regional economic and monetary union, as well as from globalizing economic forces (BR 181).

ultra neo-liberal and liberal approaches. Currently, stateless corporate actors and neo-liberal government representatives are the main authors, but not the main addressees, of such far-reaching, really "global constitutional" treaties (Schneiderman 1997).

Fortunately, however, there is some reason to suspect that the fog in which critical social and political theorists and actors found themselves recently is beginning to lift. Reflective in the immediate aftermath of 1989 on the one hand, and stunned by the extraordinary (compared to the previous twenty to thirty year period) savagery with which the neo-liberal/conservative revolution would disregard what were thought to be *morally* if not *legally* entrenched notions of human decency –such as dialogue with political prisoners on hunger strikes, debate over the means by which unsustainable deficits could be brought under control without ignoring the provision of decent standards of living for the unemployed, continued debate over the possible means to integrate environmental protections with economic development projects, etc. There is some recognition of this need by Habermas, especially for instance in the development of his work from an indignant pessimism of a precocious intellectual in the sixties concerned about the lack of a truly “culture-debating” society; to an abstract system/lifeworld sociologist in the *Theory of Communicative Action*; to an equally abstract philosopher of retrieving a seamless theory to support the ideal moral point of view; finally to his latest work which looks at the attainable possibilities for entrenching *legal* and political protections to the moral intuitions of a publicly debating society.

Outline of Chapters

This dissertation is divided into three Parts, and five main Chapters. While the First Part considers the normative versus the situated supranational *democratic theories*, the Second Part examines the *rights theories*. The Third Part elevates the analysis of the possibility of achieving these regional and supranational democratic and rights dimensions within an empirically “globalizing,” neo-liberal environment through normative (neo-Kantian) proposals for a *cosmopolitan* legal order.

More specifically, in the *first* Chapter I compare the normative liberal, republican, radical, and Habermasian deliberative models of democracy and their conceptions of the role of the *state* (1.1). I argue that Habermas uses the proceduralist “two-track” conceptualization of the democratic process in *Between Facts and Norms* to help bridge the gap between *institutional and less formal political publics*, as well as between overly fearful liberal and overly “idealist” or abstract conceptions of the political (1.2). In addition, I signal the growing importance of theorizing *supranational* forms of power, identity-formation, communication, and conceptualizing the two-track model towards political, legal, administrative and economic constellations with a supranational-level as opposed to a merely national-level analysis (1.3).

In the *Second* Chapter, I outline the more promising aspects in *the structural transformation of the European public sphere and its political, administrative, legal, and economic forms towards public policy formulation*. This transformation has been precipitated by the institutionalization “upward” of various forms of communication that may act as “sluices” for alternative employment, income, environmental, and other ethical and need

interpretations in the European Union. I highlight the usefulness of certain, admittedly more guardedly optimistic, understandings of the EU's nascent democratic systems/lifeworld model. These processes show a potential (particularly for North American critical social theorists faced with a *naked free trade rationality* with absolutely no integrated social and employment policy requirements) to vertically communicate between affected publics and administrative institutions at the supranational and national levels (2.1). The success, current and potential, in the normative distribution of power and influence towards European-level identity formation is considered vis-à-vis Habermasian criteria for democratic legitimacy which are outlined in my first Chapter (2.2).

In the *Third* Chapter, I return to *Facts and Norms* and Habermas' justification of an expanded and restructured, intersubjective paradigm of law which points beyond the juridifying liberal and even welfare legal paradigms (3.1). I also augment Habermas' abstract and intersubjectivist paradigm by fleshing out its more substantive, especially economic right, possibilities within the philosophy of law (3.2). I then consider the binding/bonding use of a constitutionally justiciable, supranational Social Charter as a *legal instrument* towards increasing social cohesion in more complex postnational lifeworlds (3.3).

In the *Fourth* Chapter, I track these legal paradigms historically (4.1), ending with the current struggle for constitutional social and employment rights in the EU's Social Charter, especially in light of the 1997 Treaty of Amsterdam (4.2). I argue that the EU Chapter's inclusion of social and employment provisions into the legal framework of a supranational action system stems from an acknowledgement of the social and economic citizenship rights

requirements for democratic participation in increasingly complex opinion- and will-formation processes and thus represents *an important historical-constitutional moment*. These *legal provisions and political "commitments"* constitute an *Entfaltung* towards fulfilling the "system of rights" as essential for a robust, communicatively active and competent postnational public sphere, and for the latter's capacity to influence expanding supranational institutions such as those of the European Union.

Consequently, I consider (4.3) the growing movement in the social and political spheres towards reduced work time in Europe to be a viable means towards coordinating the essential ends of meaningful *interaction and participatory life*. Such access to *both* income and time for interaction is key for a *vita activa* and *vita contemplativa*, or higher-level intersubjectivity. These are essential in order that citizens, as one of Habermas' colleagues of the *Kritische Justiz* movement, Preuß (1996, 553) puts it, "cope with alienage in their daily lives" stemming from such complex, postnational legal, social and political settings.

In the *Fifth* and concluding Chapter, I describe (5.1) some aspects of the current neo-liberal agenda, its global character, and the impact of this *political economy* on the viability of deliberative democratic projects. I argue that neo-liberalism, and its fiscal policies of monetarism, have been instrumental in leading to the downloading of *funding* for programs and institutions necessary for social integration and democracy. I highlight the distorting effect that this extreme ideological form of economic rationality and power is having at the *international level* and consider its implications for Habermas' theoretic and more concrete constitutional, procedural, democratic models (such as the EU). From this political economy

perspective, I shift to (5.1.2) signalling how the neo-liberal agenda is attempting to entrench rights of pure economic rationality in internationally binding legal regimes. Thirdly, (5.2) through further justification from the recent work of Habermas and Held, I point toward the need for what Held refers to as *cosmopolitan democratic law* underpinning any regional or international normative agreements. Finally (5.3), I examine how “the EU”, or rather, the model of a socially and environmentally responsible Europe described earlier, can act as a wedge to prevent the full-scale entrenchment of the neo-liberal agenda.

In the *Concluding Remarks* I draw some conclusions of short- and medium-term relevance to the European integration process, as well as more general conclusions regarding Habermas’ contributions to North American critical theory. In particular, I suggest that with the *de facto* blurring of borders and the globalization of civil society, politics, and legal and economic systems, a *conceptual and identity gap* is presently emerging. This project ends with reflections on the filling of this gap with a reconstructed project for *Verfassungspatriotismus* (constitutional patriotism).

An *Appendix* seeks to provide some conceptual background to Habermas’ theories of democracy and rights. It provides an overview of four elements in particular: a brief *annotated bibliography* of Habermas’ principal works; a brief overview of an important thesis of Habermas’ *discourse theory of society*; a longer consideration of the framework for his *discourse theory of morality*; and finally some *critique* of certain tendencies in Habermas’ work from which this project attempts to depart.

1. Habermas' Discourse Theory of Democracy: Assessing Its Usefulness for Critical Democratic Theory

According to one of the most influential contemporary social and political theorists in Germany, Jürgen Habermas, theorists with a practical interest must not abandon the emancipatory potential of public and state *institutions*, but rather highlight their *duality*. More specifically, they should highlight not only the loss of freedom and meaning stemming from the penetration and colonization of economic and administrative logics into civil society, but also their potential for institutionalizing the normative bases for social criticism and the administration of justice "out of itself" (PDM 7) towards improving citizens' civic, political, social and economic autonomy (TCA2 391). The primary purpose of this chapter is to consider the political soundness of Habermas' attempted (Kuhnian) paradigm shift from subject-centred to a *deliberative* and *radically procedural* basis for will and identity formation --at both the individual and collective and even postnational level-- *reinforced by reconstituted institutions* that would systematically help in the securing of both private and public autonomy via a two-track conceptualization of the polity.²¹

I begin (1.1) by comparing Habermas' attempt to reconstitute a more meaningful, radically deliberative and procedural democratic process by borrowing from the normative liberal and civic republican models. The adequacy of his deliberative paradigm concerned with securing both the private and public autonomy of citizens is considered. The attempt is made

²¹ See Hutchings (1996, 59) suggestion that Habermas' critical theory, far from representing a paradigm shift simply "repeats much of Kant's critical philosophy."

to retrieve the meaningfulness of the formal political institutions within more complex public spheres²² as well as the communicative power of civil society from the deformations of the logic of the subsystems of administrative power and, more particularly, *global* money.

One can then (1.2) examine this model more closely through Habermas' most recent work *Between Facts and Norms* where he attempts to *conceptualize* the *interplay* between autonomous publics and the formal sphere of political will formation while avoiding *the twin pitfalls of a naive normativism or false realism*. Borrowing from Bernard Peters, Habermas develops his "*two-track*" notion of the role, meaning, and status of these respective spheres and his conception of the processes of their interplay in a reconstructed constitutional democracy. With it he seeks to conceptualize the "hinge" in the boundary dispute between more informal and more institutional realms of will-formation.

This two-track conception is based on, among other things, a certain conception of the capacity for autonomous publics to interpenetrate and influence the "strong" public spheres (Fraser 1997) of the state and its judicial, administrative and political decisions. However, (1.3.) David Held (1995 & 1997) has systematically outlined how *the traditional model of state and society relations is insufficient* today in conceptualizing the facticity of *supranational* level of constraints --and normative possibilities-- towards exercising democratic citizenship. As Habermas (1997) has pointed out in *A Berlin Republic*, due, for instance, to the

0. Keane (1995) has flagged the changing complexity of the public sphere, particularly from the perspective of the increased borderlessness of the media. In addition, he usefully signals the dangers of the emerging more complex supranational public spheres, cautioning critical social scientists from looking for a *single* source and site for public interaction.

intensification of technological capacities, the understanding of a two-track model of interchange between informal communicative spaces and more formal spheres must take more seriously the nascent conditions caused by *supranational*, i.e., *regional* and *global* identity, economic, legal, and political alliances and disjunctures in order to, for instance, tame the autonomization of globalized markets which are wreaking havoc with lifeworld, environmental, and political conditions.

1.1 Normative Models of Democracy

The two dominant normative democratic models in North America are the *liberal* and *republican* models. The popularly understood means for social change on which most citizens in Western democratic societies rely is the (liberal) state. However, there are divergent views of *how* and *why* the state institutions change. Related to these views are the modes of legitimacy, conceptions of the process of political will formation, the relation between the state and civil society, the conception of rights, and the modes of justification in decision-making.

The dominant **liberal** ("pluralist" or "common good") theory stems from the seventeenth century writings of John Locke. It views the elected representatives and appointed bureaucrats of the state as both leading and reflecting public wishes for change. The central tenet of the inviolability of individual liberty in the liberal state concerns their *concept of the individual* as having as much influence on the apparatus of change --the legislature-- as does his or her neighbour. Thus, although there is a plurality of wishes within the populace, those who seek change according to their conception of the good have equal access to the democratic process to do so. The role of the "people's representatives" is to aggregate public

opinion, debate it among themselves in parliament, and then decide which changes need to be formulated for the "common good" of the electorate.

The purpose of the constitution is viewed largely as curbing the administrative power of the state through basic rights, separation of power, and statutory controls. In addition, classic liberal theory views the *motivation* for political interaction directed through the competition among political parties and between incumbents and opposition as they take adequate account of societal interests and value orientations.

This view of politics is one-sidedly state-centred, oriented towards making political decision-making *efficient* since it concerns itself less with the "*input*" and participation of citizens than toward the "*output*" of decisions by a government for efficient economic and social functioning. In the words of Anne Phillips, however, liberal democracy represents a "frightened kind of politics," concerned as it is with the potential for the disruption of administrative power by citizens who might interfere with the "smooth" functioning of government and with the latter's primary role of protecting civil society as a realm for free commerce among private and corporate citizens (1991, 15).

The liberal model is interested less in constructing processes which encourage the democratic self-determination and *self-understanding* of citizens through their common deliberation than in creating a separation of powers which allows for "a realm of freedom" in order that economic actors may operate free of state intervention. Such a constitutionally-guaranteed separation of economic and administrative realms is supposed to secure an essentially non-political common good by satisfying personal life plans and private expectations

of happiness protected by individualized rights and freedoms (BFN 298; Preuß 1995, 11; PDM on Marx, 393, n.13).

According to the liberal or pluralist view, the democratic process is effected exclusively in the form of compromises among interests. Rules of compromise-formation are supposed to secure the fairness of results through universal suffrage with representatives sitting in parliamentary bodies, the mode of decision making, rules of order, and so on. Such rules are ultimately justified in terms of liberal basic civic and political rights. While for republicans the separation of the state apparatus from civil society is to be lamented, for liberals, such a *gap* should not be eliminated but only bridged by the democratic process.

The **civic republican** and Habermasian models of democracy differ from the dominant liberal model in several ways. Neither view individually-aggregated opinions, such as those that stem from the voting system, as adequately constituting public judgment. Instead, political consensus is seen to emerge from ongoing public deliberation, not the competition of individually-aggregated and defended ideas. Also, in contrast to the notion that mere "free speech" is the cornerstone of democracy, Habermas and the civic republicans highlight the principle of dialogue, not monologue as essential to political will formation.

Both civic republicans and Habermas pay attention to the importance of widespread *discourse* and *civic participation* in the public sphere as essential to counterbalance the dual pressures of the power of the state and market. They conceive of the public sphere as both a process by which people can deliberate about their common affairs and as an arena in which this can happen naturally. Their work is aimed at establishing a normative framework for a

more vibrant and robust public sphere as well as preserving it from the erosive, massifying, commodifying, normalizing and reifying influences of modern economic and juridified forms of social relations. Furthermore, the most effective political deliberation is viewed as occurring between citizens rather than simply between citizens and their representatives in the formal political system (DNM 16).

The civic republican view of democratic will-formation in particular takes the virtual opposite form of ethico-political self-understanding and self-determination. Here, deliberation can rely on the substantive support of a culturally-established background consensus and principles shared by citizens. These principles --such as the concern for social programs-- are seen to have a socially *integrative* function and offer a "pre-understanding" that renews itself in ritualized celebrations and discussions. This can be a highly important solidary mechanism towards encouraging a society's self-understanding of the importance of, for instance, certain notions of the good society which may include particular kinds of social and political rights.

According to the republican view, deliberation and often direct political *engagement* is the medium towards opinion- and will-formation by which not only individuals, but society as a whole *constitutes* its self-understanding, its political culture. *Society is*, from the very start, a *political society*, for in the citizens' practice of political self-determination the community becomes conscious of itself, as it were, and learns to come to act on itself as if formed of one body through citizens' collective *engagement*. According to Habermas, however, this often leads to an offensive understanding of politics of "the people" (on the one side) directed *against the state*.

Radical democrats even more than civic republicans emphasize non-institutional, agonal, eudaemonic, aesthetic, playful and friendship bases as sources for motivation and as tools of the political in themselves. Many critical radical democratic theorists (Laclau & Zac 1994; Honig 1993; Mouffe 1992; Skinner 1991) take civic republican notions of "the political" as residing largely, if not uniquely, in the form of the people and civil society further. Skinner expresses the classical republican view that

if we wish to maximize our liberty, we must devote ourselves wholeheartedly to a life of public service, placing the ideal of the common good above all considerations of individual advantage. (Skinner 1992, 217)

This role and orientation of the citizen to the social whole is embedded in the notion of *vivero libero* or of the "free state" and its "free way of life". Skinner agrees with the traditional republican thought that the metaphor of the body politic is analogous to a human body (Rousseau 1973, 120) which "is said to be at liberty if and only if it is unconstrained. Like a free person, a free state is one that is able to act according to its own will in pursuit of its chosen ends" (1991, 217).

Habermas departs from the civic republicans' rather romanticized view of the capacity of *all* citizens to be *so* involved in political life, their theory of the state, and the "fused" relation between the state and civil society. Put differently, he wishes to emphasize that the republican view of citizenship is too undifferentiated, that a uniform view of citizens and the state engaged in a free way of life, unconstrained, the one being the "embodiment" of the other, able to act according to their own will, and devoting themselves wholeheartedly to a life

of public service.²³ This view *overburdens the citizen* with civic duties that only a privileged few could sustain. In effect (and ironically), such a theory of democracy and citizenship can help legitimize an *elite* approach to politics by those who would justify their involvement in political life as superior to those citizens who may be overburdened by structurally-imposed obligations.

Secondly, in Habermas' view, the overly fused notion of political roles *unburdens the state* to orient itself toward the achievement of consensually achieved decisions pertaining to rights and entitlements. It unburdens government from its leadership role and responsibility to act as the moral compass of a society rather than abdicating this responsibility to other powerful social and economic forces. Also, with too close an assumed connection between the state (in the political or legal realms) as embodying the general will of the citizens, it is more difficult to disentangle and change notions of the good as advocated by the republican state via deontological procedural arguments that assume all claims of the good, even those held by

²³From the more *historical* perspective taken by Arendt, “the *malheureux* whom the French Revolution had brought out of the darkness of their misery [were indeed ...] a ‘multitude ... united in one body’ and driven by one will.” For what brought them together *at that moment* was “the quest for bread, and the cry for bread will always be uttered with one voice. Insofar as we all need bread, we are indeed all the same, and may as well unite into one body.” It is therefore “by no means merely a matter of misguided theory that the French concept of *le peuple* has carried, from its beginning, the connotation of ... a mass that moves as one body and acts as though possessed by one will; and if this notion has spread to the four corners of the earth, it is not because of any influence of abstract ideas but because of its obvious plausibility under conditions of abject poverty” (1965, 89-90). However, while this is an accurate description of the historical character of the public will at the time of the Revolution, and of the motivating basis for most great revolutions, it is not the motivating basis which Habermas sees as sufficient and certainly ideal to carry complex societies less steeped in abject poverty forward.

the state or the majority of citizens, must be open to public deliberation.

Habermas certainly agrees with the republican critique of the liberal notion of the citizen as bourgeois, i.e., economically self-aggrandizing and self-referential as well as the need for "more solidarity" (PF 96) and a stronger sense of civic duty towards the common weal. However, he wishes to make a distinction in *how* new values and entitlements may be best *generated* and then *institutionalized* through the legal and political subsystem of the state.²⁴

²⁴ "Our central concern," notes a leading civic republican, Charles Taylor, "should be to see how a political life fostering freedom and self-government under conditions of equality can be developed and promoted. This will certainly require some species of public sphere. But these spheres, existing in rather different cultural contexts, will in all likelihood be even more distant from our paradigm eighteenth-century model than the contemporary Western ones are" (1995 216-217).

This is precisely the reason why Habermas has moved from his *Habilitationsschrift's* analysis of the rise of the bourgeois English and German public spheres to a more contemporary, relevant, and *normative* analysis of a highly differentiated and, in some ways fragmented public in its social, cultural and political dimensions.

As Taylor mentions, "[w]e will have to be alert to potential new forms that can open channels for democratic decision" ... "It will help ... if we have some better idea of what genuine democratic decision amounts to" (1995, 217).

For Habermas it is clear that genuine democratic decisions rely on a confluence of not only different levels of government, local, provincial, federal, but also a general provision for informal, autonomous publics to influence these *various* levels of formal decision-making, a term which Taylor leaves out, again allowing for some confusion to reign as to what *kinds* of political action, and their consequence and status we are discussing or forwarding.

Therefore, by not *specifying* the notion of "devolution" or advocating the useful, but insufficient-on-its-own notion of *subsidiarity* (see chapter 2), Taylor and others are in danger of relying on far-too abstract terms. For example, he refers to the usefulness of "devolution, or a division of power, as in a federal system, particularly one based on the principle of subsidiarity [as *necessarily* good for] democratic empowerment" (1995, 215). Yet *the details* of such a notion of subsidiarity may help provide for the conditions for less egalitarian, fair-minded, in short, local or subfederal-level political and economic tyrants to draw up their own policy priorities that would go against the spirit and letter of constitutional principles and procedures of justice. In particular, less powerful minority cultures or groups and the poor are often most at risk when stronger constitutional-level rights and protections are handed

For instance, a contemporary, positive illustration of the *potential power of civil society* to bring about massive, nonviolent social change was provided by the overturning of the governments of the former East Block countries. These political changes occurred through the persistent, small but unfolding solidary building efforts and actions of dissidents and those in various associations and spaces of civil society, from Vaclav Havel's use of "open letters" in Prague to the massive, direct civil disobedience demonstrations in Berlin by the *Neues Forum* and in the former Soviet Union (Henriques 1990).

Nevertheless, the *weakness* of this approach also becomes clear *in the wake of* these revolutions. The former leader of the Civic Forum in the new Czech Republic came to sit as the "moral conscience" of the nation in the Presidency, a formal position with little institutional power. On the other hand, the tremendous administrative power of the prime ministerial position was used to completely overhaul the social system in favour of economic liberalism.²⁵ As a result, a mere two years after the "Velvet Revolution," the administrative power of the prime minister was used to dispense with its less profitable (and ostensibly less culturally-sophisticated?) Slovakian neighbours through the political machinations of the sitting Prime

down *carte blanche* to the sub-federal levels of government.

²⁵ The *Neues Forum* in the former East Germany did not last long in its electoral efforts to constitutionally entrench some of the positive *social* features of socialism after reunification partly because of the massive electoral machine of the conservative parties (See Habermas on "The Normative Deficits of Unification" in PF). However, their speedy electoral demise was due not simply to the dominant economic and ideological following of the centre-right parties after the fall of state communism. It was also significantly due to the failure to mobilize many of those involved in the original direct and civil society action-orientations to consolidate the accountability of the reunited German Parliament to the interests of the people.

Minister and against the ultimately ineffectual protests of the President.²⁶

Also, the former Soviet Union was brought down by much of the civic publics' anger over the Communist state's complete disregard for political and civil autonomy. Nonetheless, the political and administrative systems came to slip without much opposition into the hands of those who have presided over perhaps the most rapid impoverization of a people. The scale of this immiseration dwarfs that of another European historical precedent in the privatization and commodification of social relations: the enclosure movement in England in the 1600s.²⁷

During that epoch there was certainly little administrative, political or legal recourse for the disenfranchised citizens to achieve even a measure of fair representation for their

²⁶ The explanatory value of an analytic framework based on different forms of the nation can help us partially understand the reasons for division, *viz.*, the basing of the self-understanding and normative orientation of a nation on culture rather than, for instance, more discursive bases (PF; Singer 1996). This *Volksgenossen* versus *Rechtsgemeinschaft* basis for social criticism is an important, even basic dimension of the ongoing difficulties faced perhaps particularly by the former East European countries (Sunstein 1994; Offe 1996).

However, such a framework does not appear to help us explain the *non-national* dimension of such opinion- and will-formation. In other words, the less explicit but more implied and increasingly more influential basis for the shearing off of certain regions from previously federated systems has been based not on purely or even largely on national, cultural or communicative differences and difficulties, but rather on hard economic reasoning. Secondly, the success of this economic reasoning on public opinion to encourage such divisions is due perhaps to no small degree on the increasing relevance and largely indirect power of "globalization" on opinion- and will-formation.

²⁷ A former dissident to the lack of political freedoms in the Soviet Union, Sergei Kovalyov, the "undisputed heir to the legacy of Andrei Sakharov", is now reviled by Russia's "new" ruling economic and political elites. While many of the new elite come from the former *nomenklatura*, the nature and degree of their power has changed. As Kovalyov notes, "Before, they had some privileges, but now they get property, and it's very big property. This combination is very dangerous: big property and no punishment. Power is being converted into wealth" (cited in York 1998, 2).

grievances. However, in the wake of the East European revolutions, *it was not so much a lack of the potential capacity of political, legal, and administrative power to help reorient the new nations toward a more just society that would protect not only economic, but also political, civic, and social rights. Instead, it was a lack of a rounded conception of the importance of taking back, not only the rights of civil society, but also continuing the pressure just as forcefully for reorienting the political, legal constitutional, and administrative forms of power towards helping to ensure the rounded institutionalization of political, civic, social, and economic norms of justice, democracy, and rights.*²⁸

In other words, the second, retrograde, let us say devolution, did not occur so much due to the lack of institutional political power of those in or soon to be in positions of power, such as those who rose from the leadership positions of the streets to take power in the suites. Rather, this devolution occurred due to the lack of vision of critical democratic theorists *qua* activists who have failed to conceptualize the need to make more democratically accountable and accessible ("democratize") the power of the state in "post-revolutionary", or less dramatically, but just as transformative power-laden moments, such as *constitutional reconstructive moments*.

Therefore, the real gains in motivation and resistance of radical democratic models to

²⁸ Jean Jaurès, the man who helped bring socialists and anarchists together almost three decades after 30,000 *Communards* were slaughtered in Paris in 1878, noted that it would be senseless not to take rights just because they come from bourgeois institutions. For in his non-dogmatic eyes, the purpose of the struggle was the pursuit of better life chances for all citizens, not the adherence to pre-scripted programs of action (Weinstein 1936).

colonizing processes of administrative and money media are often lost when they too often leave democratic activists out in the cold. This occurs when the profoundness of their analyses of the dangers of institutions are tied and become *limited to* concepts of institutions, democracy and citizenship which are specifically *liberal* (BFN 190, & esp. 250). This problem stems from a lack of comparative methods in order to better contextualize their *analytic* notions of and *alternative options* for institutional protections to democratic and citizenship rights. Ultimately, it highlights the incompleteness of their conceptualization of "the political".

Such a conceptualization too often peripheralizes the notion of struggling towards the radical, even "utopian," and yet simultaneously practical reconfiguration of citizens' predominant *institutional* forums of communication for democratic *will-* (as opposed to simply *opinion- or imaginary- or cultural self-*) formation. This also often leads not only to the wholesale ignoring, if not blanket criticism, of the state and "government", but also to the *failure to specify* or operationalize the pragmatic modes of exchange, the fora for democratic vertical and horizontal communication that would allow for the participatory *generation, formulation, and decision-making* of general social consensus towards particular social, economic, and regulatory policies. As a consequence of such theoretic aporia, when (and if) the opportunities for contributing to deepening the democratization of will and identity formation occur, they are not entrenched.

Critics of the culturalist and existential-ethical analyses argue that the weakness of a strategy which emphasizes ethical discourse as a tool, *if considered on its own*, is impractical and utopian, *holding out no criteria to compel, for instance, structures to consider the value*

changes occurring in the lifeworld. Although strategies oriented to ethico-existential reworkings may lead to profound change for many in civil society, this change can remain isolated and politically impotent if it cannot or will not insert itself (by reflexively differentiated and appropriate means) into the media of the state or civil society oriented to political will- and opinion-formation.

Instead, according to Habermas, first political opinion would be best *generated* by the activity of autonomous, diverse, and imaginative publics. But second, the burden of ensuring their *continuity and entrenchment* must not be *completely* borne by citizens and their vigilant eye. Although direct and civic action is an important component of citizenship, i.e., to act as "sensors" on the activity of the state and the attempts of concentrated private power to influence, to use Marshall's triad of civic, political, and social rights and entitlements, this is not sufficient to ensure that those rights will remain and, as already mentioned, this tends to overlook the "inevitable inertia" that befalls even the most dedicated of citizens. Democratic theory needs to *also* concentrate on debating and then *institutionally entrenching the obligation of the state to protect those rights* that the republican-acting citizen has managed to secure, but which are always in danger of being changed, for instance, by a change in government.

By forcing *the state* to return to entrenched and rigorous deliberative procedures for any changes to statutory, and of course constitutional laws, rights, and entitlements, it would be much more difficult for a state with newly-elected political masters, for instance, to "freely" change entitlements and rights of the citizens based on *its* ("particular, diverse") conception

of the good.

Again, Habermas would agree with the republican notion as expressed by Skinner that the necessary condition of individual liberty is through the securing and defence of their communities: "we can only hope to enjoy a maximum of our own individual liberty if we do not place that value above the pursuit of the common good" (Skinner 1992, 221). However, he would disagree with Skinner's invocation of Alasdair MacIntyre's notion in *After Virtue* that "the crucial moral opposition is between liberal individualism in some version or other and the Aristotelian tradition in some version or other" and that the key to resolving this dilemma is through the choosing of one or the other, or both (*ibid.*).

Rather, Habermas attempts to highlight the importance of a third source of maintaining liberty, *without denying the importance of either individual autonomy or the importance of civic principles: namely, institutionally entrenching deliberative and procedural safeguards to generate and maintain civic, political, and social rights and entitlements.* In other words, he wishes to emphasize the institutional conditions and orientation towards securing "the good" through the use of subjective, objective, and intersubjective procedures of will-formation.

1.2.1 Habermas' Discourse Theory of Democracy

We can see, therefore, that Habermas' discourse theory of democracy takes elements from both the liberal and, especially, the republican models (DNM 20). According to Habermas, his democratic model differs both from the liberal conception of the state as guardian of *an individualistically-oriented economic "society"* and from the republican

concept of an almost holistically-embodied and "fused" *ethical community*. Habermas' notion of the use of practical reason resides in neither the liberal conception of universal and individual human rights, nor in the ethical substance of a specific community that may be directly and unproblematically fused into the state apparatuses. Rather, practical reason resides in the rule of forms of argumentation that borrow their normative content from the validity basis of action-oriented to reach understanding. In the final analysis, this normative content arises from the structure of communication (BFN 296-7).

Habermas' discourse theory invests the democratic *process* with normative connotations stronger than those found in the liberal model, but nonetheless weaker than those found in the republican model, and reconstructs them. In so doing, he "gives centre stage to the process of political opinion and will formation," but without understanding the constitution, with its basic principles of the rule of law, separation of spheres, etc., as inconsequential. Rather, Habermas conceives these constitutional principles as a means to provide consistency to answer the question of *how* the formation of divergent opinions and wills can be institutionalized in a just manner (BR).

According to discourse theory, assessing the *success* of a politics based on deliberation is determined not simply by whether there is a collectively acting citizenry, but also by the *institutionalization* of the corresponding procedures and conditions for their communication as well as on the *interplay* of institutionalised deliberative publics with their informally developed opinions (DNM 22). This "proceduralized popular sovereignty" is combined with a political system which is itself tied into the networks of the peripheral political public sphere.

They work together to form an image of a *decentred* society. At any rate, his concept of democracy no longer has to operate with the notion of a *social whole* centred in the state and imagined as a subject writ large. Nor does it represent the liberal (or autopoietic) model of a system of constitutional norms mechanically regulating the balance of power and interests in accordance with, for instance, a market model of society.²⁹

In other words, and this is critical, Habermas' discourse theory drops all those motifs employed by the *philosophy of consciousness* that lead one either to ascribe the citizens' practice of self-determination to a *macrosocial* subject or to the *anonymous* rule of law of competing individual subjects. As we saw, the former approach *tends* to view the citizenry as a collective actor that reflects the whole and acts for it. In the latter approach, individual actors function as dependent variables in power processes --processes that operate blindly because beyond individual choice there can be at most aggregated, but not consciously formed and executed collective decisions.

Discourse theory normatively directs us towards a *higher-level intersubjectivity* of processes of reaching understanding that take place *both* through formal democratic procedures or in networks of public spheres where communication has been "set aflow", both inside and outside parliamentary complexes and their bodies for deliberation. Within these "*subjectless communication form arenas*" a more or less rational discussion can occur on

²⁹ To define the notion of autopoiesis, Habermas quotes Luhmann as suggesting that "the states of the system are exclusively determined by its own operations. The environment can eventually destroy the system, but it contributes neither operations nor structures ... " (BFN 2.1).

political matters, that is, matters relevant to the entire society and in need of regulation.

The flow of communication between autonomous publics, institutionalized elections, and legislative decisions is meant "to guarantee that influence and communicative power are transformed through legislation into administrative power." Like the liberal model, discourse theory has a certain respect for the boundaries between 'state' and 'society', but it distinguishes civil *society* as the social basis of autonomous spheres from both the *economic* system and public *administration*.

The normative implications are obvious: the socially integrating force of solidarity, which can no longer be drawn solely from sources of communicative action, must develop through widely diversified and more or less autonomous public spheres, as well as through procedures of democratic opinion and will formation institutionalized within a constitutional framework. In addition, it should be able to hold its own against the two other mechanisms of social integration, money and administrative power. (BFN 299)

This view has implications for how one understands legitimation and the role of citizens. In the liberal view, the public has the exclusive function of *legitimizing* the exercise of political power through elections. When parties win such elections they must simply justify the use of its powers to the public and parliament.

On the other hand, Habermas' discourse theory radically reconstructs the *procedures* and the communicative presuppositions of democracy. Above all, he provides far greater emphasis to *sluices* for the discursive rationalization of the decisions of an administration bound by law and statute. The increased *rationalization* of the law-making process here means more than merely the legitimation of those in the position of governing power as in a merely consultive liberal process, but less than the *direct* constitution of power as in some direct

participatory democratic models.

Nevertheless, Habermas does not shy from the specific issue that it is only the political system that can legislate. It is a subsystem specialized for making collectively binding decisions whereas the communicative structures of the public sphere constitute a far flung network of sensors that both *react* to the pressure of society wide problems and *stimulate* "influential opinions". The public opinion that is "worked up" into communicative power is not to "rule" itself. It can only point the use of administrative power in specific directions (BFN 300).

Therefore, with this view Habermas insists that law making is not to be a narcissistically self-enclosed system, but it must be nourished by the "democratic *Sittlichkeit*" of enfranchised citizens and a liberal political culture "that meets it halfway." This becomes clear when one attempts to explain the paradoxical fact that legitimate law can arise from mere legality, or, differently put, that laws that look after and protect the *individual and group* values, interests and conditions of its citizens can arise from an impersonal, universal, formal *system* of the rule of law.³⁰

Precisely the discourse-theoretic approach introduces a realistic element insofar as it shifts the conditions for a rational political opinion- and will-formation from the level of *individual* or group motivations and decisions to the *social* level of institutionalized

³⁰ The democratic procedure of lawmaking relies on citizens making use of their communicative and participatory rights *also* with an orientation toward the common good, an attitude that can indeed be politically called for but not legally compelled. Like all individual rights, the form of political rights is also such that they merely grant spheres for free choice and only make legal behavior into a duty. Despite this structure, however, they can open up the source of legitimation in discursive opinion- and will-formation only if citizens do not exclusively use their communicative liberties *like* individual liberties in the pursuit of personal interests (BFN).

processes of deliberation and decision-making. With this move, a *structuralist* point of view comes into play: democratic procedures and their corresponding communicative arrangements can function as a filter that sorts out issues and contributions³¹, information and reasons, in such a way that only the relevant and valid inputs 'count.' ("Postscript" in BFN 461-2; see also BFN 135).

Habermas' discourse principle ("D"), which is at the centre of his theory of democracy, ensures that all who are potentially affected by decisions in the legislative body must be allowed access to that process.

The *democratic process* bears the entire burden of legitimation. It must simultaneously secure the private and public autonomy of legal subjects. For individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not at first engaged in public discussions ["U"] to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs. The *proceduralist* understanding of law thus privileges the communicative presuppositions and procedural conditions of democratic opinion-and will-formation as the sole source of legitimation. ("Postscript" in BFN 450. Emphasis in the original.)

This acts as a means to ensure that the concern for private autonomy and opinion, which is supposed to be centre stage in the liberal model, is guaranteed. However, in addition to a strong discourse view of power, Habermas' *embedding of social and economic rights in the constitution* (3.1) recognizes that without adequate social resources, individuals are often unable to exercise their communicative power and public autonomy. This is hence an attempt to "equalize" the facticity of power in the social realm in order to generate the proper conditions to nourish the normative desire for more democratic will formation.

The idea of popular sovereignty in Habermas' procedural theory refers to *social-*

³¹ See JA 25-28, and BFN sec. 6.2 on "which norms are valid", and how one decides.

boundary conditions that, although enabling the self-organization of a legal community, are *not immediately at the disposition of the citizens' will*. While Habermas' model certainly requires a discursive mode of sociation *for the legal community*, this mode does not extend to the whole of an "embedded" society. The direct, deliberative nature of politics remains but a part of complex society, which, as a whole, resists one-sidedly normative approaches. In this regard, the discourse-theoretic reading of democracy has a point of contact with a detached social-scientific approach that

considers the political system neither apex nor centre nor even the structural core of society, but just *one* action system among others. On the other hand, because it provides a safety mechanism for solving problems that threaten social integration [such as unregulated capital, unemployment, and administrative colonization of the lifeworld], politics must be able to communicate through the medium of law with all the other legitimately ordered spheres of action (BFN 302)

In sum, Habermas is in agreement with the civic republican attempt, and, for instance, the feminist strategy to put the formation of political opinion and will up front in society through increasing the sites and spaces for deliberation of substantive values and virtues (SR 115-117). However, Habermas wishes this to be done without coming to understand the state as a "secondary site" for the formation of opinions and democratic will (DNM 22). In an attempt to get beyond the either/or and "false antinomies" of direct "versus" representative politics (Fraser 1997), Habermas wants to *bring autonomous voices back in to the decision-making process* of social norms through revitalizing deliberation in all public spheres *as well as* bringing the state and government back on side of social and economic transformation through radically improved procedural processes to make them accessible to all affected.

It should be emphasized that Habermas' deliberative democratic model refuses one-sided, macrosubject, individualistic, juridical, legalistic, liberal constitutional conventions and their view of deliberation as a mere competition of isolated ideas, rather than as a reconstructed space for true deliberation and self-constitution.

The overall goal is to provide the resource of solidarity --which can express itself spontaneously and without preconfigured subjective networks-- with discursive procedures against both the resources of administrations and money (DNM 23). Thus, through discourse procedures, the resource of solidarity is no longer alone. Through the procedures and rules of open and equal access to issues which affect them, it can equally use the force of public argumentation over the other resources of administration and money.

In the following section, I begin by describing Habermas' *two-track* model of democracy. I highlight the *precision* of this simultaneous *formal-informal* dynamic rather than the more *abstract deliberative* dimension since this has been rather well exposed in the literature. I will briefly review the criteria for the legitimacy of democratic two-track systems, and signal Habermas' reference to the emergent, and highly fragile supranational public sphere.

1.2.2 The Two-Track Model of the Democratic Process

Habermas' concretized conception of a *two-track* approach to opinion- and will-formation, is making an attempt to *close the gap* between two levels, and realms of discourse. On the one hand, the justice and law-making discourses of the formal and institutional realm and, on the other hand, the concrete, *legitimacy-generating*, everyday, solidarity and ethical discourse processes stemming from the informal communicative impulses of civil society and

its autonomous publics.³²

With such a desire to close the gap between these two realms, one still has to flesh-out whether and how there can be an effective and legitimate circulation of power between them. To bring precision to this interchange, Habermas uses Bernard Peters' model of processes of communication and decision making as occurring along a *centre-periphery* axis structured by *a system of "sluices"*.

According to Bernard Peters' model, the *core* area of the formal political system is formed by *institutional complexes* of administration (including the Government), the judicial system, and democratic opinion- and will-formation (which includes parliamentary bodies, political elections, and party competition). This centre is distinguished from the periphery in virtue of *formal* decision-making procedures and its exercise of institutional state power. Among the above three institutional complexes, the parliamentary bodies would be the most open and sensitive in perceiving and thematizing social issues and problems that emerge from the informal civil society (BFN 355).

Habermas suggests however that these complex network of organizations which coordinate the functioning of certain social sectors need *supplementing* by a broader spectrum of groups, associations and organizations. These groups would give voice before parliament and the courts to social problems. They would make "broad demands, articulate public

³² Benhabib has been a "friendly critic" of Habermas regarding the dangers of his over-abstraction (Hutchings 1996, 171) to which BFN appears as part of his response to such criticisms. See also a comparison of Habermas to Ackerman's dualist model in Benhabib (1996, 80).

interests or needs, and thus [ideally] attempt to influence the political process more from normative points of view than from the standpoint of particular interests" (BFN 355).

Habermas makes use of Peters' "sluice model" to elucidate the *modes* (or forms, Held 1995) of exchange and *direction* of problem solving communication between the core and periphery. In order for decisions to be *binding* and *legitimate* they must pass through the "narrow channels" of core public institutions.

Habermas emphasizes the need for a "sociological translation" of the discourse theory of democracy by approvingly quoting the following from Peters' model. *Viz.*, that

the legitimacy of decisions depends on processes of opinion- and will-formation at the periphery. The centre is a system of sluices through which many processes in the sphere of the political-legal system must pass, but the centre controls the direction and the dynamics of these processes only to a limited degree. Changes can start just as much at the periphery as at the centre The idea of democracy is ultimately based on the fact that political processes of will-formation, which in the schema sketched here have a peripheral or intermediary status, are supposed to be decisive for political development. This is not predecided by the present schema. (BFN 356. My emphasis.)

While the *everyday* business of politics need not satisfy such strong communicative conditions due to the need to maintain administrative effectiveness, where and when particular "routines" of the courts, bureaucracies, parliaments, or parties no longer enjoy the confidence of the public, other modes of exchange for introducing and deliberating social problems must be meaningfully available to members of civil society.

The procedure for determining decisions at the *formal, structural level* is the key towards legitimacy and, for Habermas, the core structure in a separate, constitutionally organized political system. This structured procedural model is *not* a model for all lifeworld

and civil society institutions (nor even for all state institutions).³³

Habermas utilizes Joshua Cohen's characterization of the necessary *seven minimum postulates or rules for a fair procedure*:

- a. Processes of deliberation take place in *argumentative form*, that is, through the regulated exchange of information and reasons among parties who introduce and critically test proposals.
- b. Deliberations are *inclusive and public*. No one may be excluded in principle; all of those who are possibly affected by the decisions have equal chances to enter and take part.
- c. Deliberations are free of any *external coercion*. The participants are sovereign insofar as they are bound only by the presuppositions of communication and rules of argumentation.
- d. Deliberations are free of any *internal coercion* that could detract from the equality of the participants. Each has an equal opportunity to be heard, to introduce topics, to make contributions, to suggest and criticize proposals. The taking of yes/no positions is motivated solely by the unforced force of the better argument.

Additional conditions specify the procedure in view of the *political character* of deliberative processes:

- e. While *ideal* moral deliberations can in principle be indefinitely continued or resumed at another time, at the level of practical political deliberation, they must be concluded by majority decision in view of pressures to decide. A *fallible* majority decision [see PSP in BFN, or Held's *attainable vs. ideal* (1995)] may be considered reasonable until further notice, namely, until the minority convinces the majority that their (the minority's) views are correct.
- f. Political deliberations extend to any matter that can be regulated in the equal interest of all.

³³ It would be *inappropriate* to put such hyperstructural and procedural requirements on *civil* society associations and communicative fora. They would expose a deliberative procedure meant for one particular *level* and sphere of deliberative will-formation to the danger of increased penetration and juridified forms of communication and sociation, a danger that militates precisely against the setting aflow of communication in the lifeworld and civil society.

In Habermas' view, the *discursive level* of public debates constitutes "*the most important variable*" (See SR and JA on the critical notion of *Sinn der Angemessenheit* (a sense of appropriateness)). While the notion that decisions are open to reasonable debate is the basic requirement for legitimacy, the most important *variable* for making this integrative function, and normative participatory requirement *practical* is to provide institutionally guaranteed levels, and spaces to provide and promote citizens' access to the appropriate level of participation. The appropriateness of the level could be determined by an understanding of the need to set aflow communicative interaction, while also keeping free of illegitimate and privileged interests (BFN 150) the *direct* exercise of formal political power.

This does not imply, however, that topics and subject matters traditionally considered to be 'private' in nature could be a fortiori withdrawn from discussion. *In particular, those questions are publicly relevant that concern the unequal distribution of resources on which the actual exercise of rights of communication and participation depends.*

g. Political deliberations also include the interpretations of *needs* and wants and the change of prepolitical attitudes and preferences. Here the consensus-generating force of arguments is by no means based only on a value consensus previously developed in shared traditions (BFN 305-6. My emphases.)

Unlike general elections which simply organize the voting that *follows* informal opinion formation these procedures would augment the opportunities for deliberation, and ensure the fairness in the composition and operation of "arranged publics", in the form of assemblies that 'convene' for a 'sitting' in which an agenda is 'negotiated' and resolutions are passed (BFN 307). They provide the reference points for fairness. The assemblies *at the formal level* operate less with an intention to discover and [1] *identify* problems than to deal with already pressing problems, to [2] *justify* those problems and the competing proposals made to solve them. This "context of justification" is then drawing on the "contexts of discovery" from the public sphere that have struggled to bring their issues to this level of formal political public debate. This is the practicable means whereby one can conceive of an *internal relation* and closing of the gap between the *formal* decision-oriented deliberations regulated by procedures above and the *informal* processes of opinion formation in the public sphere.³⁴

What *status* and *role* do the other two levels of society --the micro-level everyday interactions of the lifeworld and the social movements, civil and ethnic associations and groups

³⁴ According to Habermas, the determination of the appropriate *level* and *type* of participation, in either opinion- or will-formation, is also to be assessed in rational discourse.

in civil society (or the micro- and meso-levels; Eder 1993)-- have in his conceptualization of the democratic process? According to Habermas, the formal political institutions that decide under time pressure have a weak capacity to *detect* problems, which are apprehended either insufficiently or not at all by settled routines, nor do they have much initiative to stage new problems in a successfully dramatic way.

Due simply to the time, ability (and often inclination) deficits of members and structures of the formal sphere to pose and solve problems, the illegitimate independence of "social" and administrative power is averted *to the extent that* the *periphery* has both (a) a specific set of capabilities and (b) sufficient occasion to exercise them. The first assumption refers to "the capacities to ferret out, identify, and effectively thematize latent problems". An "activated periphery must then introduce them via parliamentary (or judicial) sluices into the political system in a way that *disrupts* the latter's routines." In order for this disruption of routines to occur, there "is a growing need for integration that renders crises permanent, stimulates the public sphere, and makes accelerated learning processes necessary" (all from BFN 358).

On the other hand, "structures of a power-ridden, oppressed public sphere exclude fruitful and clarifying discussion" and are therefore illegitimate. Since the quality of public opinion is an *empirically verifiable* variable, we are provided with *a basis for measuring the legitimacy of the influence that non-elite public opinion has on the political system.*

[T]he political influence that the actors gain through public communication must *ultimately* rest on the resonance and indeed the approval of a lay public whose composition is egalitarian. The public of citizens must be *convinced* by comprehensible

and broadly interesting contributions to issues it finds relevant. The public audience possesses final authority, because it is *constitutive* [of the very notion of the public.] (BFN 364).³⁵

The boundaries between the strong and weak public spheres "remain permeable in principle. The rights to unrestricted inclusion ... prevent exclusion mechanisms of the Foucauldian type and ground a *potential for self-transformation*" (BFN 374). Labour and feminist movements and discourses are examples of a taking advantage and extending of the latent power to "shatter the structures" that attempt to prevent the movement from *de jure* to *de facto* equality embedded in the idealized discourses of bourgeois constitutions.

Political sociologists, when discussing the everyday depiction of the public sphere, would be rather cautious in suggesting that civil society has much of an influence on the political system. However, when the public sphere is not "at rest" but rather becomes *mobilized*, "the structures that actually support the authority of a critically engaged public begin to vibrate. The balance of power between civil society and the political system then shifts" (BFN 379).

How then, in particular does the civil society come to influence the political system,

³⁵ "The public sphere is an intermediary structure between the political system and the sectors of the lifeworld and functional system. It is a highly complex network of overlapping international, national, regional and subcultural arenas. It is also differentiated into levels according to the density of communication, organizational complexity, and range --from the *episodic* publics found in taverns, coffee houses, or on the streets; through the *occasional* or 'arranged' publics of particular presentation and events in theatre, concerts, party assemblies, of church congresses. Finally, they include the *abstract* public sphere of isolated readers, listeners, and viewers scattered across large areas, often brought together only through the mass media" (BFN).

and who places the initiatives on the agenda? First, the initiatives may come from officeholders or political leaders and can be implemented by the latter on their own. Secondly, the initiatives can again come from inside the political system, but the proponents of the issue must mobilize members from the public sphere to garner greater force for the issue.

Thirdly, with a mobilized public sphere, the pressure of public opinion, that is, the resource of solidarity, the formal public sphere is compelled through "sufficient pressure" to consider the issues and agenda from the weaker public sphere. The above is most prone to occur at critical moments "of an accelerated history [when] actors get the chance to *reverse* the normal circuits of communication in the political system [and thereby] shift the entire system's mode of problem solving" (BFN 381). The communication structures of the public sphere are linked with the private life spheres in a way that gives the civil-social periphery *greater sensitivity in detecting and identifying new problems, such as ecological threats, the dramatically progressing impoverishment of the Third World, the problems of the world economic order, and feminism*. As Habermas notes, hardly "any of these topics were *initially* brought up by exponents of the state apparatus Instead, they were broached by intellectuals, concerned citizens, radical professionals, [and] self-proclaimed 'advocates'."

Yet, Habermas also points out that there is a "*latent dependency* built into the *internal structure* of every public sphere" in which the "players in the arena owe their influence to the approval of those in the gallery."³⁶

³⁶ To consider his dynamic understanding of the nature of constitutional systems as unfinished, fallible, and revisable projects, even if they must expose themselves to and accept

From this long-term perspective, *the constitutional state does not represent a finished structure but a delicate and sensitive –above all fallible and revisable–enterprise*, whose purpose is to realize the system of rights *anew* in changing circumstance, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically. This is the perspective of citizens who are actively engaged in realizing the system of rights. Aware of, and referring to, changed contexts, such citizens want to overcome in practice the tension between social facticity and validity (BFN 384).

Although the above notion of an active citizenry who may be forced to use civil disobedience to affect the change from *de jure* to *de facto* rights is not part of the everyday routine of politics, it is an essential character of the constitutional state, in Habermas' view (CD 102). Thus, while Habermas emphasizes the usefulness of the strong public sphere for achieving the routine actualization of the system of rights, which is an *effective*, because specialized structure for this purpose, the *legitimacy* of this effectiveness is nullified if the political and administrative systems become too detached from the communicatively generated power of civil society. The way to avoid the "legitimation dilemma" is to maintain an open circulation of communicative power between the subsystems and civil society and even remain open, in principle, to the dramatic impulses from acts of civil disobedience.

1.3 The Supranational Transformation of the Democratic Public Sphere

While the above demonstrates the possible interchange relations between formal and informal, or steering and countersteering (BFN 327) spheres, Habermas, among others, suggests that with the intensification of inter-nation-state relations a new problem has been brought to light: the fact that "democratic processes constituted at the level of the nation-state

acts of civil disobedience see CD.

lag hopelessly behind the economic integration taking place at a supranational level" (BFN 491; also 303). More recently he has elaborated on the above point that

the different tendencies toward the globalization of every kind of interchange and communication, economic production and its financing, transfers of technology and weaponry, the drug trade and criminality [particularly in the former East Bloc countries], and especially strategic and ecological dangers, confront us with problems that can no longer be solved within the framework of the nation-state. The hollowing-out of the sovereignty of the nation-state will continue, and require us to develop capacities for political action on a supranational basis. (BR 168)

While the two-track conceptualization of democracy and the political process articulated in the previous section provides a useful bridging between participatory and representative democratic conceptions, it needs to be reconceptualized to look beyond the representative mechanisms, procedures, and public sphere of the nation-state level and include a parallel conception of that two-track dynamic as also necessarily *including, without being eclipsed by*, the supranational level.

David Held (1995) has provided perhaps the most complementary, succinct, yet systematic and integrated analysis of the nature and *implications* of these changed supranational political, legal, economic conditions. Held's notion of a post-liberal democratic *Rechtsstaat* (constitutional state) has, as he suggests, many "parallel conceptions" to that of Habermas' (BFN) project (Held 1995, 157). However, he manages to take what I have emphasized as the intent of the *two-track* conception of democracy --that of maintaining democratic participation and accountability of institutions while nonetheless allowing for the political and economic subsystems' needs for a certain degree of non-communicative functioning-- and articulate the need for this "two-track" conception of the democratic process

beyond the civil society/nation-state to the local, national, and *supranational* level of analysis.

Held acknowledges that although the nation-state "remains vibrant", the heightened intersection of national and international forces and relations indicates shifting patterns of power and constraints. The process that has led to the prevalence of supranational over national bases of integration is described by Held as stemming first from the proliferation of regional, international and transnational agents, organizations and institutions (governmental and non-governmental). Held offers a view of how the growing interconnectedness leads to a *crisis in nation-states* and a requirement for greater collaboration between nation-states.

With the intensification of processes of regional and global interconnectedness, the distinction between external or international and internal or domestic issues has eroded. The state has become a fragmented policy-making arena, permeated by international groups (governmental and non-governmental) as well as by domestic agencies and forces. The penetration of civil society by transnational actors has also been extensive.

This proliferation has triggered the growth of global interconnectedness in a number of key dimensions, *viz.*, economics, politics, technology, communications and law. With these dynamics, there is increasing permeability of borders and, similarly, a diminution of a state's capacity to generate policy instruments able to control the flow of goods and services, ideas and cultural products, etc., which leads to the growing requirement of states to cooperate with each other to control policy outcomes. Also, there has been a parallel growth in international agencies and institutions with mechanisms to sustain the balance of power, expand regimes, develop international organizations, improve multilateral diplomacy, and increase the scope

of international law and cooperation with non-state actors and processes.

With the increased global interconnectedness, the number of political instruments available to particular governments and the effectiveness of their instruments are declining. "This tendency occurs, in the first instance, because of the loss of a wide range of border controls --whether formal or informal-- which formerly served to restrict transactions in goods and services, production factors and technology, ideas and cultural interchange" (1995 90). This manifests itself in the creation of a system of global governance which, as one of its outcomes, sustains and redefines the powers of states. Nonetheless, this "interdependent global system" remains highly fragile and vulnerable to shifts in resources, religious belief, ideologies and technologies at national and subnational levels (Held 1995, 89-98).

The result has been a vast growth of international institutions, organizations and regimes.³⁷ The new global politics, with its multibureaucratic decision-making, within and between governmental and international regimes, all triggered by transnational technological and capital forces and new forms (or visions) of multinational integration

has created a framework in and through which the rights and obligations, power and capacities of states have been redefined. [...] The state's [and citizen's] capacities have been both curtailed and expanded, allowing it to continue to perform a range of functions which cannot be sustained any longer in isolation from global or regional relations and processes. (Held 1995, 91-2)

This means, Held suggests, that the meaning of national decision-making *institutions* has to

³⁷ There is a crucial difference between *an international society* which contains the possibility of political cooperation and order, and *a supernational state* which has a monopoly of coercive and legislative power (cf. Kant and sec. 5.2 below).

be explored in the context of a complex international society and a huge range of actual and growing regional and global organizations, transcending and mediating national boundaries.

All this makes the context under which Habermas has traditionally posed the issue of "decentering" and the necessity of "postnational" citizenship bases more immediate. To use Kant's phrase, there is the need for "enlarged thinking" that is, in Habermas' words, both capable of *transcending* traditional notions of societies and boundaries and, yet, embedding those transcendent notions in the *pragmatic* procedures and organizations capable of providing the conditions for justice among citizens' nations.

As with Habermas' analysis of the dissonance between facts and norms in contemporary societies, Held notes that there are "internal" and "external" *disjunctures* between the *formal* political authority that nation-states claim for themselves and the *actual*, often *informal* practices of the state and economic systems at various levels. By disjunctures in law, politics, identity, and economics Held is referring to the erosion of sovereignty by forms of a "higher" and/or independent authority which curtail the rightful basis of decision-making within a national framework" and its right to make the rules, regulations and policies within its territory (99-100). With the advent of the expanding international context, the theory that the nation-state exercises final command over *internal* affairs and, secondly, that there is no authority above and *beyond* the state is being displaced.

Disjuncture 1: International Law

Governments and non-governmental organizations (NGOs) are increasingly subject to new systems of legal regulation at the level of international law. Its powers and constraints,

rights and duties often override the claims of nation-states "which, while they may not be backed by institutions with coercive powers of enforcement, nonetheless have far-reaching consequences" (Held 1995, 101).

From the United Nation's Universal Declaration of Human Rights (1948), the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and the Covenants on Rights (1966), it is recognized in international law that individuals have rights and obligations that transcend those of their own state-bound systems (see 4.1). For instance, in the UN Declaration, it is recognized that individuals not only have the right, but the obligation not to conform to national laws that may be non-humanitarian. This doctrine resulted from the International Tribunal at Nuremberg (and Tokyo) which stated for the first time that when *international rules* concerning humanitarian values conflict with *state laws*, individuals must transgress the state laws (Held 1995, 101).

The European Convention initiative made a radical legal innovation in principle to allow individual citizens to initiate proceedings against their own governments or "take the first steps for the *collective enforcement* of certain of the rights stated in the Universal Declaration" (102). More recently European countries have appended a clause of the Convention which allows citizens to petition *directly* the European Commission on Human Rights. While this direct petition is not guaranteed to result in a hearing at even higher levels, nevermind a justiciable enforcement, it sets the scene for ensuring that states no longer have supreme authority over its own citizens.

In addition, the two treaties of the Convention on the Moon and Other Celestial Bodies

(1979) and the Convention on the Law of the Sea (1982) codified a new concept for arguing that the vast environmental spaces are the "common heritage of mankind." As Held suggests, such a concept points to the possibility of an international legal system based on equity and cooperation (Held 1995, 105). Indeed, elements of the concept are visible in the Rio Declaration on Environment and Development and in Agenda 21 which were both adopted at the Earth Summit in Brazil in 1992.³⁸

While the principles of accountability and enforcement remain vague in most of the treaties and conceptualizations above, Held notes the increasing consensus that the subject, scope and source of international law has shifted and that it should be based on alternative organizing principles beyond the doctrine that international law is and should be a "law between states only and exclusively" (Held 1995, 107).

Disjuncture 2: Internationalization of Political Decision-making

The second major area of disjuncture between the theory of the sovereign nation-state and the contemporary global system lies in the expanding numbers of international regimes and organizations to attempt to manage transnational activity (such as trade). From international

³⁸ As Held explains, Principle 7 of the Declaration demands that "states shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem"; and Principle 12 calls for 'environmental measures addressing transboundary or global environmental problems' which should, 'as far as possible, be based on an international consensus'. [Agenda 21 specifies that this] commits all States to engage in a continuous and constructive dialogue, inspired by the need to achieve a more efficient and equitable world economy, keeping in view the increasing interdependence of the community of nations and that sustainable development should become a priority item on the agenda of the international community" (Held 1995, 106).

governmental organizations (IGOs) to international non-governmental organizations (INGOs), the number and new forms of multilateral organizations have led to new implicit or explicit principles, norms, rules, and decision-making procedures that reach far beyond the confines of national borders.

This is particularly important concerning organizations like the World Bank, the International Monetary Fund (IMF), and the UN which are oriented to questions relating to the management and allocation of rules and resources over the control of national, regional and global policies. Moreover, more informal organizations for political and economic coordination, most notably the so-called "Group of 7" (G7, now the G8 with the Russian political and economic elites bringing the country into the capitalist economic model) have considerable influence over the direction of political and economic activity. As Held suggests, while *de jure* sovereignty may not be infringed by the nature of decision-making of many of the above bodies, the capacity for the people of nations to self-determination concerning their own policy directions is strained.

While we will look at it more closely in the next chapters, Held notes that the European Union provides an important illustration of the potential political decision-making structure for international organizations. It provides an important extension to the above due, in addition, to its formal capacity to make laws enforceable on member states as well as an important illustration of the need to make the emerging international decision-making character of trans- and supra-national formal and informal power accountable, via explicit decision-making rules and procedures, to the democratic community.

Currently, the Council of Ministers has powerful legal instruments such as regulations and directives that allow it to formulate and enact policy with a minimum of national-level accountability. Regulations as an instrument in particular are notable because they have the status of law *independently* of any further negotiation or action "on the part of member states. Disputes about national interpretations and applications of regulations and directives can be heard at the European Court of Justice" which has taken an active role in harmonizing the laws within the union (Held 1995, 112).³⁹

Disjuncture 3: National Identity and the Globalization of Culture

This is a more familiar "disjuncture" for Habermasian theorists (PF; BFN) and it will be taken up in more detail later. Nonetheless, in Held's conceptualization of this process, goods, capital, people, knowledge, images, communications, weapons, culture, pollutants, and beliefs now flow across what were previously territorial "boundaries," profoundly affecting the identity and culture of those at the receiving end. In addition, the existence of global systems of trade, finance, and production tends to affect the understanding of what binds the prosperity and fate of households, communities and nations (121).

Disjuncture 4: The World Economy

"There is," Held categorically underlines, "a clear disjuncture between the formal

³⁹ Held also includes a *fifth* disjuncture concerning hegemonic powers and international security structures that have stemmed from the intensification of globalization in the post-Second World War era. These have led, Held notes, to the simultaneous expansion of the liberal states' responsibilities and to an erosion of its capacity to deal effectively alone with those demands (1995, 121. See 5.2 below further on this point.)

authority of the state and the spatial reach of contemporary systems of production, distribution and exchange that often function to limit the competence and effectiveness of national political authorities" (127).

Two aspects of the intensified economic processes are central to this trend: the internationalization of *production* and the globalization of *financial* transactions, both led by multinational companies (MNCs). They coordinate their production, marketing and distribution on a *regional or global* rather than national basis. Financial organizations can monitor and respond to developments of economic units --currencies, stocks, shares, 'futures'-- almost instantaneously on a global level. Both world production and financial systems have been reshaped by technological change. This technology increases not only the *global scope* of economic interactions, but also the *volume* and *velocity* of transactions, coordinations, locations and management of production and economic units with an eye to deriving maximum benefit from the different conditions around the world (128).

Held argues that with the emergence of global financial markets and their almost round-the-clock trading, geographic boundaries become almost meaningless. On the other hand, markets and societies are becoming more sensitive to one another "even when their distinctive identities are preserved" (129). Therefore, the very possibility of a state's finance minister rationally formulating a national fiscal policy is potently reduced. The monetary and fiscal policies of individual governments are frequently dominated by the fates of international financial markets. Figures from the Bank of International Settlement indicate that foreign exchange trading amounts to a *daily* turnover of \$1 trillion. This sum represents more than

three times the amount of the total foreign reserve holdings of the US, Japanese and UK central banks combined for the entire *month*. In addition, the vast majority of foreign exchange dealing and "investment" is *speculative*.

As a result of these developments, national rules and national regulatory systems for the control and development of markets such as monopolies or anti-trust legislation are of doubtful value. So is the concept of national economic policy formation. To quote Blumenthal, it is not that "national rules and policies are obsolete or no longer needed [rather it is that they] cannot work unless attention is paid to what is being done elsewhere" (in Held 131). In other words, the *effectiveness and legitimacy* of the formal political decision-making ministry of a state is limited if it is at odds with other international economic informal decision-making systems, or "disorganized capitalism" (Offe, 1985).

Conclusion

Not only does much contemporary critical social theory focus largely on [1] cultural, informal and undifferentiated "civil society" level and forms of politics to [2] the detriment of *formal state level and forms* of politics, but it also often marginalizes (if not completely ignores) the influence of [3] *international and even regional levels* of legal, political, and economic *forces and actors* on deliberative models of democracy. For example, Tony Judt in his sweeping critique of the emerging potential of European integration suggests that the nation state is the most modern and still most dominant of political institutions (1996 121). While it is true that the modern state is *a* most modern institution, the fact is that its capacity to be the most modern, or the most powerful legal, economic, or even political institution has

been seriously undermined. While it still commands considerable, and potentially even a dominant influence, its dominant position has fallen, and the implications for a democratic politics are enormous.

Why is there this lack of consideration of these levels and forces, particularly those of international, or really, nation and stateless capital? It partially stems from, paradoxically, the (perhaps not fully self-conscious) malaise that these emergent frontiers, both in terms of the level and form (*international* level, and legal and especially economic forms) may, in many cases, eclipse even the possibility that democratic *actors*, even highly resourceful groups, may be able to have a long-term and deep impact on improving the life chances of human and non-human life. As a result, one rationalizes, such forces and levels of analysis and action are best ignored.

However, at a minimum, an *analysis* which seeks a better understanding of the potential for modernity to fulfil its promise of democracy and citizenship rights must not continue the very practices by which distorting hegemonic forces survive –i.e., lack of transparency as to their workings and impact on the social and non-human environments. To essentially *reproduce* such aporia, one is in danger of acting as a most helpful tool in the hegemonic discourse of turning society, for instance, into one of culture consumption rather than the culture debating of the issues and forces that undermine public and private autonomy. What Habermas, and more schematically David Held provide is an enlarged view of the new context of political thought brought about by the structural transformation of "the political." What should be clear by now is that one of *the new challenges for critical social theorists is*

to determine how to reconceive democratic accountability within a constitutional framework over the new supranational formal institutions and subsystems: governmental, political, administrative, judicial, but most importantly perhaps, economic.

As Habermas suggests with regard to the growing supranationalization of relations in the European context

nation-state theory presents a problem along the path to European Union not so much on account of their insuperable claims to sovereignty but because democratic processes have hitherto functioned, imperfectly to be sure, only inside national boundaries. To put it briefly, up to the present the political public sphere has been fragmented into national units. Hence we cannot avoid the question whether a European citizenship can even exist at all. (BFN 502)

Habermas notes that as of 1991, *acquiescent* political and administrative subsystems were steering national agendas at the European level to the dictates of purely economic reasoning while the (more) representative European Parliament had limited powers, "scarcely visible in the political public spheres of the member states. ... For the citizen, this translates into an ever greater gap between 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." Habermas continues on this line of thought of what is a growing dilemma of a more organizationally complex, and power-laden modernity:

[C]itizens have no promising opportunities to bring up issues and influence European decisions. ... Does this disparity represent merely a passing imbalance that can be set right by the parliamentarization of the Brussels expertocracy? Or do these bureaucracies, oriented as they are by economic criteria of rationality, merely highlight developments already long under way and inexorably advancing even within nation-states? (502-3)

This is the question to which we will now turn. In what follows is a brief examination

of whether and how some Europeans are attempting to develop more legitimate democratic countersteering measures at the supranational level.

2. The Structural Transformation of The European Public Sphere

In Jürgen Habermas' (1996) opus, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, he attempts to conceptualize the *interplay* between autonomous publics and the formal sphere of political will-formation while avoiding the twin pitfalls of a naive normativism or false realism regarding democratic institutions. His "*two-track*" notion of the role, meaning, and status of these respective spheres gives precision to their interplay. The conceptualization of a "postnational" interplay is based on, among other things, a certain conception of the level and relative status of the three main resources in a "society": social solidarity, the state's administrative power, and money.

However, along with a growing number of critical theorists,⁴⁰ Habermas emphasizes that the traditional model of the interplay of the resources of the citizens-state-economy "societal" level model is insufficient today in conceptualizing the facticity of *international and supranational* barriers as well as normative possibilities towards the meaningful exercise of citizenship. In light of, for instance, the intensification of technological capacities, the understanding of a two-track model of interchange between informal communicative spaces and more formal spheres must take more seriously the nascent conditions caused by *global*

⁴⁰ David Held's ongoing work on supranational systems of governance are extremely useful to help heighten and clarify the nature and normative contours of this phenomenon. I owe much to Held's (esp. 1995) attempt to develop a more accessible critical supranational theory with a pragmatic-normative orientation. Instead of following Held on his analysis of "global" systems of governance, this work takes an even more pragmatic-normative use, although with a similar trajectory in mind, by using the EU example.

economic, legal, and political alliances, and the relative shift in the balance of influence and access to power over even an active citizenry. In their efforts to reconstruct viable *alternatives* to increasingly powerful "market forces" and models over those of, for instance, political and democratic principles and models, critical theorists must take the supranational level of the problem in hand.

The ongoing "democratic deficit"⁴¹ experienced at the supranational level in the attempted integration of over 370 million citizens in the European Union (EU) provides an example of the *legitimation* problems stemming from increased complexity. Moreover, the EU helps highlight the nature of influences and, particularly, the distorting influence of money on political steering capacities for societal integration in modern societies. In the wake of what was popularly conceived as an illegitimate, elite manner in which the 1992 Maastricht Treaty was negotiated, European institutions sought to improve the mechanisms designed to "bring the Union closer to their citizens" during its 1996-1997 Intergovernmental Conference (IGC) in Amsterdam. This "constitutional" (Preuß 1996) conference considered the requirements for the improvement of its lagging democratic legitimacy stemming *ostensibly* from the EU increasingly complex administrative, supranational form. The competing conceptualizations of citizenship and democratic opinion- and will-formation processes at this new level of social and political coordination represented an important moment towards achieving the possible

⁴¹ More precisely as Scharff explains it, the EU has problem-solving legitimacy, but not democratic legitimacy. That is, it has "output legitimacy" because it has proven rather effective at problem solving despite its complexity. However, it does not have *input* legitimacy, which leads to the problem of the "democratic deficit" (Scharff in Greven 1998).

contours of a Habermasian two-track and postnational model for radical democratic politics. In other words, of conceptualizing formal and informal interchange relations in a postnational public sphere in general.

In this Chapter, we begin (2.1) to outline the more promising aspects of EU institutions and the various bodies that may act as the "sluices" for the cultural, welfare, environmental, and other value and need interpretations of citizens in the public sphere through their associations and movements. These will provide a basis to (2.2.1) assess the usefulness of the processes *to vertically* communicate between citizens, autonomous publics, international non-governmental organizations (INGOs), and other institutions at the supranational, national and local levels despite Habermas' recent point that the EU in general "lacks a communicative public sphere" (BR 158). The success in these processes' normative distribution of power and influence are compared with Habermas' criteria for democratic legitimacy outlined in the previous chapter.⁴²

Habermas' analytic theory proves far superior to that of the liberal representative democratic model towards unmasking the predominance of *illegitimate* currents of power relations and flows of communication on the decision-making actors (for instance, on the

⁴² Holding these interchange relations to Habermas' democratic criteria means holding them to an even higher, more radical standard than a liberal representative standard found at the nation-state level. There is vigorous debate whether the EU can achieve even that standard. However, I suggest here that that Hamiltonian standard of democracy is not the one that we should be reducing ourselves to. Rather, the developing *sui generis* form of governance in the EU may offer more powerful and different opportunities to create even more representative democratic spaces and transparency in that process.

results eventually stemming from the IGC conference in Amsterdam, sec. 2.2.2 *infra*). And relevant to the more reconstructive nature of this chapter, his *normative* procedural paradigm is useful in helping to outline the legitimacy requirements for such complex institutions and relations in emerging postnational public spheres generally, such as to increase their democratic accountability and accessibility.

2.1. The Democratic Institutions and Bodies of the EU

The communicative flow in the European Union's inter-institutional and vertical interplay is complex. This has led Habermas to recently lament that it is "impossible to get a comprehensive view of it" (BR 158).⁴³ Nonetheless, a general overview of those EU bodies and institutions which have influence in the administrative, political, legal, and economic agenda of the Union is useful especially for North American critical theorists in order to understand the relative distribution of power in opinion- and will-formation and whether, in the end, democracy in the EU may be at all possible (BR 158).

To begin, the *European Commission* (the Commission) is in the front lines of legislative action as "the executive civil service" of the EU. It is composed of 20 formally independent Commissioners from all the currently 15 Member States.⁴⁴ It makes ongoing

⁴³ Habermas has also admonished that we "avoid tendencies to oversimplify a complex world" (BR 156). But of course we must also avoid the tendency to perhaps err in the opposite direction, at least in the presentation of the argument, and obfuscate some of the *main problems of our times*.

⁴⁴ There are currently fifteen Member States (MS) in the EU: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom. The number of countries is expected to increase to 20-25 over the next decade through its inclusion of countries from the former

proposals for legislation; it has a large administrative body (the Directorates-General (DG)) to help monitor compliance with the Treaties, Commission directives and regulations, Community laws; and it administers common EU policies. The Commission is bound by the subsidiarity principle to leave the *implementation* of specified policies to the national and subnational level administrators.

The powerful *Council of the European Union* (the Council) is made up of one minister from each Member State government. Which minister attends a meeting depends on the policy area under consideration (for example, the Council of Environment Ministers is made up of the 15 Ministers of the Environment). The Council and the European Parliament adopt Community legislation, initially proposed by either the Commission or Parliament. They make final decisions on laws to be applied throughout the Community through consensus. But since such consensus is often difficult to achieve, most decisions are based on qualified majority voting.⁴⁵

The Heads of State or Government of the Member States and the President of the

Eastern Bloc countries and Cyprus.

⁴⁵ A *qualified majority* of Commission proposals must receive 62 votes out of a total of 87 in order to be approved. To amend a Commission proposal without the Commission's consent, *unanimity* among Council members is required. Weighting of votes between the 15 current EU members is as follows:

Germany, France, Italy, United Kingdom	10 votes
Spain	8 votes
Belgium, Greece, Netherlands, Portugal	5 votes
Austria, Sweden	4 votes
Denmark, Finland, Ireland	3 votes
Luxembourg	2 votes

Commission meet at least twice a year in the *European Council* (EC) to discuss general issues confronting the Community. The European Council decides broad policy lines and directions and determines the "extraordinary agenda" (Wood & Yesilada 1996) for Community policy and cooperation.

The European Investment Bank (EIB) was established to contribute financially to the cohesion and integration of member states into the Union. A *European Central Bank* (ECB) is to take its place by the time of the third stage of the European Monetary Union (EMU) in 1999.⁴⁶

The European Court of Justice (ECJ) is the supreme court of the European Union. The Court has judges from all the Community countries and currently numbers 15 judges and 9 advocates-general. It passes judgement on disputes arising from the application and interpretation of Community law with a mandate to ensure that the Treaties are respected and applied during the process of Community integration (George 1996, 33). Due to the increased importance accorded the Court by all social, economic, and political actors as the influence of the EU institutions in general grew, a Court of First Instance deals with less pivotal cases, with the potential for appeal to the main Court remaining open.

⁴⁶ There is also a *Court of Auditors* which monitors the management of Community finances. It is made up of the 15 members.

The new French socialist Prime Minister called for the increasing of people's democratic capacity to tilt the balance in favour of social and political steering of fiscal policy by institutionalizing a "European Economic Government." Alongside the ECB this Economic Government would reestablish politics and democracy in assuring citizens' rights. "Representing the people, it will be in charge of coordinating the political economy of the states of the Union" (*Parti Socialiste Français* 1997; cf. Held in sec. 4.3 *infra*).

There are two additional independent, permanent, yet, only potentially influential, *advisory* bodies which may act as "sluices" for direct citizen participation in the institutional *pre-decision* process. The *Economic and Social Committee* (ESC) has 222 representatives of the various economic and social groups in the Community. It involves for instance representatives from trade unions and social and professional groups in the process of drafting Community legislation. It helps institutionalize a process of "social dialogue" at the regional level to create the conditions for a "Euro-corporatist" (Gorges 1996) "partnership" between government, employers and employees as found in many of the European countries.

A more catch-all forum is provided by the *Committee of the Regions* (COR) which also has 222 representatives of local and regional authorities appointed by the Member States and who represent issues that do not fall under the more economic and social issues of "Ecosoc" described above. Its mandate is to bring regional and local citizen- and municipal-level government concerns such as the environment to the attention of the decision-making institutions of the Union. While it introduces a more local, EU-wide representation for regional and local bodies into the Community institutional system, it too only has advisory status.

Finally, besides the Commission and the two Councils, *the European Parliament* (EP) is the institution with the legitimacy and treaty-based power for *initiating European-level* legislation. What makes the EP most significant in the light of Habermas' *postnational* democratic analyses is that it is the world's only *directly elected, international, representative institution*. It currently has 626 (with a proposed ceiling of 700) Members of European Parliament (MEPs) who exercise representative "democratic control" at the European level.

Its members are elected every five years by a largely proportional representative electoral system.

Since the EP is touted, with some right, as *the* vehicle for citizen input into the public policy *decision-making* process through, for instance, both standing and ad hoc committees, we will examine a bit closer its capacity to provide communicative spaces for autonomous publics.

Organized blocs or "political groups" are encouraged to coalesce in the EP in their attempts to shape European policy. The largest of these blocs are the Socialists, with the Greens, Liberal Democrats and Reformists on the state interventionist and participatory democratic side and the neo-conservative Christian Democratic European People's Party and Le Pen's strong right-wing nationalist party on the other.⁴⁷

Like other nation-state level parliaments, the European Parliament has the formal responsibility to represent the interests and values of citizens, and it has three official *powers* to do so: the power to *legislate*, final approval of the *budget*, and the power to *supervise* the executive. The European Parliament is the only Community institution that meets and debates

⁴⁷ The communist Left Unity group lost its parliamentary recognition for lack of seats. On the other hand, the extreme right parties which have been making inroads, albeit slow and irregular, remain a real danger. See Harvey Simmons (1993) *The Rise of the Right*.

However, instead of such ideological forms becoming an argument on the left to one-sidedly suggest "the danger" of supranational institutions, even of the EP, it should also become a rallying site concerning the seriousness with which critical social theorists would take these *supranational institutions* as parallel sites for positive, progressive debate on policy, constitutions, values, and principles. As Jacques Delors noted: "Creating Europe is a way of regaining that margin of liberty necessary for a 'certain idea of France'" (cited in Judt 1996, 14).

in public. Its debates, opinions and resolutions, notably unlike those of the Council, are regularly published.

The Parliament's Members also sit in 20 *standing committees*, each of which specialises in a particular field and constantly hears citizen requests.⁴⁸ Some of these twenty committees include: Budgets; Economic and Monetary Affairs and Industrial Policy; External Economic Relations; Legal Affairs and Citizens' Rights; Social Affairs and Employment; the Environment, Public Health and Consumer Protection; Culture, Youth, Education and the Media; Civil Liberties; Budgetary Control; the Rules of Procedure; Women's Rights; and Petitions. In addition to these standing committees, Parliament can also set up temporary and *ad hoc subcommittees* or committees of inquiry that deal with specific problems which may not fall under the purview of the permanent committees.

Citizens in Europe are also represented by *national* Members of Parliament of the Member States. Joint Parliamentary Committees and major '*Parliamentary assizes*' help maintain relations between the EP and these Parliaments. This framework provides a means to help avoid isolationism –either at the national level *or* at the supranational level. It is a mechanism to encourage national- and supranational-level representatives and political groups to exchange information and have a communicative forum for discussing emerging European-level policy and concerns.

⁴⁸ According to Weber's typology, this makes the EP into a more of an *Arbeitende* parliament, rather than a *Redende* parliament: a parliament which tends to *work* on problems in committees rather than *discuss* issues in plenary sessions. See Schmidt's (1996) analysis of the German Parliamentary system.

While MEPs are spokespersons for their constituents in meetings with the Commission, the Council and other institutions, European *citizens* have the right to petition and submit, individually or in a group, to the President of the European Parliament their requests or grievances on matters within the European Union's jurisdiction. The *Ombudsman* is a mechanism available to citizens for investigating disputes between citizens and the administrative authorities of the European Union's institutions, usually the Commission's DG. The Ombudsman has the potential to be a thorn in the side of the EU administrators particularly since he has considerable independence and can make use of the European media to publicize his role as well as problems drawn to his attention by the public.

Legislatively, MEPs help *draft, amend and adopt* European laws, and, most significantly, make policy *proposals*. At the time of the first elections in 1979, the EP had little influence in policy matters. However this institution --which is touted by the European Commission as giving the "democratic legitimacy" to the entire EU (Commission 1995)-- is insisting on and having some success in receiving more power over the policy decision-making process.

The 1957 Rome Treaties originally empowered the Commission to initiate policy proposals and the Council to decide on them after "consulting" Parliament. However, in some respects, Parliament's role in the legislative process has been both widened and strengthened, and its *influence* extended to the drafting and adoption of Community legislation. The European Parliament and the Council now share the power of decision in many, but not all, areas, through the "*co-decision*" procedure. Its recent acquisition of the *power of initiative* for

policy proposals and its examination of the Commission's annual programme of work also give Parliament some influence over policy direction.

In the making of EU-level legislation, there are three principal legislative *procedures* by which the European Parliament may exercise its legislative power, depending on whether the proposal concerns macroeconomic and financial policies, functional policies, or sectoral policies (George 1996). These include the consultation, cooperation, and co-decision procedures.⁴⁹

The *consultation* process merely seeks parliament's opinion before a legislative proposal from the Commission is adopted by the Council. However, Parliament's *assent* is required for decisions concerning the accession of new Member States, association agreements with third countries and international agreements, the organisation and goals of the Structural Funds and the Cohesion Funds, and the tasks and powers of the European Central Bank.

In the *cooperation* procedure, if Parliament's opinion, delivered at its first reading, is not sufficiently taken into account by Council in the latter's "common position", Parliament may reject the proposal at second reading. The Council can overturn Parliament's rejection only by a unanimous decision. Since unanimity is difficult to achieve, the Council is frequently forced to go through the *conciliation procedure* (made up of Members of Parliament, the Council and the Commission) to prevent its proposal from being rejected. This procedure

⁴⁹ There is a fourth, the *assent* procedure, which is largely a rubber-stamping of decisions made by the Council and which are outside the jurisdiction of Parliamentary overview.

applies to a large number of areas such as the European Regional Development Fund (ERDF), the environment, and cooperation and development between members states.

Finally, the most significant of these procedures is *co-decision*. Here, Parliament actually shares decision-making power with the Council. Through this procedure, if Parliament is unsatisfied with the Council's response in its common Parliamentary opinion on draft legislation, Parliament can prevent the adoption of the proposal. To prevent the rejection of its proposal again a *Conciliation Committee* is convened to seek a compromise before Parliament's third reading. If agreement is still not reached, Parliament can reject the proposal definitively.⁵⁰

2.2.1 Assessing the European Unions' Democratic Institutions

Given their differentiated constitutional powers (or "competencies") which of the above institutions are effective and influential as administrative, legal and political vehicles for deliberative opinion- and will-formation, regarding, for instance, cultural, health, environmental, welfare, social, and economic policy in the European public sphere? Given their differentiated legal-constitutional powers and responsibilities (or "competencies") what is their capacity to properly represent and convert the communicative power of citizens into European-level law or public policy? And finally, how porous are boundaries to deliberations

⁵⁰ This co-decision power, along with the assent procedure, is one of Parliament's most important powers. However, although the areas for the co-decision procedure was increased at Amsterdam, the power of Parliament is *seriously* limited due to its applicability to highly limited areas in the Treaties, such as to the free movement of workers, the establishment of the internal market, technological research and development, consumer protection, the environment, education, culture and health.

in *decision-making* institutions and, not simply advisory bodies, in the EU to what Habermas describes as the

issues, value orientations, contributions, and programs originating from a political public sphere *unsubverted by power*" [? ...] Only if such an interplay were to materialize between institutionalized opinion- and will formation and informal public communications could citizenship mean more today than the aggregation of prepolitical individual interests and the passive enjoyment of rights (my emphasis. BFN 506.)

These considerations represent the *legitimacy* test for this *parvenu* supranational system of governance. Below I assess each of the institutions and bodies of the EU --beginning with the COR, the ESC, the ECJ, the Commission, the EP, and finishing with the Council-- with the above criteria in mind.

The Committee of Regions

COR is a body that may appear as a natural site for Habermasian theorists interested in the proliferation of sites for autonomous voices. COR certainly fulfils the role of providing communicative spaces to autonomous and often marginalized voices in the European public sphere (Keating 1995; Hooghe & Keating 1996; Jeffrey 1997).

However, there are two principal dilemmas with theoretically elevating the status of COR at the European level, one empirical and the other normative. First, autonomous publics' beliefs that access to COR provides them with access to a powerful European-level body with ties to the administrative, political, and legal institutions and their resources is more apparent than real. Legislative and will-formation power lies in the other institutions. Secondly, while the capacity for COR to improve *local democracy is a critical one for a two-track* notion of

democracy, there are dangers to excessively ceding this role to COR. The danger is that COR representatives may conflate "regional" or really *local* representation as a, if not *the*, basis for legitimacy *over* more postnational and discursive bases for the interpretation of needs. Instead, as Habermas' two-track approach advocates, the twin requirements of local *and* supranational publics are required. In other words, the sites for the determination of justice do not only rest in local communities, *but also* in larger communicative fora as well as in broader conceptions and stricter procedures for determining that good.

This comment is made in order that COR does not weaken its real strength. That strength concerns the provision of local influence in the decision-making procedure and even more direct input over the actual *implementation* of broader policy directives. The conflation of these two points would weaken the implementation requirement for democratic citizenship with a much more *ambiguous* notion that local communities are *the* "primary," *legitimate* basis for determining the good for larger, less regionally-bound legislations. This has been the tenor of certain COR propositions regarding renewed "competencies".

COR wishes to see its authorities involved in dialogue at the earliest stages of the European decision-making process, as active members in what Europeans call "social dialogue". Such a step would make it possible to improve the quality of decisions taken and strengthen their legitimacy. COR could ensure that the voice of more European citizens are heard as well as making sure that decisions which *directly* affect citizens and local management are based on, for instance, the principle of sustainability and ecological biodiversity.

Numerous European or national policies inevitably pass through the local or regional

level. COR seeks to mitigate the exclusion of issues such as the right to housing and sustainable development that respects the environment. It works on creating networks between towns and cities for the dissemination of information and mutual exchange of experience. COR also seeks cross-border exchanges in order to strengthen democratic links, promote economic development and improve living standards. As well, it helps provide a forum for a more grounded understanding and experience concerning the necessity to, and reasons for resisting corporate, non-sustainable agendas.

COR encourages processes to protect Europe's cultural heritage as an important source of its identity and as "a powerful means for achieving unity." It also supports world-wide cooperation between local and regional authorities to re-emphasise the commitment of European elected representatives of local and regional authorities to:

- the *development of local democracy in the world* - one of the soundest foundations for peace and prosperity among people;
- the promotion, within the United Nations, of the principles set down in the Charter of Local Self-Government of the Council of Europe, in particular the principle of subsidiarity in order to achieve a World Convention;
- the implementation, as soon as possible and in appropriate ways, of a procedure enabling IULA [International Union of Local Authorities] and other representative organisations of cities and local authorities across the world, brought together in the G4, to be consulted by the United Nations Organisation.

As COR emphasizes, it is eager "to work towards setting up a light but permanent coordination structure, to reinforce the growing convergence in the work of the world-wide organisations in order to make the voice of local and regional authorities heard more strongly" (COR 1996).

For instance, at COR's General Assembly on 25 May 1996 it was suggested that Europe should promote such fundamental values as solidarity, tolerance, democracy and respect for humanity by inscribing in the Treaty the right of citizens to manage a substantial part of public affairs through *local and regional elected assemblies* and by introducing the principles of the European Charter of Local Self-Government. Secondly, it was proposed that local and regional authorities should hold responsibility for the *implementation* of European policies. However, such an *emphasis* on localism over the interests of all citizens may act, as Alinsky (1971) was insightful enough to point out, as a "Trojan-horse" for eliminating more universal standards for social and environmental care.

More positively, COR called for an increase in *structural autonomy* and a guarantee of its body and local authorities' *democratic legitimacy*. However, it also requested that it should, or rather, "must become *an Institution [towards] ensuring equitable and balanced representation of the local and regional authorities in each Member State*, able to make an effective contribution to the process of drafting European policies" (COR 1996, my emphasis). In other words, the basis for determining equity and balance would be determined on local "soundings." However, COR's desire to become an institution somewhat contradicts its earlier suggestion (previous endnote) that it is interested in working to remain "a light but permanent coordinating structure" (COR 1996).⁵¹

⁵¹ Finally, current self-conceptualizations of COR appears more oriented to a notion of *multi-level governance* rather than the tenets of *intergovernmentalism*. The former is a system of "continuous negotiation among nested governments at several territorial tiers -- supranational, national, regional and local" (Marks, in George 1996, 52). See also Monnet

The Economic and Social Committee

Like COR, the ESC is not an institution but an “organ” or weaker “body.” It stems from the requirement for “*social dialogue*” between sectoral interests in the form of consultation with management and labour in industry, trade unions, agriculture, etc. Opinions or recommendations from the two sides are made through the ESC before proposals are submitted to the Commission, Parliament and the Council. The “social partners” may also choose to negotiate an agreement to implement the proposal, which is then adopted at their request as a Council decision. The ESC encourages general “exchanges of information” and creation of networks. Exchange programs concern various categories of people such as the old and disabled and issues such as employment, health, equal opportunities for women and men, training, poverty and exclusion. The ESC also encourages “innovation, good practice and the transfer of know-how” (ESC 1996).

However, the mandatory consultation of “Ecosoc” was limited to relatively few areas despite its slight strengthening in the Maastricht Treaty. Because it is a relatively weak organ in terms of its influence, sectoral interests have tended to group around the Commission, the Council and Parliament (Westlake 1994, 51). And the decision-making on proposals to send to the above institutions has often led to watered down and very weak social proposals as the business and management representatives often block the passage of more vigorous social and economic proposals. It is also argued that the exchanges that this forum sets up can often be

(1996) on federal versus confederal visions for European integration.

subtle forums for encouraging employee unions to see the governmental or employee's "perspective" regarding the *types* of "innovation and good practices" that the management representatives see as necessary for a "competitive, global market economy."

The European Court

The ECJ and its evolving *status* and *power* --or should we say, its powers stemming from negotiations by Council members at IGCs-- constitute an alluring topic for critical theorists. Such a topic is of particular interest to critical social and legal theorists because, whereas the *power* and *influence* of other international courts and their laws are "notoriously vague and weak" (Nugent 1994, 215), the ECJ is continuously establishing the precedent of a legal body with *supranational legitimacy* and *authority* over issues concerning not only trade disputes, but also of the *obligations state institutions to fulfil enlarged social, environmental, and economic rights of "postnational citizens"* (see Bercusson 1996; Burrows & Mair 1996).

In other words, European citizens have set in motion the codification of a relatively independent, supranational legal institution for the adjudication of issues of justice that will be less embedded in narrow national, regional, administrative, political, and economic sources of judgement than other institutions in Europe. This may lead more readily to judgements based on more "*impartial, postnational adjudication criteria, yet still open to democratic impulses* concerning economic, social, cultural, bodily, and political rights.

One may compare for instance the *Bundesverfassungsgericht's* (German Constitutional Court) upholding of the strict convergence requirements for the qualification of other countries into the January 1, 1999 monetary union. The basis for the decision rang of national (Weiler

1997) and fiscal reasoning. While the current French government is pledged to improve the notorious lack of independence of its constitutional courts from Presidential powers under the Fifth Republic, the ECJ appears to bear a better chance at understanding itself and passing judgements which are less subverted by national and economic perspectives. (See Burrows & Mair (1996) for an assessment of recent judgements by the Court. The authors emphasize the more limited jurisdiction of the ECJ on UK law and policy.)

This suggestion is not meant to ignore the considerable problems that *will and do occur* in ECJ judicial decisions and the fact that critical theorists could not rely on, for instance, the goodwill, or even the good sense, of a Judge Hercules (Dworkin) to render just judgements. In addition, national and economic power complexes continue to insist on restraint over the *jurisdiction* in which the ECJ can even adjudicate (See Golub 1996 on the decreasing number of judgements brought down by the courts concerning environmental issues due to the increasing influence of the German Länder.) Thus, while *internally* the reasoning, procedures and mechanisms for more just, postnational and transparent decision-making processes favourable to emancipatory impulses from the lifeworld may be possible, national and economic interests hostile to the expansion of the ECJ's jurisdiction at a constitutional level still restrains its full capacity. But notably, the supranational level exposes the *external* influence of these more narrowly economic and nationalist, as opposed to more moral, universally-oriented communicative reasoning.

However, increases in the jurisdiction of the ECJ is not the most important element. For the status of not only the ECJ but also of the EU in general as well as the identity

orientation of citizens' towards a European, that is a postnational *Verfassungspatriotismus* (constitutional patriotism (BFN 507)), would be strengthened if the ECJ reinforced its *existing* framework of policies, such as the Social Charter (see Chapter 4.). Through the reinforcement of this Charter the credibility of the move towards supranational union and European citizenship could become considerably enhanced in the eyes of the European public.

Of course, since the ECJ only has the power to *interpret* laws already passed and adjudicate on constitutional questions, the expansion of such a broad Social Charter as a bonding basis for European identity could neither *legally* begin here, both according to EU law, nor should it *normatively*, according to Habermas' discourse theory of law. Instead, it must begin as a *political rather than legal* process in the communicative spaces available to the citizens in the European public sphere.

Once autonomous publics and their representatives at the various subnational, national, and supranational levels --made institutionally co-ordinable through the Parliamentary Assizes, etc.-- successfully push such social agendas on the table and are negotiated into treaty texts, the ECJ would *then* be able to protect and perhaps augment those treaty norms. However, the ECJ is not capable of *generating*, for example, large macroeconomic or social and regulatory policy. Currently, only the European Council has that power.

The Commission

There are two opposing views of the Commission. First, that it is the real engine for supranational democratic, social, economic and environmental justice, while the Council is the blocking institution, representing parochial national interests. The second view is that

announced by de Gaulle in 1965 and Thatcher in 1988 that it is a mere bureaucracy that is trying to centralize power away from the Council and especially the European Council which supposedly represent the common will of the European peoples since their political position was legitimated through national elections (Rometsch & Wessels 1994, 203. See the authors' more differentiated four-part model of the roles of the Commission).

However, as the top administrative body, there has been considerable interest in the Commission due to its exemplification of the potential of an enlightened *supranational* executive (civil service) to not only merely administer Council directives and community legislation, but also to embody and stir a postnational political will. With its formal executive position to help steer the considerable (though still relatively unmobilized) administrative power of European-level resources, the Commission would appear to be well-placed to use this steering capacity towards institutionalizing the conditions for progressive, supranational citizenship rights and improved democratic measures. And to some extent it has done this.

During his tenure as Commission President (1985-1993), Jacques Delors took advantage of his office to inspire and reinvigorate certain groups, notably unions, as well as national leaders to look beyond their national borders and narrower interests and traditions towards rebuilding "a more social Europe." Prior to his tenure, a certain "Euro-sclerosis" had set into the entire notion of a coordinated economic, social and political union or even an understanding of the potential viability and *influence* of a European-level system of governance on such an agenda (Ross 1995, 245).

For instance, it was not the efforts *alone* of subnational autonomous publics and social

movements or even national and EP-level parties to inspire a renewed constitutional and, in particular, a more socially and democratically accountable vision of European integration. Rather, social justice movements depended on *the complementary* force of national governments and the leadership of the Commission's Presidency. In the late 1980s, the particularly pivotal moment in slowing --at least at the European but not necessarily national level-- the trend towards an increasing and creeping Thatcherite neo-liberalism into the potential European self-conception of the role of the state was Delors' speech to the trade union movement in England. He gave this speech exactly one year after and in the same spot as Margaret Thatcher had given a speech representing the neo-conservative view of the role of the state (Delors 1994, 51). Of course Habermas, for instance, is nonetheless fully aware of the fact that none of these heroic moments, or affirmations of the ethico-democratic wishes and needs by the latter institution and its leadership would or could occur without the force of communicating and agitating civic societies and autonomous publics (see SR 115 and Chapter 3 on democratic law-making).

Nonetheless, to its credit, and unlike the Council or certainly the European Council, the Commission makes itself and the reasoning for its decisions accessible to public scrutiny. It also engages in rather extensive consultations of the various bodies and the EP regarding policy initiatives. However, this pre-decision dialogue and sometimes negotiation with affected publics remains on more of a *discretionary* basis according to the democratic inclinations of the sitting President and individual Commissioners although some changes have occurred in the 1997 Amsterdam Treaty.

In addition, the Commission is of course an *administrative* institution with insufficient democratic credentials to wield political discretion to choose among competing social and economic models. Although a charismatic and visionary Commissioner can have a positive impact on the priorities to which the considerable resources of the EU can be oriented, excessive reliance on this administrative institution undermines the democratic model of legitimacy and, as Habermas puts it, outruns its technical competence (BFN 190-3).

Certainly, the *identity-forming capacity* of the Commission, which promotes itself as the conscience and guardian of the EU, would tend to not resonate as *meaningfully* with many citizens as does the executive leadership of a nation-state or even as the EP does. For European citizens, the "resonance deficit" of the formal administrative and representative institutions is already significantly strained and competed for between the EP and the European Council and, of course, their own national democratic parliaments. While there is considerable variance between countries due to their particular democratic histories --the monarchical parliamentary UK and the republican Presidential French systems for instance--, the Commission may conceivably summon a strong measure of highly fragile legitimacy for its office even though its *capacity to dictate* policies to citizens has already been significantly circumscribed by national political elites.

In addition, the citizens' reticence to consent to, literally, the dictates of a supranational administrative body, however well disposed its sitting President is to citizens' issues at the

moment⁵², should be viewed as a positive sign of *a citizenry being more critical of less than democratically controlled, authoritative institutions generally*. However, this positive dimension should be weighted, at least in the short- to medium-term, with the fact that the alternative competing *institution* to the Commission --with the leadership capability and the treaty-based *power* to help orient and coordinate the resources of the Union towards the need interpretations of the citizens *as a whole*-- is not so much the EP (with its diffuse political groupings and weak executive role), but rather the European Council. And it is the latter which has shown, as we will see below, a propensity towards retrenchment towards more *national and, above all, steering via economic rationality*.

The European Parliament

The EP by formal treaty represents over 370 million European citizens. Since 1957 and, particularly since the Single European Act ((SEA) 1986) and the Treaty on European Union ((TEU, or Maastricht Treaty) 1992) Parliament's powers have gradually grown. Parliament is involved in *adopting* Community legislation and the EU budget; it *supervises* the activities of the Commission and the Council; and through their political groups, committees, and the European Ombudsman, MEPs help represent and *mediate* between the interests and values of citizens and the subsystems of the state and the economy.

⁵² The "brokerage" image of the role of the Commission (Laursen 1996) may be compared to Jenson's critique (1992) of this concept of governance generally. And the "promotive-normative" functions of the Commission (Laursen 1996, 135-6) are subject to see-saws according to the Council's appointment of the type of Commissioner as President. As Hix and Lord (1997, 1) point out, this is based on the "custom" of alternating between the Union's main political centre-left and centre-right groups.

Nevertheless, while the powers of Parliament have expanded, so too have the powers of other more nationally-oriented (especially the Council) and directly and indirectly large economic interests. This makes a determination of the gains in the more (representationally) democratic EP's "power" a *complex* and certainly relative matter vis-à-vis the resources of money and nation-state political and administrative power.

Since 1979, the European Parliament has enjoyed marginal increases in powers against those of the historically more conservative Council of Ministers. The European Parliament has also been the site of progressive international action, having passed important initiatives on foreign policy, human rights, ecological protection, and social welfare. It has become *an important site* for European-wide discussions of political, environmental, social and economic policy and rights.

One of the most unique democratic characteristics in the EP is the formal recognition and even encouragement of *political groups*. The umbrella groups emphasize co-ordination, the exchange of advice, and administration, compared to the actual European parties which are organized around being directly elected (Pedersen 1996). These groups do not just help to further represent the various political tendencies within the assembly, they also help to bring about a *more diverse representation of the wider political culture*. Such a mechanism provides a "*sluice*," in some ways, for a *more representative diverseness* of the European political horizon to enter into dialogue. At the same time, they constitute this variety without overly formalizing and hence assimilating these different voices into *further* organizational logics and obligations that more bureaucratically-structured political *parties* are obliged to follow. This

approach also helps to avoid excessive fragmentation in coalition and decision-making processes.

New parties, such as the Greens, often try to avoid the left-right continuum in order to define a "new politics" (Offe 1985). However, as Hix and Lord point out, (26, 1997) the main "parties invariably demand that new movements also compete on the traditional political issues; this forces new issues to be amalgamated into the original left and right concepts, and new parties to be aligned on the left-right dimension." Thus for instance, by the late 1980s, the majority of Green parties had taken up positions on the left of most political issues. The "fundis" (as opposed to the "realos") were more or less pushed into "*familles spirituelles*" not by choice, but by voting strength on an issue. In addition, the Greens, despite their interest in justifying environmental protection and pacifism through more "post-materialist" arguments and proposals, have been forced to more clearly define their positions on the main issues dividing the other main party families, namely, economic policy, along the left-right spectrum (Hix and Lord 1997, 38). This is not necessarily a negative trend for it leads to the interpenetration of more marginalised ideas into the more mainstream political and policy agenda (Scott 1990).

In terms of helping to create a more *postnational* orientation on the one hand, and a more culture- and *issues-debating* public sphere, researchers are detecting a palpable movement as embodied and encouraged in the EP's structure from a *Europe des patries* to a *Europe des partis* (Hix and Lord 1997). That is, from an (inter) nation-debating to an issue-debating public sphere. And all this occurring at the *potentially* more visible, and influential

level of suprapstate politics.

Therefore, *of all the institutions in the emerging European public sphere, the EP currently represents the more truly supranational, diverse, public, widely transparent and accessible forum* for the local, national, and regional concerns of citizens as well as European and even *international* issues. While in a comparison to the power of most national-level parliaments the EP falls short, in a comparison to other supranational and international decision-making bodies it has no peer in its democratic and representative capacity.

The *diversity* provided by the political groups are particularly useful in setting a more decentred, *postnational* perspective through more *rational* and effective debates and decision-making procedures. Although there are political groups in the EP that expressly support more narrowly nationalist and even racist and anti-redistributional programs, those Europeans with a more postnational and supranational value-orientation find that the EP provides a better "house" for rationally arguing social, economic, and political forms of interdependence. In other words, the EP provides them with a more truly *postnational communicative space*.⁵³

This more representative diversity in the formal political realm helps demonstrate the *potential* of this realm. It is a useful contrast to notions of "oppressive bureaucratic government" (Hayek) which even critical social theorists join in and which thus help validate such views of "government" generally in the popular imagination. Instead, the potential of

⁵³ The minimum number of Members required to form a political group is 29 if they come from one Member State, 23 if they come from two Member States, 18 if they come from three Member States and 14 if they come from four or more Member States (Jacobs & Corbett 1996).

diverse and radically oriented *parties* with a two-track approach is best exemplified by the German Greens. They represent the potential for *issue debating* groupings aligned along distinctive and fundamental *values* that they debate in a parliamentary forum. This has the potential, again, to signal a return to the more original *Kampf* for the *öffentliche Meinung* which was distorted with the more *liberal representative* and, one could add, with the more British single-member plurality system. With the move towards a more PR electoral system at both the national- and EU-levels, another important historic element in the structural transformation of the public sphere may be emergent.⁵⁴

In sum, the EP acts as the most democratic and supranational institution available to European citizens to bring up concerns and influence decision making. However, despite its fulfilment of these normative *legitimacy* requirements its *actual capacity* to [1] convert citizens' communicative power into legislation; [2] to direct funding for democratically generated priorities; [3] to supervise less democratic institutions; and [4] use its *political* and administrative *power* stemming from democratically constituted consensus to steer national, European, much less international *economic forces* are still in need of strengthening. The EP requires more budgetary, supervisory, and legislative powers to become a truly supranational and, equally important, *democratic* institution (Newman 1996).

Specifically, as Habermas emphasizes about idealizations of the liberal democratic model in general, the more liberal depictions of the decision-making process at the EU level

⁵⁴ See Habermas' (1991) *Structural Transformation* on the historical undermining of the Kantian notion of publicity.

believe the heavy hand of the European Council in the formal governmental sphere.⁵⁵ But even more significant is that those "naively normativist" liberal depictions provide an inaccurate picture of the influence of national and, particularly, international *informal* forces from the economic sphere on the decision-making process (Williams 1991; Connolly 1995; Newman 1996; Greenwood 1997).⁵⁶

Such excessive influence on "high politics" issues such as monetary policy "where almost entire populations are affected" (Greenwood 1997, 13) has led to Europeans' distrust of the *integrity* of the decision-making process to act in the truly public interests and in keeping with the democratic and egalitarian values of most Europeans. And without such an *explicit understanding of the nature of the legitimacy crisis in the legal constitutional state*,

⁵⁵ A liberal point of view of interchange procedures among the political institutions of the EU focus on the *horizontal* decision-making directions. However, what they do not show regarding decision-making influences and not simply the "competencies" of the various institutions is as important as what they do. Namely, it largely gives the impression that decision making initiatives begin with the Commission and then pass through both the EP and the Council of Ministers. It belies the heavy hand that, in the formal *political* sphere, the so-called "European" Council, made up of its heads of states, lays over the direction of most initiatives from the Commission and, certainly, the Council of Ministers. Even more important, it "naively" makes translucent the influence of large economic interests on its decision-making process.

⁵⁶ Hix and Lord in *Political Parties in the European Union* suggest that the EU is "run by party politicians," but what they really mean, as they state further on, is that politicians are more involved in the "management of the Union" (1997, 1). The distinction is one between the capacity for democratic political parties and even for the Council to provide politically-determined *leadership*, and the mere *management* of the emerging economic orientation of the Union and its priorities. And although Hix and Lord are correct in pointing out that the structure of the EP tends to allow what they call the "overrepresentation" of opposition and fringe parties (*ibid.*), this still does not sufficiently underline the fact that the real influence on the decision-making capacity of the Union often lies beyond the reach of these parties.

*one cannot accurately point toward the direction for tentative solutions to such problems.*⁵⁷

And the nature of the problem certainly has a good deal to do with the lack of transparency and openness of the decision-making processes in the executive levels of nation-state ministerial leaders in Europe's predominant decision-making institution, the Council of Ministers.

2.2.2 The Council and the 1996-1997 Intergovernmental Conference

Some of the issues relation to the democratic deficit at the IGC in the changing European public sphere included: EU citizens' growing insistence on having communicative spaces made available to them so that they would be able to influence the decision-making process;⁵⁸ strengthening the power and influence of domestic and European-level Members of *Parliament* on the policy-making process vis-à-vis the European Commission, and, more importantly, the European Council (the "postnational executive" and the "national executive" of the EU respectively); making the decision-making process of the executive institution of the Council more transparent; and using that increased transparency and increased political power

⁵⁷ Of course another major reason why the *nature of the crisis* may remain translucent to many citizens is due to the tremendous influence of much of the mass, *corporate* media whose interests often parallel those of the other political fiscal conservatives (Keane 1991). For this reason, the Commission's "bureaucratic rationality" and general inferiority to more truly democratic, and supranational institutions, in other words, institutions more resistant to nationalist and economic elite bases for judgement as opposed to postconventional, decentred, social, and autonomous public and private reasoning is again noteworthy. (See Smith (1996) on the *problem* of a lack of independent transnational media for European identity and cohesion purposes).

⁵⁸ Such spaces, for instance, through advisory bodies and committees, would be desirable without completely dissolving the different roles and statuses between citizens and systems of governance (BFN).

through the parliaments *and* citizens' fora to steer self-understandings of the Union away from, for instance one-sided monetary obsessions towards simultaneously deepening social and economic citizenship rights or, more generally, moral norms, and more constitutionally defined rules of recognition in the unfolding Union.⁵⁹

The policies of fiscal austerity, deregulation, evisceration of universally accessible public services, public employees, and consequent high unemployment rates, etc., were largely blamed on the one-sided obsession by national conservative governments with achieving the EMU (European Monetary Union) convergence criteria. In France for instance, this created the image of a "*Europe des banquiers et du fric*" instead of a *social Europe* which would embrace and continue to attempt to deepen and broaden the egalitarian principles set in motion by the French Revolution. As a partial result of the one-sided obsession for a monetary and free trade zone rather than a simultaneously social and democratic union, the *Parti socialiste français* helped lay waste to the conservative government in the June 1997 legislative elections.

⁵⁹ As their *Programme 97: Changeons d'Avenir* stated, the Jospin government is oriented against the "conformism" of most Western governments to austerity and deregulation measures demanded by monetarist economics compared to the affirmation of an integrated social model. Their 1997 election suggested that there was a clear choice between the programs of the left and the right: "D'un côté, une société dominée par le [neo-]libéralisme qui conduit inévitablement au règne sans contrôle de l'argent. De l'autre, une société moderne, fidèle à ses valeurs fondamentales, dans laquelle l'intérêt général est placé au-dessus de l'intérêt financier. Une société où l'Homme est au coeur de l'économie" (*Parti Socialiste Français* 1997). In England, home of the monetarist economic revolution since 1979 (see 5.1), the new Labour Government is now oriented towards a more balanced creation of a "Decent Society" alongside economic management.

Nonetheless, the question of generally opening the emerging EU-level decision-making process to publicity, not so much by the EP or the Commission, but particularly by the Council has been raised by citizens and even certain Member States. During the 1997 revision of the Treaty, this issue was central to the discussion, especially in countries with a stronger tradition of openness in public affairs such as Finland, Sweden, the Netherlands and Ireland.⁶⁰

In an overall assessment of the transparency issue by the Commission, they suggested that "[o]penness and transparency are designed to help the public to grasp the decision-making process and require that Community legislation be made more comprehensible." However, "as things stand, the public's expectations are far from satisfied." Significantly, it is the Commission which suggested that a great deal remained to be done, "especially in the Council, which must be more open in its legislative function. [In addition, t]he Community's efforts will be to no avail, however, if the *national* authorities for their part do not ensure transparency in the transposal and application of Community legislation" (Commission 1996).

This is crucial when one considers that the executive branch of the members states have been indirectly considerably empowered through their position in the Council as an institution which has received a massive transfer of competency from nation-states to the Union. This

⁶⁰ Even the German Foreign Office (1996) wrote a paper noting the importance of transparency by suggesting that "*euro-fatigue*" has to be counter-acted so that Europe will be brought closer to the citizen. Terms such as "*subsidiarity, closeness to the citizens, democracy and transparency*" must not remain words with an empty meaning. Writing in *Liberation* (25.03.1996) President Chirac, perhaps unaware of the German government's briefing drawing attention to the problem of vagueness becomes the object of dramatic irony when he continues to only rhetorically call for "a closer relationship between the European Parliament and its electors."

transfer of power has occurred, again indirectly, at the expense of the national parliaments (Weiler 1997, 265)

The process leading up to the outcome of the Maastricht II constitutional round is most instructive as an example of the difference between the *actual versus apparent influence of the resources of postnational* EU administrative and political institutions, the communicative force stemming from solidarity resources in autonomous publics in civil society, and *the influence of national political elites and the power of money and economic rationality* in the decision-making process. This example helps demonstrate why, as Habermas has noted critically of Ackerman's constitutional theory, that autonomous publics must not wait for the "overheated constitutional moments" to make proposals and become involved in the process for, by then, it is certainly too late. Instead, Habermas' deliberative model of *Verfassungspatriotismus* understands constitutionalism, not as "high politics," but as an ongoing process involving citizens, with the intention of reconstituting not only everyday identity and community, but also playing a part in constructing the very constitutions that citizens will live under and that will guide those who govern, supposedly, for them.

Shortly after the signing of the 1992 Maastricht Treaty under the guidance of the Commission's President Jacques Delors, Delors attempted to continue to integrate the idea of democratic, social and, in particular, employment concerns in any decisions on the future structure of the EU, especially economic and trade decisions. As he adamantly stated, "[t]he EU must not become a mere free trade zone" (Ross 1995).

However, after the release of the ambitious Green and White Papers in 1993 that boldly

attempted to incorporate the notion of a more "social Europe," the influence of a greater economic rationalization of the European agenda began to become prevalent again. While the immanent replacement of the dynamic and adroit leadership of Delors was one factor in the movement from a more ambitious and complex social rationality, to a more narrow and technically-oriented economic rationality, the overall pressure at the national, regional, and mostly international level of economic and, particularly, monetary criteria on decision-making reasserted itself over the agenda of the European Council.

The prevalence of monetary criteria over social and even democratic concerns culminated in 1996 at the Dublin Summit with the signing of the Stability Pact. Pushed forward largely at the behest of the German Chancellor Helmut Kohl (and based on the German system of giving independence to the central bank to maintain monetary stability rather than to the political leadership), this Pact called for the European Council to confirm "the crucial importance of securing budgetary discipline" in stage three of the Economic and Monetary Union (EMU). Six months later in Florence, the European Council reiterated this view and in December 1996 in Dublin, it signed an agreement on the main elements of the Stability and Growth Pact.⁶¹

⁶¹ In stage three of EMU, "Member States shall avoid excessive general government deficits: this is a clear Treaty obligation. The European Council underlines the importance of safeguarding sound government finances as a means to strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation. It is also necessary to ensure that national budgetary policies support stability oriented monetary policies. Adherence to the objective of sound budgetary positions close to balance or in surplus will allow all Member States to deal with normal cyclical fluctuations while keeping the government deficit within the 3 percent of GDP reference value" (European Council

In June 1997, with, on the one hand, a fresh and strong mandate from the French electorate and with, on the other, thousands of demonstrators in the streets of Paris acting as clear popular support, the French Prime Minister Lionel Jospin was in a strong position to attempt to reorient the Amsterdam Agreement towards a more social and democratic restructuring of European *Entfaltung*. Nevertheless, while the Amsterdam IGC was vaunted as *the* forum in which the political leadership of the European community would at least negotiate a new Treaty base for the regions' 370 million citizens, the social, environmental, etc. parameters for what could be negotiated in that Treaty had already largely been circumscribed by the fiscal constraints signed into European law at the Dublin Summit with a relative lack of public debate and communication. In other words, the communicative force of autonomous publics in the streets and their representation by the Jospin government, as well as the recommendations of the earlier Commission and those institutions "closer to the citizen" (such as the EP, the ESC or COR) were largely eclipsed by non-publicly consulted, never mind debated, economic rationality as to the future constitutional direction of the Union.

As John Keane (1995) may put it, the Amsterdam conference acted largely as "a constructed public sphere" and media event. If it had not been for the election of the Jospin government and the complementary pressure on the streets of Paris and Amsterdam⁶², the predetermined and precircumscribed manner of the negotiations in Amsterdam may never have

1997).

⁶² There were over 400 demonstrators arrested in Amsterdam alone calling for a more social Europe or no further integration and loss of national determination of economic, social, and environmental policy (Beuve-Méry and Rivais 1997, 4).

become evident. And the ability for such non-public, yet constitutionally determining, negotiations to occur is only aided by theoretic analyses which do not emphasize the current and growing influence that monetary rationality has over the other resources of administration (here in the form of the Commission, the EP, etc.) and solidary forces.⁶³

In sum, from a Habermasian perspective the three truly *supranational*, i.e., above the governments of the members states (George 1996, 3) institutions of most interest are the Commission, the ECJ, and the European Parliament. *COR* offers the representation of *local democracy* issues but without the more decentered capacity to orient broader policy initiatives towards less particularist perspectives. On the other hand, the two *Councils* embody the greatest *decision-making power* at the supranational level while simultaneously exemplifying the least adherence to *almost all* criteria for a discourse theory of democracy. Although the *Commission* is in such an institutional position of *authority and efficiency* that it can take a leadership role in policy initiatives that may reflect the ethico-political will of citizens, it lacks the democratic *legitimacy* to do so. The *EP* has the democratic legitimacy to institutionalize broad enough legislation in a regulatory direction. However, their current "areas of competency" as outlined by various (constitutional) treaties is highly restricted compared to that of the Council.

⁶³ In order to consolidate the existing policies and framework of the EU, the Dury and Majj-Weggen report of the EP considers that *an adequate system of autonomous resources* should be established in accordance with the *principles of solidarity and subsidiarity* between the Member States so as to guarantee the autonomy of the Union and the effectiveness of its action.

As to the role of the *ECJ*, it can only *uphold*, interpret or clarify the wording of rights *that are and have already* been constitutionally embedded. The Court merely adjudicates on these essential, binding, constituting understandings of the conditions for citizenship. Therefore, for instance, it cannot be "jurisgenerative" (Baynes 1995) in an interesting, far-reaching sense of creating new categories and bundles of rights. Nor should it be, as noted earlier, since this is a properly political and democratic issue. However, the importance of such debates in helping to constitute the future direction of states and, especially now, postnational systems of governance, has not been deeply and widely acted up by autonomous movements.⁶⁴ In the ECJ challenges have been of a dangerous trend to largely undermine Commission directives concerning regulatory policies on the corporate sector and, secondly, the economic obligations of nation states to protect the basis for social cohesion in the enlarged Union (Bercusson 1996; Burrows & Mair 1996; Golub 1996).

Therefore, notwithstanding the possible validity of Habermas' argument that the proceduralism of a supreme court is the most accountable and controllable adjudicator in difficult questions, the dilemma lies elsewhere. Firstly, there is the question of what *categories of rights* the court has before it to adjudicate on. This points to the heart of the problem of who has the *power to initiate* and also make binding decisions to *institutionalize* new laws and, more specifically, citizenship rights, either as legislated or as constitutionalized, binding and justiciable rights.

⁶⁴ For example, the Greens launched a successful appeal to the Court regarding all-party funding (Smith 1996, 280).

Beside the issue of showing the potential *role* of the executive in representing and institutionalizing the ethico-political will of the people, the other issue is the potential *processes and procedures* that help ensure that the interests and values that *are* being brought to the formulation and implementation level by the Commission are *transparent* to the rest of civic society. In the case that the policies being formulated and considered do represent the ethico-political consensus of the public, there is less controversy. What Habermas is attempting to ensure is that people can see that their consensus opinion is being discussed at the formal level and that the transparency of the decision and policy process allows citizens to continue in the dialogue around that policy issue, either directly through influential "sluices" or informally in civil society. This way they not only perceive that the system is fair, but also that they help constitute that dialogue and are constituted by it. On an equally important level, Habermas' notion of proceduralism is secondly designed to guard against the *illegitimate influence* (Blaug 1996) on decision-making by forms of power which subvert rational decision making, such as powerful monied interests.

Habermas' *Between Facts and Norms* attempts to send out a strong signal to critical theorists: autonomous publics must not only lay "siege" to institutions but also develop a sense of appropriateness for that activity (RPS 451-4). And more importantly, many of those formal institutions, old or emerging, must be steered in more democratic directions. That such formal institutions must be "worked on", not simply from the outside, as if irretrievably, irredeemably "other," as sources of oppression. Instead, if some of the same passion must be used to reconstruct them, which may very well require outside and direct action to promote their

opening up to truly representative forces, and not the increasingly national and international economic interests (BFN 486-7).

Conclusions

This chapter has described and assessed some of the more democratic and potentially legitimacy contributing supranational-level institutions that are being struggled for in Europe today. More theoretically, this chapter has played on the mutually reinforcing manner in which [1] *Habermasian* democratic theory could help illuminate the democratic legitimacy requirements for European integration. But also this chapter has emphasized how [2] the struggle for a more democratically accountable and socially-oriented Europe could help inform Habermasian scholars about the *supranational* level of democratic struggle today.

For instance, with regards to [1] above, the *transparency* procedures proposed to illuminate the influence of actors on political representatives in the EU could be better informed with the Habermasian model. While there was some consensus as to what the problem is (lack of transparency and comprehensibility), the proposals advanced at the 1997 IGC constitutional negotiations were still often very general. Providing such precision is the strength of Habermas' work: his analysis indicates the importance and criteria of transparency in order to unmask the currents of power that *illegitimately* access the political realm, on the one hand, and to expose the *lack* of access to communicative flows by more diverse autonomous publics on the other. His normative proposals (1.2) offer guidelines on what it would mean for opinion- and will-formation procedures to be open to publicity. *What is critical* in terms of the legitimacy of the EU as a democratic model of supranational citizenship

cut from the Habermas cloth at this point is making economic, political, social, and cultural policy-making more *transparent* and open to the communicative power of citizens.⁶⁵

Therefore it is not simply a question of which body or institution and on what justification or interpretive basis it should decide issues. The important point is that whatever issue is raised for consideration, the complexity of *the nature of the influences on the decision-making process*, and the potential impact of a decision on citizens should be made as transparent as possible in order that they can further the discussion on its merits or lack thereof.

Towards this end, *constitutional* or treaty talks represent historical moments in the struggle for a European public sphere oriented by constitutionally determined democratic, egalitarian, and postnational moral norms. They provide the basic blueprint for the future development of the Union past the year 2000. The different visions which prosper at these conferences often succinctly illustrate the rationality forms and communicative flows which dominate in this supranational body. As George Ross has mentioned, there is an awareness among many European critical democratic theorists that their emerging and relatively humane "model of [supranational political and civil] society" is part of a "conflict that is of global

⁶⁵ In the proposals by governments, one should note the uniformity in the *lack* of suggestions that the transparency should extend to actual European Council meetings rather than simply the Council of Ministers. What Habermas is attempting to ensure is that people can see that their consensus opinion is being discussed at the formal level and that the transparency of the decision and policy process allows citizens to continue in the dialogue around that policy issue, either directly through influential "sluices" or informally in civil society more generally. This way they not only *perceive* that the system is fair, but also that they actively help *constitute* that dialogue, and are constituted by it.

importance" (1992, 114)⁶⁶. The awareness of this struggle over normative models at the supranational level on the part of North American critical theorists appears to be less developed at this point.

With regards to the second dimension [2] of the study, the *supranational* systems of interchange such as the EU provide an empirical example that this level of action system is an increasingly present form of coordination and oppression. Habermas even suggests that they are a more *appropriate* level of radical democratic analysis. Arguing recently in *The Question of Europe*, he suggests that the EU is not an "institution to be *put up with*, and with whose abstractions we must live"; instead, we must come to understand the "reasons why we should *want* it politically. I would submit that the greater danger is posed by the autonomization of

⁶⁶ Writing in 1992 while the struggle for a Social Charter was underway during the constitutional debate in Canada, and before Jean Chretien was to become elected Prime Minister on a platform of "jobs, jobs, jobs" but instead stayed the course with neo-liberal market economics, Ross was perspicacious in suggesting that in "Canada, as in Europe, victory by neo-liberalism in defining the logics and structures of 'economic union' would be a defeat felt far beyond Canadian borders, even if Canadians would suffer most and most immediately. Thus, if there is something for Canadians to learn from Europe, beyond an understanding of the basic differences between the EC and Canadian settings, it is that what is at stake in 'economic union,' often disguised in plain vanilla technocratic rhetoric, is very important indeed" (114).

The current President of the Commission, Jacques Santer, has a greater concern for economic and democratic "*efficiency*" with often more rhetorical democratic pretensions than his predecessor. If this is correct, it would constitute the unfortunate succession to the executive of the EU of what Nancy Fraser (1995) has called in U.S. President Clinton, "a neoliberal political imaginary." Whereas the emergence of a neoliberal imaginary may provide *relative* relief to a ravaged American social and political economy after the Reagan-Bush onslaught, the succession of Santer to the executive position of the EU represents what George Ross and Habermas had feared would happen: the ascension of neo-liberalist rationalism not only from the national, but to the EU-level after the relatively progressive and visionary two-and-a-half terms of Jacques Delors as President.

globalized networks and markets which simultaneously contribute to the fragmentation of public consciousness. If these systemic pressures are not met by politically capable institutions, the crippling fatalism of the old empires will grow again in the midst of a highly mobile economic modernity." (RG 261). Increasingly, it is only this level of subsystems *which has sufficient administrative power to provide a sufficient (administrative and social) counterweight to the medium of international money*, its economic rationality and strictly technical rather than human and political steering interests.

This chapter has attempted to point to the potential promise of Habermas' *two-track strategy* towards the *re-appropriation of the institutions of such a "postconventionally" oriented* modernity, and its members. Such a two-track strategy provides a more viable interplay between the media of solidarity found in autonomous publics and the power of administration to help mutually reorient themselves towards improving procedures and conditions for justice. The source for such a potential change in the people's democratic institutions points to the importance of *autonomous publics'* involvement in consensus-building to influence the *constitutional level* amendments to the relative power of Parliament. In addition, constitutional-level discourses can act as a source of social cohesion and *bonding* through social dialogue concerning the fundamental, constituting character and values which a union would wish as its orienting values, social and individual goals, not mere minimum bases. The relatively frequent constitutional moments in the EU create potential communicative forums with a far stronger orienting capacity than do the more "routine" affairs of legislation. These moments have not traditionally been prepared for, and taken advantage

of by autonomous groups, relative to the amount of orienting, institutional power that such moments represent. Economic actors have been less myopic in this regard (Greenwood 1997).

In light of the European example, the Habermasian model of state/economy/society interchange works more appropriately at the *supranational*-level, rather than nation-state *level*. The emerging EU model provides many, however fragile and endangered, double-edged communicative spaces, from COR, the EP Committees, to the ECJ.

However, such communicative forms must, if they are to help guide the mechanisms and workings of symbolic and structural systems --cultural, political, economic, moral and legal-- be pre-prepared with some ontological notions of the good and deontological notions of the just that should substantively and positively fill proposals in these spaces. The EU example provides us with one model of such an ongoing and still highly fragile attempt at guiding a more inclusive, egalitarian model of interdependent postnational lifeworlds *and* systems.

Reflection upon the EU example can help critical social theorists move beyond *one-sided* analyses of the human condition and its institutions and, more vigorously than before, begin to challenge the cruel consequences of the underutilized potential of individual and collective wills, re-oriented towards the protection and enhancement of private and *public* autonomy in the emerging global-level struggle between models of society and democracy.

It is promising that creative political action is becoming more informed and influential over the agenda and institutions of supranational coordination and more oriented towards the most promising site for the democratic, critical and creative agenda, the European Parliament.

This helps to increase its relative decision-making power vis-à-vis the other less democratically open and accountable supranational institutions. Without such an understanding of the importance and influence of this institution and its level of decision-making and coordination, two trajectories will continue.

First, the less democratically open, nationally- and one-sidedly money-mediated decision-making body of the European Council will remain in *formal political* charge of agendas. But more onerous for democratic principles is that even the thin *de jure* decision-making capacity of formal political institutions will become increasingly irrelevant due to the *de facto* increasing steering power of money through highly mobile and volatile financial and production processes and institutions whose only reasoning basis is determined by economic, rather than social, never mind democratic criteria. The capacity to do so is increasingly entrenched in international legal treaties that are attempting to "transform business rights into moral rights" (Mandel 1996).⁶⁷

⁶⁷ Due to the increased importance of regional *blocs* rather than nation-states the emergent European paradigm is also significant for more than "Europeanists" It is of particular interest for critical social theorists concerned about the democratic and social deficit brought about by NAFTA for example --not only in NAFTA's one-sidedly economic integration model, but also in the lack of democratic checks concerning its *ongoing* implementation and interpretation procedures. The informal, opaque and unaccountable decision-making process of international bodies such as the Group of Seven and the World Trade Organization over not simply "economic" questions, but also cultural, environmental, health, and social public policies of "postnational-states" is disturbing. For example, an unelected Commission has the power to interpret and apply trade and investment agreements thereby overriding the popular democratic will of a particular nation as well as social, environmental, and economic legislation passed by elected national governments (Scheiderman 1997; Mandel 1997).

Therefore, the overall argument is that given the increasing pressure of supranational forces on the agenda setting of subnational and national settings much of the research focus of critical theorists interested in promoting autonomous and democratic politics will find the best *hope* for making spaces for such democratic opinion- and will-formation even relevant towards autonomous publics who are attempting to increase the treaty-based powers ("competancies") of more democratically accountable, and *existing supranational* bodies and institutions. In the particular European case, this institution is the EP. As we have seen, it is the only institution at a regional level which provides a potential model for the democratic requirements of other regional level systems of governance, which has both the potential democratic *legitimacy, decision making influence, representativeness, openness*, etc. Working on making such an institution more legislatively powerful while at the same time making it more democratic would perhaps be Habermas' main point in arguing for the importance of a two-track, postnational system of governance, one which recognizes the importance of formal (parliamentary) democratic bodies *as well as* informal publics who can influence the agenda of the latter through transparent procedures of access.

One conclusion is clear: support for new supranational or international constellations which represent *de facto* changes in the capacity for autonomous publics of citizens to meaningfully contribute to the process of their public and private autonomy can only be made *if* there are sufficient democratic mechanisms and sluices in place for *meaningful* citizen input and a communicative space to make common *meaning* together. Otherwise, any attempts at creating such supracitizen systems of governance may increasingly fall victim to the Swiss pre-

empty no, the French *petit oui*, the Danish no,⁶⁸ or the French voters' 1997 expulsion of governments which attempt to simply accommodate financial interests, rather than public values and needs.

If the trajectory of the EU begins, or rather, continues to reproduce at a higher level the current excessive interpenetration of economic rationality into supposedly autonomous national political decision-making realms; if attempts are made to reduce rather than augment the capacity for citizens to make their civil and political rights *actionable*, then *that* configuration of supranationalism must be vigorously opposed. Critical democratic theorists are not interested in having "things change to stay the same" (Meny 1996), or, just as the above has argued, the new European model has the potential to improve the democratic, civil, and social conditions for an increasing number of countries, particularly, in the former Eastern Bloc countries, it also has the capacity to again ravage the lives of those in nearby and far-off lands. The struggle is to *institutionalize* the true potential of the best of European values; this is, as Habermas suggests, its "second chance" (PF; PSP).

We must emphasize the importance of these *two* potential forces and spheres, and their particular resources --administrative and solidarity-- both of which are required today to struggle against the current alliance of one-sidedly economically-oriented parties and resources

⁶⁸ In a 1992 referendum, the Swiss voted against the European Economic Area by 50.3 to 49.7 percent, leading to the suspension of the capacity for the government to push for inclusion in the EU. The same year the French people barely accepted the Treaty on the European Union by 51 percent. Also, that year the Danes rejected the same Treaty by 50.7 percent, forcing the Council at the Edinburgh meeting to make precedent-setting concessions in the Treaty (Nugent 1994, 455).

of (now) international money. Simple crisis frameworks which, if they even dare to point in a normative direction, tend to one-sidedly celebrate civil society and new social movements. While these sources of solidarity are *vital*, they are insufficient by themselves to help hold back current alliances of economic neo-liberalism and political "leaders," really mere managers of monied interests both of which are creating policies which are proving disastrous for the capacity to have competent, reflective citizens.

In conclusion, Habermas is prescient in defending the *potential of formal and institutional, both representative political, judicial, and even administrative institutions* (the EP, ECJ, and the Commission respectively in this case) to be "*opened up*" to publicity and, secondly, *to act as institutional "sluices" for the interests and values conducive to active citizenship*. They can indeed act as "guardians" and even as the mandated, vetted, institutionalized "conscience" of the letter and spirit of postnational aspirations as embodied in Treaties or constitutions, but always under the "sensory" eye of an active, robust and vigilant civil society.

Despite some of the more positive moves towards European integration, European citizens still maintain their different languages, parliaments, histories, cultures, all of which provide them with diverse and even conflicting senses of identity. If Europe is to create an "ever closer Union," it will require *something* to bind/bond them together. As a coalition of autonomous groups have suggested, such a bond cannot be acquired simply through institutional renewal or even greater opportunities for political participation. What will have more motivational force is something more concrete that refers to their normative values and

which will address their everyday fears and needs. In the following two chapters we will consider the justification for more social and economic rights to provide such a motivational force for cohesion and justice.

3. Habermas' Justification of a New Paradigm of Rights Towards the Meaningful Exercise of Citizenship: Securing Private and Public Autonomy

Central to Habermas' analysis of the legal constitutional *system* and, more generally, the rule of law is its *dual character*, both legitimizing the systemic media of money and power and also carrying with it the potential to articulate and administratively guarantee the normative expectations of the lifeworld. In short, it offers an additional site in the struggle to institutionalize the conditions for private and public autonomy.⁶⁹

Honneth has noted that "A central problem of the critical theory of society is the connection between normative theoretical intention and historically situated morality. If a theory is to do more than merely appeal to the ethical standards upon which its critique of society is based, then it must prove the existence of *empirically effective forms of morality with which it can reasonably connect*." With the collapse of empirical evidence that social class struggles in the (Marxist) revolutionary tradition hold a necessarily moral impulse, the task today is one of "linking ethically founded norms and historically effective morality" (Honneth

⁶⁹In *Towards a Rational Society* "mediatization" of popular will refers to the encapsulation of the latter's substantive decision-making power in organizations and political parties that then determine needs with regard to the stability of the political system (Shapiro in TRS viii, ix). More specifically, Habermas distinguishes between law as *medium* and law as *institution*. As a medium, law is seen as a tool, a steering mechanism with which to regulate system preferences. Law as institution is seen as a general repository of social values and normative principles (TCA 356-373). See Tweedy and Hunt's (1994, 314-315) questioning of whether Habermas has downplayed this formulation in BFN. However, Habermas has made the rejection of this separation explicit (BFN 562, n.48). The implication is the difference between a strategic view of laws and laws as a stable site of normative morality which should not be viewed strategically.

1995, 205. My emphasis). In particular, I consider here "rights" and, especially, economic rights as a *category* which may provide the distinctions, depth and clarity for a critical social theory to illuminate the normative and practical conflicts of our time. In so doing, I follow Habermas with his radically intersubjectivist and proceduralist reconstruction of the currently narrowly proceduralist and individualist basis of law and a system of rights. However, I augment the latter with what Honneth (1995) has called the necessary *reintegration* of the "experiences of economic dependence and social deprivation," or *economic insecurity*, which Habermas' discursive and procedural theory has tended to marginalise (BFN; CR). While Honneth has so far tended to integrate this dynamic of economic insecurity via his *recognition-* rather than a *communication-*theoretic approach, his and others insights concerning the hidden moral grammar/injuries of economic insecurity are drawn on in order to justify a system of rights that more explicitly integrates this autonomy-affecting dimension of citizenship. This will provide additional analytic depth to a justification of the expanded and more differentiated categories of rights proposed by David Held (1995).

In this Chapter, I first briefly describe the two dominant and competing *normative* paradigms of liberal and welfare law (3.1). In so doing I describe Habermas' critique of both paradigms. Up front one should be clear that his critique of the *traditional* welfare rights paradigm is not aimed at the efforts to guarantee freedom *enabling* substantive rights, but rather at the politically pacifying, normalizing and surveillance apparatuses which its administration --stemming both from a bourgeois privatist, and the traditional social welfare perspective-- presently equally enables (BFN 550, n.23).

I follow with Habermas' own (3.2.1) *procedural* paradigm of law, beginning with its *constitutionalizing* aim and radiating (*ausstrahlend*) systems of rights. These rights are focussed on as a source for securing *de facto private and public autonomy*. I also highlight its "two-track" process for going beyond the stage and level of *formulation* to the *implementation* of policy changes, or from the *juridifying* liberal welfare top-down model to a more participatory administrative model (3.2.2. See also Held 1995; Bartholomew 1993; Coote 1992; Sunstein 1991; Young 1990).

I end the chapter (3.3) with what can be viewed as substantive and complementary, not competing, contributions to Habermas' system of rights through David Held's (1995) more programmatic and enlarged *categories of rights* for citizenship. Finally, while much of Habermas' recent work focuses on the jurisprudential questions of how, under what conditions, and with what referents the (supreme) courts should interpret and adjudicate issues,⁷⁰ this section concentrates on the issue of by what *legal instrument*⁷¹ we could conceive of *politically and formally instituting* the binding/bonding rights stemming from his notion of non-juridifying mechanisms to securing private and public autonomy. Options pointing toward an *institutionalized, justiciable, universal social charter* will be outlined (Kymlicka & Norman

⁷⁰ These principally include the realist, hermeneutic, and positivist legal theories, and especially of Dworkin's discretionary "Herculean Judge," Michelman's communitarian natural law, and Alexy's formal universalization principle stemming from Kant as the bases for adjudication (BFN chapter 5).

⁷¹ See 4.2 on the Amsterdam Treaty (para. 3) regarding *economic policy* as an effective instrument, or the public sphere as a more diffuse (non-institutional) *political "instrument"*.

1992; Nedelsky & Scott 1992).

The above attempts to highlight the complexity and depth of the challenges facing democratic politics at the levels and stages of *generating* ideas and motivation (1.1 and Honneth 1995). It also attempts to conceive of the possibility of participatorily *formulating* rights and social policies to make citizenship *actionable*, and *implementing* them.

Of course, these conceptualizations are only possible if we orient ourselves to radically reconstructing democratic *institutions* and *rights* rather than conceiving of *completely overturned* systems. To determine such concrete, empirically viable processes makes politics harder, not easier, as such political options must be critically analysed for their capacity to avoid social atomization, one-sided profit maximisation and the consequences of weakening the individual, community, economic and social preconditions for self-esteem, solidarity and interaction.

3.1. Normative Paradigms of Law and Citizenship Rights

According to Habermas, constitutional scholars debate in a manner which tends to assume that there are only two legal paradigms.⁷² On the one hand, there is “the” *welfare* state

⁷² While there are these two legal paradigms, Habermas does not contest the essential character of modern law generally. He summarizes the normative presuppositions for legitimate law in “Struggles for Recognition”: “Modern law is *formal*, because it rests on the premise that anything that is not explicitly forbidden is permitted. It is *individualistic*, because it makes the individual person the bearer of rights. It is *coercive*, because it is sanctioned by the state and applies only to legal or rule-conforming behavior --it permits the practice of religion but it cannot prescribe religious views. It is *positive* law, because it derives from the (modifiable) decisions of a political legislature [not the whims of a king or executive]; and finally, it is *procedurally enacted* law, because it is legitimated by a democratic process. Positive law requires purely legal behavior, but it must be *legitimate*; although it does not

model⁷³ which, despite its "freedom guaranteeing" provisions, often over-intrudes into the lifeworld of its "clients", thus undermining their autonomy and capacity for self-determination (TCAII, sec. VIII; NC chap. 2). In *Between Facts and Norms* Habermas has come to emphasize more than in his previous works that this weakness in the social welfare paradigm stems from its adoption of elements of the "social blindness" of the *liberal* or bourgeois formal

prescribe the motives for obeying the law, it must be such that its addressees can always obey it out of respect for the law. [Cf. Held (below) on the rights stemming from law as producing not mere respect but also *obligations*. This mirrors somewhat the debate with Benhabib, Honneth, and even more communitarians concerning the motivation for obeying, and hence the legitimacy of commands, laws and a given legal order. Habermas attempts to counter this problem with the following:] A legal order is legitimate when it safeguards the autonomy of all citizens to an equal degree" (SR 120-1; see also BFN 55 & BR 150 for more elaboration). Above all, it cannot "narcissistically marginalize" itself in self-wonder of its own code values, but must instead be "nourished by the 'democratic *Sittlichkeit*' of enfranchised citizens" (BFN 51 & 461).

The reason for Habermas' focus on law is that law is meant to solve social coordination problems. This becomes increasingly important in modern, pluralistic societies with their different background assumptions. This is combined with Weber's "disenchantment of the world" where there is no "sacred canopy" left due to the *Versprachlichung des Sakralen* (linguistification of the sacred, TCAI, 140) leading to an increasingly fragmented social and political realm where facticity and validity are no longer fused. Finally, Habermas argues that (democratic public) law proves the most capable of coordination in face of the complex differentiation of functional spheres with specific tasks for social reproduction (economy, education, politics, etc). See Deflem 1996 & Baynes 1995 for further explanations of Habermas' recent elaborations on his theory of law. See Rassmussen 1996, and esp. 1990, 67-69 on the Hegelian versus Kantian "motives for action" which animate much of Habermas' legal theory.

⁷³ Rather than lumping all forms of welfare state models together as potentially, and equally embodying the ambiguity of "freedom guaranteeing" and "freedom denying" capacity, an internal analysis of different welfare state models such as that of Esping-Anderson (1990) helps different at least three dominant models. There is the means-testing model dominant in the US; the insurance-based corporatist model of Germany and France; and there is the Scandinavian welfare model which, through its general revenue-raising policy, helps provide *universal*, and hence less *commodifying and surveillance-prone* forms of social welfare.

law paradigm. The inconsistent and unsatisfactory structures of these two legal orders has made the search for a new paradigm essential (BFN 390).

The need for a *new paradigm of law* stems from the steering deficits and the diminishing binding force of nation-state statutes and constitutional law, particularly on economic and administrative forces in increasingly complex, postnational, and differently coordinated societies and from the threat that dynamic poses to the *principle of popular sovereignty*. For instance, whereas some legal theorists such as Luhmann are suggesting that constitutions, due to the increasing complexity of societal structures, must altogether abandon their normative project and wipe "out all the hermeneutical tracks" (BFN 47), Habermas argues for a radically reconstructed *proceduralist* paradigm (BFN 430). The desired paradigm should, according to Habermas,

satisfy the best description of complex societies [in particular the empirical and normative requirements of these societies]; it should illuminate once again the original idea of the self-constitution of a community of free and equal citizens; and it should overcome the rampant particularism of a legal order that, having lost its center in adapting to the *uncomprehended* complexity of the social environment, is unravelling bit by bit. (BFN 393)

And its "unravelling" is occurring in part due to the liberal paradigm's incapacity to *internally* justify the legislated and judge-made welfare entitlements that have become necessary towards securing social solidarity and yet maintain the normative and empirical requirement to include a social, non-juridifying, democratically *and* institutionally steered social dimension to the democratic legal systems' view of citizenship rights.

Habermas is neither satisfied with the hodge-podge of statutory law (*Gesetzrecht*) or

judge-made law (*Richterrecht*) which supplements constitutions and thus makes them often even more incoherent and which, even more importantly for Habermas, undermines the democratic nature of law (BFN 394).⁷⁴ Habermas is certainly not against the mobilization of law by courts and democratic legislatures, or the "permeation of the constitutional state by ethics" in general (SR 123). Rather, he remonstrates the *purely instrumentalist reasons with which many laws are mobilized, displaying no coherent rationale, either for or from a society's self-understanding* (cf. Honneth 1995). Instead, the mobilization of law must be done

⁷⁴ The "juridification of politics" occurs when the constitutional court overextends its role to the point of exercising a subsidiary legislative function. "The court ought not to confuse the constitution with a 'concrete order of values,' and in exercising its normative control it should essentially monitor the democratic character of the creation of laws; that is, it should ensure that the legislative process fulfills the exacting normative presuppositions of the democratic process" (cf. Baynes' (1995) "jurisgenerative" interpretation).

By way of example, Habermas notes that if the German "Federal Constitutional Court was to make such a proceduralist self-understanding the basis of its decision, it could, for example, not simply send the abortion law back to the Bundestag, which had passed this law only after an exhaustive discursive preparation in the political public sphere and after repeated, conscientious consideration of all the arguments and counterarguments presented by all its members; moreover, it passed by a decisive, thoroughly bipartisan majority vote. At least the court ought not to have sent the law back unless it could produce *other* grounds for its decision" (BR 155).

Therefore, the constitutional *court* should not overturn laws coming from parliament *if* such law-making went through the proper discursive criteria. On the other hand, *parliament* should not too easily abdicate its *political* responsibility onto the judiciary to make laws rather than merely interpret or monitor the decision-making process.

The decision to adjudicate or not on an issue should stem from the criteria of whether it has been adequately and fairly debated by all those affected (1.2) in concrete situations rather than too quickly returned to adjudication based on points of law and precedent. Social policy, for instance, must go through the proper process of evaluation from parliament to government and only for monitoring matters to a constitutional court.

For an example of the increasing tension between political and legal spheres due to an inconsistent constitutional basis, see the examples in Morton and Knopf (1992) concerning the Canadian Charter of Rights.

in concert with normative rights, principles of democracy, solidarity, and justice, all of which are *normative bases for legal judgement* that "the public of citizens" rather than simply constitutional experts must find convincing. This entails essentially *a political struggle* over the correct paradigmatic understanding of the legal system (BFN 395; SR 115).

For instance, will that normative basis for social criticism and development -- institutionalized in the steering and binding subsystem of constitutional law-- stem from the image of society as best or "naturally" steered by the *economic and instrumental rationality* of market and systems logics? Or will that normative basis stem from the understanding of a society and, particularly, of its legal and political realms that should be *deliberatively accountable to a public of citizens and their communicative rationality*?

The principle of legal freedom for the individual is central to the classical **liberal**, private, bourgeois formal law paradigm. It requires "that the individual is due the highest possible degree of freedom to do as he or she pleases, relative to the legal and factual possibilities." Habermas notes that this principle coincides with Kant's universal human right to the greatest possible degree of equal individual liberty.⁷⁵ Both of these principles and rights

⁷⁵ Kant's concept of legitimacy viewed basic equal rights of individuals' liberty grounded in a universal principle of law, the *Rechtsprinzip* or the "principle of right" (BFN 83, 85). This principle could elaborate the conditions under which it is possible for morally oriented subjects to universalize the limits to their external behavior as strategically oriented individuals (BFN xii; 33). In *The Metaphysical Elements of Justice* Kant proposes a "moral conception" of law which is "the sum of those conditions under which the free choice (*Willkür*) of one person can be conjoined with the free choice of another in accordance with a universal law of freedom" (BFN 90-94, 105, 120). There is thus an *internal tension* between rights as facts which set limits to the extent which individuals can act; and rights which deserve the respect of moral subjects *because they carry morality within them and thus carry*

are oriented towards *enabling* an autonomous conduct of life in the ethical sense of pursuing one's own conception of the good" (BFN 399). This freedom of the ethical person to consciously, "autonomously", "self-responsibly" live out one's own life is guaranteed by the *negative* conception of rights that attempts to reduce the legal and state regulation on the individual's ethical life-choices. It points to the "metalegal, indeed ethical, value of legal freedom" of the liberal conception of rights and society (BFN 399).

According to Habermas however, "*the real weakness*" of this liberal theory of rights is that it falsely assumes that private autonomy is "curtailed by the competing, politically

the claim of legitimacy (BFN 72).

According to Habermas, however, the claim to legitimacy should not be based in morality any more than on the charismatic authority of a leader and their individual sense of the ethical life. Instead, it must be based in publicly deliberated will-formation of citizens. Otherwise Kant's account of legitimacy would *subordinate* law to morality.

Nonetheless, although Habermas rightly makes a great deal of this subordination of law to morality, he has never made a totally convincing argument that *Kant* himself has made this subordination in a manner much different from his own. Kant appears to make only a *relative* subordination relative to the democratic obligation. As Habermas admits, "In Kant, too, the democratic principle has to fill a gap in a system of legally regulated egoism that cannot reproduce itself on its own but must rely on a background consensus of citizens" (BFN 33). The concept of modern law "harbours the *democratic idea* developed by Rousseau and Kant: the claim to legitimacy on the part of a legal order built on rights can be redeemed only through the socially integrative force of the 'concurring and united will of all' free and equal citizens" (BFN 32. Habermas' emphasis. See also "Publicity as the Bridging Principle between Politics and Morality" in STPS 102-117.) However, the disturbing fact remains that Habermas has never fairly articulated, in my readings, the central role of rational communication in Kant's own moral and legal theory (as argued in Rosen 1993, 207). Instead, he has invariably relied on *Hegel's* critique of Kant (a process which begins in STPS, *supra*). This remains a potential weak spot for Habermas' work considering the importance of his notion of autonomy as stemming from Kant (for a definition of the latter see Rosen 1993, 44-5). See Strong and Sposito's (1995; & to a lesser extent Hutchings 1996, 56) insightful analysis of this theoretic aporia of Habermas' work. They offer, however, no systematic redress to this problem.

enforced claim of social justice" to social responsibility. The liberal model of law is profoundly incorrect in its assumption that the economy is, for instance, power-free and does not overly intrude on the capacity for liberal-conceived individuals to freely pursue their ethical life choices. Instead, according to Habermas, legal freedom, individually-conceived, must prove itself *by making ethical freedom possible* in "no matter which social sphere", "public," "private," or "political" (BFN 400).⁷⁶ "Most important", Habermas continues, restrictions on the classical liberties cannot be blamed on the application of *other* legal principles such as social justice or social responsibility.⁷⁷

What appears as a restriction is only the flip side of the enforcement of equal individual liberties for all. This is because private autonomy, in the sense of this universal right to equal liberties, implies a universal right of equality, that is, the right to equal treatment according to norms that guarantee substantive legal equality. This may produce *actual* restrictions for one or another party in comparison to the status quo ante. If so, such restrictions are not limitations on the principle of legal freedom, but arise as a result of abolishing privileges that are incompatible with the equal distribution of individual liberties required by this principle. (BFN 401)

On the one hand, the critics of the liberal paradigm note that the expectation of social justice required the articulation of "*nondiscriminatory conditions for the actual exercise*" of liberally-conceived liberties. Habermas agrees that *new categories of social entitlements* "are *justified in a relative sense*, namely, in relation to an absolutely justified equal distribution of

⁷⁶ In this areas, see also of course the seminal work of Marshall (1963, 1965, 1981) concerning the elaboration of a "specifically social version of the individualistic [civil and political rights] ideas of English liberalism" (Turner 1992, 35; cf BFN 77, 503-4 regarding liberal versus socialist rights, from a functionalist and a normative viewpoint respectively).

⁷⁷ See Hayek (1960, 1982) and Nozick (1974) for the influential arguments of the twentieth century.

individual liberties." These new categories which concern themselves with economic and social equality result from "the fact 'that legal freedom, that is, the legal permission [*de jure*] to do as one pleases, is worthless without actual [*de facto*] freedom, the real possibility of choosing between the permitted alternatives'" (BFN 403).

The democratic basis (see also 1.2) of Habermas' theory of law gives rise to four absolutely justifiable categories of rights⁷⁸ that form the abstract system of rights (BFN 122-3):

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.
2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.

These first three categories of rights safeguard *private* autonomy and stem from the discourse principle. "They must not yet be understood in the sense of *Abwehrrechte*, that is, liberal rights against the state ... " (122). The rights of private autonomy attach to citizens in their capacity as "*addressees* of law," and they reciprocally recognize each other in this role. In the next category, citizens also become *authors*, participants of their legal system, simultaneously *generating* law and *securing* its legitimacy.

4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they

⁷⁸ According to constitutional law, absolute basic rights cannot be limited or abolished by parliaments, otherwise courts will strike such legislation down (BR 153. Cf. Bakan's (1997) critique of the supplanting of Parliamentary supremacy by judicial supremacy with the introduction of a written Charter of Rights in the case of Canada. See further 3.3)

generate legitimate law.

The content of the system of rights thus remains open to negotiation through the institutionalization of processes of discourse such as legislatures (Baynes 1995; SR). Through not mere *Richterrechte* or *Gesetzrechte* but rather publicly involved constitutional deliberations⁷⁹, a society can come to "saturate", i.e., interpret and give concrete or substantive shape to the categories of rights. The right in principle to such substantive rights are justified under Habermas' abstract system of rights in the following manner:

5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights list in (1) through (4).⁸⁰

Habermas argues that new *social entitlements* and constitutional categories of rights deliberatively generated are necessary due to the fact that under the conditions of late capitalist societies "the actual freedom of a large number of rights-bearers does not have its material basis in an environment [for example, subsystems steering according to national and

⁷⁹ See for example Resnick on "constituent assemblies" (1991, esp. chap. 8).

⁸⁰ "[T]he category of social and ecological rights can be justified only in relative terms [whereas the first four are] absolutely justified categories of civil rights" (123). However, Habermas later suggests that "Political deliberations extend to any matter ... *In particular, those questions are publicly relevant that concern the unequal distribution of resources on which the actual exercise of rights of communication and participation depends.* [...] Political deliberations also include the interpretation of needs and wants ... by no means based only on a value consensus previously developed in shared traditions and forms of life" (BFN 306, my emphasis. See JA 105-111 for an elaboration on the *moral* responsibility of humans for their nonhuman environment.)

Nonetheless, it is curious as to why Habermas collapses "wants as coeval" to "needs," as one could suggest that this dilutes the force of the struggle for needs to that of mere wants (cf. Leiss 1976).

international market, monetary, and financial forces] that they control, but essentially depends on government" interventions (BFN 403; SR 100). As Ulrich Preuß, a fellow participant in the *Kritische Justiz* movement puts it, the *opposite* of a society that has an adequate constitution and that is thus properly "constituted" is

the condition of a society which can deal only very imperfectly with its destructive tendencies, its power structure, its social inequalities –in short, its institutionally underdeveloped potential for a successful confrontation of its normative foundations with real conditions. (1995, 110)

On the other hand, the dilemma with the **social welfare paradigm** of law was that it has merely "*materialized*" and thus simply justified the existing, implicit liberal-individualist paradigm of law regarding the economic assumptions about the natural equilibrium capacities of market processes and social obligations. What was vital about the institutionalization of the right to property and individual rights and freedoms which the social welfare paradigm has not fundamentally addressed was, as Preuß attests, "the emancipation of a person's assets from social duties" (1995, 11).⁸¹

The purpose of the explicit inclusion of highly delimited social protections in the social welfare model of law is merely to provide compensations for so-called "'market failure' to those in weaker market positions" (employees and consumers, for instance). This "compensatory law" merely makes the results of *structural disadvantages* in their access to information, power, and authority more statistically categorizable, predictable, manageable, impersonal, and, ultimately, justifiable as a comprehensible "systemic risk." Those who do not

⁸¹ See Habermas' historical analysis of this trend in STPS, esp. chap. 10.

prepare themselves adequately for such risks through obtaining the requisite, individualized insurance, are easily identifiable and categorized and, through such identification, they are in turn normalized, regulated, micro-managed, and eventually pacified (TCAII; BFN 404-5, & 432; Ewald 1991).⁸²

Another disadvantage of the social welfare or really the *liberal* welfare model is that it is conceived and functions in a manner that *the state* tends to be held accountable for crises and problems in the system, not, for instance, the *market* system. As a result, in times of social and fiscal crises, the liberal market model appears as the only other viable alternative to the apparently and often massifying, depersonalized, system of the social welfare model. This occurs because the internal connection of the model itself to liberal property assumptions continues to encourage a focus on *individual* rights and a distrust of the capacity of the state's subsystems to institutionalize the best deliberatively determined compromises stemming from the public sphere .

As Habermas insightfully describes it, whatever problems occur in a society are viewed as a *competition* between the two dominant interlocutors: the state and those subject to it, both

⁸² Alternatively, Habermas suggests via Denninger, and perhaps keeping too closely to the obsession of both postmodern as well as neo-liberal critics of the state, that the legal system has moved from being based on a certainty of law [*Rechtssicherheit*] to one based on a security of legal goods [*Rechtsgütersicherheit*] that potentially "dissolves" individual legal protection, to the current "security state" (*Sicherheitsstaat*) with its expanding surveillance apparatuses (BFN 433. Rehg translates *Güter* in the above as "values", although I believe that represents a not insignificant change in the meaning, and thus our understanding of the historically changing bases of the legal system, and of the very issues of social and economic rights that are discussed here).

of which dispute each other's competence. The market system is not caught, ironically, in this competition of apparent competencies. On the other hand, the welfare model ends up *paying for* the expanding agency of the state. As Habermas explains, whether articulated as the active "interventionary" or "supervisory" state, individuals perceive that the powers given to the state for "social" regulation "must be *taken*, in the form of [their] private autonomy, from individuals caught in their systemic dependencies. From this point of view, [...] what the one gains in competence the other loses [leading to the perception by both of a] *zero-sum game*" (BFN 406).

This allows the liberal model to assert, in some ways rightly, that the subjects are now subject to the superior political and administrative will and power of the state which can dictate paternalistically to them through programs the limits of their legal freedom. This helps to open the way for "alternative," for example ultra liberal, political, economic, and legal measures to promise more "freedom" from the enabling state (Parijs 1992; Held 1995; see further chapter 5).

The dilemma for the *Kritische Justiz* movement in Germany (Offe, Preuß, Habermas) as well as the Second Left in France and Anglo-American countries (Rosanvallon 1988; Hirst 1994; Hunt 1993; Keane 1988; and Fraser 1989 & 1997; Weiner 1997; Cohen & Rogers 1995; Young 1990 respectively) is conceptualizing *what kind of normative legal paradigm would allow for* the state to provide services and goods to improve the life opportunities for its citizens --for instance by guaranteeing access to health care, housing, a basic income, education, recreation, and the "natural bases of life", i.e., granting "each person the material

basis for a humanly dignified existence" of the *Sozialer Rechtsstaat*-- without, at the same time, impairing their public and private autonomy? Certainly, as Habermas notes, "the justified critique" against the individualist, bourgeois formal law "*precludes a return to the liberal paradigm*" (BFN 407. My emphasis.)⁸³

3.2.1 Securing Private and Public Autonomy as the Justificatory Basis of a System of Rights

According to Habermas, in justifying a system of rights, and legitimizing a legal system based on a different paradigm of law itself, there is a mutual dependency between *public autonomy*, with its constitutionally regulated and facilitated circulation of power nourished by forms of communication of an unsubverted public sphere, of an undistorted lifeworld, and the *private autonomy* largely described above.

With this conception, the burden of normative expectations [in the public ...] shifts from the level of [individual or even state] *actors'* qualities, competencies, and opportunities to the *forms of communication* [made constitutionally available by the state] in which an informal and noninstitutionalized opinion- and will-formation can develop and interact with the *institutionalized deliberation and decision making inside the political system* [concerning the further formulation, and implementation of citizens' rights]. (BFN 408)

This conception would break the "zero-sum game," or individual *versus* community approaches (Caporaso & Levine 1992) between the need interpretations of citizen and state

⁸³ The welfare model must distance itself not only from the *individualist* zero-sum model of the liberal paradigm, but also from the *productivist image* of society. The latter is an image of society and the worth of the individual as tied to their work, rather than to, for instance, the quality of their individual contemplative life as well as community and political interactions (PDM; Gorz 1989; Keane & Owens 1986).

or governmental actors. The legal and democratic order and its system of rights would then be deemed legitimate to the extent that it would equally secure the *co-original* private and political autonomy of its citizens; at the same time it would owe and *trace empirically its legitimacy to the forms of communication and sluices it would have constitutionally made necessary* for the interchange of communication in which the private and public autonomy of its citizens and society in general could prove itself (BFN 409; SR 110; BR 150).

In the final analysis, the *legitimacy* of law depends on undistorted forms of *public* communication and indirectly on the communicational infrastructure of the *private* sphere as well. This is the key to a proceduralist understanding of law. After the guarantee of private autonomy has proven insufficient [in the liberal and even Kantian paradigms], and after social intervention through law also threatens the very private autonomy it means to restore, the only solution consists in *thematizing the connection* between *forms of communication* that *simultaneously* guarantee private and public autonomy *in the very conditions from which they emerge*. (BFN 409. All emphases mine, except the last two.)

Therefore, Habermas does not wish to *privilege* and essentially let off the hook either the liberal or welfare paradigms of law. Instead, a new paradigm of law must be oriented towards the securing of both the *private* autonomy of individuals and the conditions for *public* autonomy: a public of autonomous citizens is essential for the persons as *addressees* of law to understand and be involved in the self-reflective *authoring* of those laws. In other words, "private and public autonomy are equiprimordial. It is not a matter of public autonomy supplementing and remaining external to private autonomy, but rather of an internal, that is, conceptually necessary connection between them. For in the final analysis, private legal persons cannot even attain the enjoyment of equal individual liberties unless they themselves, by jointly exercising their autonomy as citizens, arrive at a clear understanding about what interests and

criteria are justified and in what respects equal things will be treated equally and unequal things unequally in any particular case" (SR 111). All of the above *presumes* a certain level of more substantive, material autonomy in order for such autonomous public communicative actions to freely occur. Such a sense of autonomy would rely on a sense of private autonomy or, as Honneth (1995) has described it, self-esteem, self-respect, and self-confidence.

Thus Habermas' interpretation of the problem of the authoring of law if subjects are to become competent authors and addressees --constituent of and constituted in law-- is to resolve itself through an immanent critique of either the bourgeois formal or materialized social paradigm and to determine whether either can fulfil one of the *basic principles of legal freedom* (or, conversely, whether they inherently contradict it). And he can use this *justification strategy* effectively and without internal contradiction to his own model because he has already shown that the (reconstructed) system of rights helps provide the very basis of the legitimacy of the system in the first place. These preconditions for the democratic authoring and addressing of citizenship rights "merely" requires making these assumptions more obvious to postnational citizens, judges, and (autonomous) politicians' self-understandings of the legitimate --i.e. democratic-- basis for constructing life-choices together (cf. Preuß & Offe 1992, 150).

Habermas' strategy at the social level is to shift from the liberal and productivist image of actors *having* (goods, for instance), both in the liberal and social democratic paradigms, to showing that a legal democratic order is legitimate when it *secures* (not only) things, but the *empirically verifiable communicative autonomy* of citizens more generally. This assumes the

presence of conditions for this private and interactive autonomy to exert itself because that communicative autonomy, the ability, freedom, capacity to deliberate is the very basis of the legitimacy of the system in the first place.

Given the limits in both the liberal and welfare paradigms, Habermas notes that "the social-welfare project must neither be simply continued along the same lines nor be [completely] broken off, but must be pursued at a higher level of reflection. *The intention is to tame the capitalist economic system, that is, to 'restructure' it socially and ecologically*", as well as to bring administrative power --one of the most important mechanisms available to any society to restructure and regulate its economic system-- *under democratic control* (BFN 410, my emphasis. Cf. 4.3.)

For *effectiveness* and in order to avoid functional crises, and therefore as a result legitimacy crises in the system due to overload (Luhmann's apparent one-sided preoccupation), the administrative system must employ (counterintuitively at first) more democratic, contextualized, less top-down, micro- or macro-managed forms of steering (see how this is meant in 3.2.2). Also, from the standpoint of *legitimacy*, this means "linking the administration to communicative power and *immunizing it better against illegitimate power*" (BFN 410; Blaug 1996). This path is achieved neither simply through "reflective law" nor through favouring formal bourgeois or materialized bourgeois law. Rather it entails a better understanding of the *meaning* of the requirement for a system of rights. This refers back to the radically *democratic, deliberative* basis of Habermas' theory of law. This meaning is to

secure the citizens' private and public autonomy *uno actu*: each legal act should at the

same time be understood as a contribution to the politically autonomous elaboration of basic rights, and thus as an element in an ongoing process of constitution making. (BFN 410)

This *radicalizing of the democratic intent of law making* goes even beyond a simply collectivist or social notion and intention to strengthen citizens' legal status. Proposals for *social autonomy* as the basis for increasing the "capacity for articulation" of rights and the capacity for rights to have a solidaristic function, while pointing in a much more favourable, solidary building direction than individualistic liberal understandings of rights, reduces too quickly the complexity, reflective, and solidary building capacity of an understanding of rights that at least *analytically* recognizes the difference between private and public autonomy. It appears to Habermas' argument that to reduce rights to the social dimension *too quickly* runs the danger of effecting reification, alienation, surveillance and normalizations, all combining to restrict the autonomous and ethical actions of citizens, whether in their capacity as workers, or larger social participants. On the other hand, "If private and public autonomy are co-original," Habermas continues to challenge us, "then this relation can, *in the final analysis*, be specified only by the citizens themselves" (BFN 414). The co-originality of autonomy provides a reciprocal reference, "an intuitive standard by which one can judge whether a regulation promotes or reduces autonomy" (BFN 417). This is, of course, an exceedingly high standard for determining new rights.

Nonetheless, Habermas is *insistent* that we must accept nothing less from a democratic legal state, and from ourselves, than to go back to the citizen to determine the legitimacy of laws in their design and implementation. *Legitimate law, while closing the circle between its*

addressees, must also ensure the conditions for the public autonomy of citizens to act as authors of their legal order. This puts greater emphasis on deciding the criteria for not only legitimate law, but also the criteria of "equal treatment" under the law (BFN 415; SR 122; Cf. Held op. cit.). Citizens themselves must "draw the boundaries" to ensure that their private and public autonomy is ensured. The criteria for determining this for Habermas is that a

legal program proves to be discriminating if it is insensitive to how actual inequalities have side effects that in fact restrict the use of equally distributed liberties. And it proves to be paternalistic if it is insensitive to the freedom-restricting side effects of the state's compensations for those inequalities. (BFN 417)

According to Habermas' model and drawing somewhat perhaps on the emerging "recognition-theoretic" basis of rights in Honneth,⁸⁴ *the recognition of claims to social benefits*

⁸⁴ In a reconstructive history of philosophy reminiscent of Habermas' *Theory and Practice*, but perhaps benefiting from greater attention to the importance of forms of law and the bases for rights rather than mere political theory, Honneth's *Struggle for Recognition* begins to lay the reconstructive basis for his own theory of law. His historical treatment concentrates on the "intersubjective innovation" of Hegel who took from Hölderlin's philosophy of unification (*Vereinigungsphilosophie*) in order to question the perceived atomistic and individualistic presuppositions of Kant and Fichte's moral theory, both of which had influenced Hegel's own thought at Frankfurt. According to Honneth, by then Hegel became more influenced by a third stream of political philosophy in his reading of Plato and Aristotle that ascribed a greater role to the intersubjective nature of public life. Finally, the above three influences were somewhat disciplined by the insights of the emerging British political economy which led Hegel to suggest that any future organization of society would include a market-mediated sphere in which "subjects could only be included in society on the basis of the negative freedom guaranteed by formal rights" (1996, 11).

This skilful and penetrating work of Honneth's reviews such important influences to his own recognition-theoretic work as Hegel, Mead, and Marx but suffers from its marginal treatment of Kant and Habermas' moral and legal theory. This could be a problematic trend for the new Head of the Frankfurt School, a trend to avoid confronting the more nuanced issues through a closer registration of the most *relevant* theorists for one's project, *viz.* Habermas' legal and moral theory. As I have mentioned elsewhere, this tendency was, ironically, perhaps heralded by Habermas himself in his marginal treatment of Kant's theory

(and protection from ecological or technological threats) *is justified* in relative terms: such recognition is indirectly *related to* the guarantee of *personal self-determination* as a necessary *condition for political self-determination*. In other words, the recognition of, and *justification for social economic and other positive rights stems from the need to secure an "autonomous citizenship status"*. In this regard, Habermas approvingly takes the following quote from Preuß:

society as a whole depends on the citizens' decisions having a certain quality [to be] informed, in their capacity to reflect and to consider the consequences of their politically relevant decisions, in their will to formulate and assert their interests in view of the interests of their fellow citizens as well as future generations. In short, it has an interest in their 'communicative competence' The unequal distribution of basic goods diminishes the quality of civic virtues For this reason, a policy of compensating for the unequal distribution of social goods can be justified as a 'politics of qualifications for citizenship.' (BFN 418)

Without the capacity for rational, informed, reflective consideration of the issues and their consequences citizens could, for instance, come to the irrational decision of supporting right- or left-wing authoritarians who offer short-term relief to their diminished or desperate economic position and the increasing social disorder that may result. Therefore, *positive economic rights for communicative competence* as well as negative liberties for *autonomous, self-realization* are required to make publicly influential decisions autonomous of irrational,

compared to that of Hegel's.

Despite Honneth's promising acknowledgement of the problem of the marginal treatment of class in Habermas' work, another trend which Honneth's work must avoid to remain relevant in a world of increased economic insecurity is the recent one-sided, or at least highly ambiguous use of the notion of the struggle for recognition for every kind of discrimination other than economic discrimination. (See "The Phenomena and The Levels of Their Analysis" in SR 116-122).

power-steered criteria.

"Struggles for recognition in the democratic constitutional state possess legitimate strength only to the extent that all groups find access to the political sphere, [...] that they are able to articulate their needs, and that no one is marginalized or excluded." This is a "qualification for citizenship" in which it "is already important to secure the factual preconditions for equal opportunity to exercise formally equal rights. This is true not only for political participation, but also for social participation, since no one can act in a politically autonomous fashion unless the conditions for private autonomy are guaranteed" (BR 150).

These criteria certainly preclude the *micro-managed* means-testing approach to determining the criteria for social programs suggested even by some discourse theorists.⁸⁵ Rather, Habermas' criteria call on rights advocates to be aware of the sometimes irrational effects of some social programs designed without the input of those directly affected by such

⁸⁵ However, a narrow(ing) focus on *implementation* threatens to be juridifying itself. It leads, for example, to Cohen and Arato's (1992) suggestion for means-testing, which ties the right to the access of goods and services to the "particular" conditions of the *systematically* marginalized citizen. Instead, there is the need for providing the conditions, economic and discursive, towards helping secure *universal* access to such provisions and services in the interest of securing private and public autonomy of the citizen, in the so-called public and private spheres, especially from cultural, economic, social, and political constraints to exercising citizenship. *In addition*, citizens require a hand in the determination over how, and if, certain of these rights need implementing at all by those affected themselves (Galligan 1992).

Nonetheless, Habermas often confusedly suggests that while he supports "measures" such as quotas, these are "intended to have 'a remedial effect' and are therefore only temporary in nature" (BR 150). While this temporary dimension is more understandable for quotas, should the same temporality, and thus insecurity and potentially "means-testing" approach be applied to more social and economic rights?

programs.

Consequently, his theory of rights is not individualistic, but intersubjective. Secondly, it is meant to be *intersubjective in a two-track manner* or at macro and micro levels. It is intersubjective first in the "macro" level when *public discussion must clarify* the differences between the experiences and living situations of (specific groups of) women and men in order to better articulate the conditions for maximizing private and public autonomy. This deliberative approach helps ensure that at this level institutionally defined stereotypes are not assumed without question but rather are recognized and confronted as the social constructions they are (BFN 425). Habermas' theory of rights views "rights as tools" to understand, critique, and reconstruct the bases for *relations* between citizens. While "[j]uridification [is not] an *inevitable* consequence of the welfare state" (BR 154), rights cannot be adequately formulated at all unless the relevant aspects for defining treatment are convincingly articulated and justified beforehand, or where citizens are themselves involved in the interpretation of the standard by which legal equality is to be established. There is also the need for *social dialogue* at a more macro level in which we "collectively" decide to change the basis and rules for the right to resources, of money, education, health, work, and clean environment (BFN 425).

The more the law is to be used as a means for political steering and social planning "the greater is the burden of legitimation that must be borne by the *democratic genesis* of law" (BFN 428). In other words, before bourgeois formal law was merely interested in governing individuals; now it determines the social. Therefore, the social has to be more involved in the determination of the genesis of new laws.

Let us now consider in more detail the second-, or micro/meso-level at which the intersubjectivist approach to law is posed to be understood as a *procedural* approach to remedy injustices of economic marginalization, cultural domination, non-recognition, or disrespect (Fraser 1997, 13-14).

3.2.2 Dealing with Difference & Juridification in the Implementation of "Universal" Policies and Constitutional Law

Habermas uses the history of feminist struggle to exemplify the above different paradigms of rights that have been used by emancipatory groups. This helps us to understand the attempts to, on the one hand, expand the categories of rights to include not only negative liberal rights, including rights of *deliberation* in the opinion- and will-formation of civil and political society generally, but also *positive economic and social* rights. On the other hand, this history also exemplifies what one may understand as a *"two-track"* conception of a paradigm in rights which includes the right to inclusion in the *generation* of laws through deliberative space (above & 1.2) as well as at the stage and concrete point of their *implementation*, both stages being necessary to secure the private and public autonomy of citizens who are expected to freely agree to be addressees of a system of law.

Habermas notes that many of the U.S. feminists' demands that are stated in their 1977 Charter have not been fulfilled despite their more *"liberal" goals of inclusion*.⁸⁶ Other feminists

⁸⁶ For instance, such demands would include the abolition of all gender discrimination in education and employment, increased representation of women in elective and appointive public offices, etc.). Even less fulfilled are those demands that would require more governmental power ("*besonderer Gewaltverhältnisse*" such as support for battered women and displaced homemakers; revision of criminal and family laws regarding marital support)

went beyond these liberal demands of inclusion and agitated for *social-welfare* rights, such as an adequate standard of living provisions, including income transfers labelled as wages, not welfare, for indigent homemakers with dependent children and federally-funded childcare services accessible to families at all income levels, with adequate opportunity for parental involvement (BFN 421).

Habermas suggests that an important *reflective* attitude (*Einstellung*) arose with the success of some of those demands over the past two decades. This involved an understanding that *in addition to* the demands for such matters as employment for example, there must *also be the built in ability for workers to participate in the decision-making* about, for example, the opportunities for self-managed (as opposed to simply "flexible") and part-time schedules to correspond to the particular life needs of employees.⁸⁷

With the benefit of historical hindsight, the successes of some of the rights, such as the demand for increased social income and equal access to the workplace, have led to ambivalent results for women. The "feminization of poverty" and the increased paternalistic presence in

and newer issues (reproductive freedom, pornography, consensual homosexual activity, etc.).

Habermas also points out that such liberal approaches that are meant "to promote the equal status of women in general often benefits only one category of (already privileged) women at the cost of another category [... such as] (social class, age, ethnicity, sexual orientation, etc.)" (BFN 423).

⁸⁷ This is something for which the European workers have waged a long struggle, which is now bearing some fruit in terms of shorter, more self-managed work weeks and job-sharing. Importantly, this is being negotiated not in the form of a "partnership" with business whose discourse about the need for worker flexibility in the face of competitive world markets has been used most successfully in North America to force concessions from workers and unions rather than labour negotiations based on good faith (Gorz 1989; Offe 1996; see further 4.3).

the regulation of their lives led to a Weberian sense of *loss of freedom and meaning* for many women, despite the important and necessary freedoms of equal access struggled for and in some cases partially won (BFN 422; TCAII).

It cannot be overemphasized that the inclusion of women (in this case) into wage labour, political institutions, etc., are *not* at fault for the ambivalent results themselves. Rather it was, according to Habermas, that women and all those who benefit from such inclusion often lose control of the capacity to determine their own criteria and values once assimilated into organizational and legal structures.⁸⁸

In regard to the latter point, the problem with the traditional welfare paradigm is that it relies on the notion of justice reduced largely to an equal distribution of goods that individuals can share and possess. *This mechanism of increasing justice merely through administrative redistribution on its own is a necessary but not sufficient condition towards securing private and public autonomy.*

Habermas quotes Iris M. Young's explanation of the mistake of only viewing "freedom as redistribution," and the complementary focus on redistributive rights.

What does distributing a right mean? One may talk about having a right to a distributive share of material things, resources, or income. But [... r]ights are not fruitfully conceived [only] as possessions. Rights are relationships, not things; they are

⁸⁸ See Jenson on the need to understand not simply *external* democratizing requirements for citizenship, but also *internal* democratic processes. In other words, despite the fact that some women, for instance, may gain greater access to representative democratic institutions, the very internal political culture and processes may again, through its "iron law", make those women conform to processes and procedures and values which do not reflect the larger intent of the movement.

institutionally defined rules specifying what people can *do* in relation to one another. Rights refer to *doing* more than *having*, to social relationships that enable or constrain action. (BFN 419)

In other words, it is not enough simply to say that citizens have the right to public housing. It must also be said that we are responsible to ensure that citizens have rights that liberate themselves to act on and expand the limits of their humanity through interaction with others and determine the particular character of their lifeworld space. One must be able to act and voice that which dominates and represses one's humanity, and have an active means to change those conditions. This helps accord *positive* recognition to devalued group norms and their voices (Fraser 1997, 22). Again Habermas quotes Young approvingly:

Justice should refer not only to distribution, but also the institutional conditions necessary for the development and exercise of individual capacities and collective communication and cooperation. Under this conception of justice, injustice refers primarily to two forms of disabling constraints, oppression and domination. While these constraints include distributive patterns, they also involve matters which cannot easily be assimilated to the logic of distribution: decision-making procedures, division of labor and culture. (BFN 419)

It cannot be overemphasized that materiality for Habermas is a major factor affecting the capacity for citizens to develop the competencies for ethico-political decision-making (supra.). *In addition*, however, Habermas encourages the attempt in Young's theory to develop further the internal and necessary relation or dialectic from *de jure* to *de facto* equality through insisting on the opening of the dialogue about the more precise social relations of rights through guaranteed access to opinion- and decision-making processes. More specifically, women have to be involved not just at the level of *generating* ideas or even *formulating* policy alternatives, but also at the level (or stage) of *implementing universal* programs and policies

to their *particular* lifeworlds.⁸⁹

In particular, many radical and socialist feminists persist in the struggle for equal rights to access to different levels of the decision-making process --as *citizens* rather than mere *clients*-- because they understand the normalizing and demobilizing effect of becoming mere clients struggling after and becoming "dependent" on structures and juridifying discourses. The passifying structures and discourses often help "clients" lose their sense of entitlement to still help orient the future direction of both their particular, meso- and macro-social organization of values and priorities. A singular focus on the distribution paradigm leads to a kind of domination of the spirit of resistance and sense of right to self-and-community determination as an ongoing process (Honneth 1995).

Habermas suggests that as long as the one-sided juridifying and "colonizing dependency" is not overcome, much of the well-meaning politics against material discrimination may end up in the wrong direction, for it will *stymie the voices of those, who alone can say, what the relevant conditions are for like, and unlike treatment* (BFN 425; TCAII; Tweedy and Hunt 1994; Bartholemew 1993; Galligan 1992).⁹⁰ In order to reverse the

⁸⁹ The difficulty that some collectives have in dealing with difference, not so much between "weak and strong publics" (Fraser 1992) but between and *within* progressive weak publics for the open discussion of uses of resources and objectives is also a site where Habermas' discourse theory can, if radically contextualized, be of some assistance. See for example Warnke (1995), Chambers (1995) for examples of feminist theorizing on this application of Habermas' theory and, more generally, Blaug (1996) on this "missing tier" of theory.

⁹⁰ Of course it is cynical to demand, as neo-conservatives do, that individuals and groups should take care of matters for themselves rather than "depend" on the state when these neo-conservatives know that enormous structural forces, especially economic, often

"normalizing effect" of *individually*-oriented and structurally-colonizing regulations of rights as conceived in the individualist-liberal-capitalist-welfare model, Habermas quotes Rhode's (1989) reworking of rights as, to use Young's phrasing, "doing" rather than *solely* having-oriented. In other words, rights should have as their basis the notion that they can be animated and redefined by those who are affected by them. For example, a more satisfactory framework for employment rights would not take jobs as fixed. Of greater significance would be whether that occupation can be redefined to accommodate socially-constructed differences and make those differences less occupationally-relevant (BFN 423).

What Habermas is attempting to show with the above argument is that "rights talk," which has successfully been used to *force* compromises out of the state, *need not necessarily be tied to an individualistic* foreshortening of the notion of rights. If one sets forth an *intersubjective concept of rights*, one can much more easily see the source of the problem in both liberal and the liberal-derived welfare rights paradigms. In Habermas' conception, issues of difference for the equal use of subjective rights *must first be clarified in public discussion*. Institutionally-defined gender stereotypes must not be allowed to take shelter as something given. Such social constructions can today only be cultivated in a conscious way in public

shape the life chances of individuals to act autonomously. Therefore, it is the *direct* dependency on, for example, *means-testing*, or the "if-then structure of conditional law which is 'foreign' to social relations" that creates the kind of dependency and passivity which Habermas criticizes, rather than the intervention of the state *per se* (TCAII 362). In other words, it is a very particular *kind of intervention*, and how it is administered, that make all the difference in the role of the state and the capacity for such intervention to either enhance or reduce meaning and autonomy, moral and ethical formation. Cf. comment on Cohen and Arato (1992) above.

discussions by those who are themselves affected. This involves the pragmatic and public interpretation of the *particular application of universal rights*.⁹¹ The intersubjective conception of rights encourages the interaction and interdependence of citizens rather than an individualistic approach. It allows counter-tendencies to develop against the homogenizing, privatizing, and consumerist tendencies of liberal, and liberal-welfare approaches.

Therefore, to reiterate Habermas' position, the struggle, negotiation and acquisition of social, economic, and bodily needs are a necessary prerequisite for citizens to become competent and active political citizens. *In addition to* the inclusion of these categories of *universal* rights in constitutional guarantees, however, public and democratic policy would have deliberation (or the intersubjective nature of the rights) continue at the stage and level of the *implementation* of universal programs to determine their precise configuration for and by those affected. Unlike more vague philosophical calls for the need of "radical democratic discourse," Habermas' deliberative model of rights for the meaningful exercise of citizenship indicates the importance of pursuing difference- highlighting and -enhancing (rather than "repressing") procedures at *all* stages and *all* levels of justification, and application.

⁹¹ Habermas cites Martha Minow's (1990) work on *Making All the Difference. Inclusion, Exclusion and American Law* as an example of this *pragmatic* and public interpreting of the *particular applications of universal rights*.

Interpreting rights as features of relationships, contingent upon negotiation within a community committed to this mode of solving problems, pins law not on some force beyond human control but on human responsibility for the patterns of relationships promoted or hindered by this process. In this way the notion of rights as tools in continuing communal discourse helps to locate responsibility in human beings for legal action and inaction. (BFN 425).

Consequently, when Habermas is calling for constitutional guarantees to allow the interpenetration of ethical and political into legal discourses in the varied fora and at the particular stages (or "levels") of generation, formulation, legislation and implementation of values, norms, and policies, he is also suggesting that radical democratic theory needs to interpenetrate these realms, not only critically, but also reconstructively for a more varied and deep understanding of the requirements of "the political" and, more extensively, towards securing public and private autonomy.

3.3.1. Beyond the Juridifying Liberal Welfare Paradigm⁹²: Concretizing Habermas' Constitutional Rights

David Held's (1995) categories of rights raise our gaze from the more abstract and, in some respects, motivationally limiting categories of rights articulated by Habermas (see Honneth in endnote above). The point is not that Habermas' categories of rights are off the mark. Rather it is that Held provides critico-normative social theorists with more *politically* useful clarity through his more substantive, less abstract examples of the very rights that *one could* understand as stemming from Habermas' more deontological, abstract-philosophical representation of the rights debate.

Habermas, in an attempt perhaps to provide us with a clearer indication of the more *pragmatic-concrete* rights, principles (beyond the general ones of *liberté, égalité, and*

⁹² Here, I begin to differentiate [a] Habermas' attempt to retrieve the legal system from non-normative critical legal theories, as well as illegitimate, naively normativist and rational choice legal theories, from [b] Held's strategy of articulating how particular bundles of rights can help overcome the motivational deficits of Habermas' more *deontological and formal* legal theory and strategy.

fraternité to which he remains enthusiastic) and vision that animate his abstract, deontological, formal, and procedural deliberative reconstruction of legal and democratic Western systems, approvingly quotes Rhode on the following:

Although we cannot know a priori what the good society will be, we know more than enough about what it will not be to provide a current agenda. It will not be a society with wide gender disparities in status, power and economic security. Nor will it be a society that limits women's reproductive freedom, tolerates substantial poverty, violence, and racial injustice, or structures its workplace without regard to family needs. Finally, and most fundamentally, it will not be a society that denies many of its members substantial power over the terms of their daily existence. To realize its full potential, feminism must sustain a vision concerned not only with relations between men and women but also with relations among them. The commitment to sexual equality that gave birth to the women's movement is necessary but not sufficient to express the values underlying that movement. (Rhode in BFN 427)

In other words, Habermas feels that he may not be able to state as confidently as social democrats --or even radical proceduralists, civic republicans, socialists, and feminists-- that *all of the positive virtues and goods* that we desire must be included in moral and political discourses and struggles, and particularly at the point of their implementation. However, and as Young notes, we can aim in political discourses and actions to remove the *costs of difference* in the life chances of others (see Baynes 1995).

Nonetheless, as I have mentioned above, a politically- and practically-oriented critical legal theory requires something more concrete, especially in Anglo-American constitutional and rights debates, to help better *politically mobilize* public opinion to engage in rights talk that does not endlessly oscillate between communitarian and liberal conceptions.

Although Habermas' categories of rights represent an attempt to provide a moral-philosophical justification for a broadened set of rights --a "moral" consensus-building-capable

justification of a legal order and its system of rights based on a deliberative theory of democracy that would be acceptable by a majority of citizens--, Held has taken a more political-theoretic position, articulating more clearly what those rights would and should look like to achieve the democratic rule of law which Habermas points toward but does not catalogue.⁹³

While Habermas' interest has always been "practical", and oriented towards understanding and justifying the normative conditions for autonomy based on empirically motivating sources, his concern was also to retrieve the basis for a highly abstract, discourse-theoretic philosophic *justification* of the necessity to secure the conditions for public and private autonomy. This entailed the search for a philosophically and morally defensible position which was not dependent on or overly exposed to the danger of traditional, ethical, or politico-pragmatic based arguments (BFN Preface). The *basis* for the legitimacy of the authority of action orientations is sought in the same basis as, in some respects, the rule of law, where

⁹³ See Kellner (1989, esp. chapter 8) on the importance of this more substantive, practically-oriented form of critical theory. And compare Held's, or even Habermas' (1996) in-depth treatment of categories of rights to, for instance, Rehg's example (1996, 104) which is characteristic of much of contemporary critical theorists' research focus on only one of the dimensions of critical theory's original vocation, as a theoretical arm to political struggle.

As Horkheimer noted in the 1930s, "The Critical Theorist's vocation is the struggle to which his thought belongs. Thought is not something independent, to be separated from this struggle" (quoted in Kellner 1989, 204). While "the struggle to which [one's] thought belongs" is, *pace* Foucault (1980, 114-5; cf. 1984, 43), a dialectic process, the struggle for social and economic justice, and the concrete means to allow for its *Entfaltung* (unfolding) has become excessively marginalized by many critical theorists. Recently, "critical theory," particularly in its "ethical turn," is beginning to resemble a levelled and more philosophically sophisticated form of (American) civic republicanism, bereft of soul for the least of our *concitoyens*.

neither tradition, temporal ethical views (however deeply felt and legitimate to many), charismatic authority, emotional argument and arbitrary reasons *alone* would be the sufficient, or even dominant bases for judgement, i.e., the determination of their universal validity. Instead, Habermas has sought as the basis for legal judgement the more transparent validity of decision-making procedures which all could agree is reasonable given all the evidence and safeguarding that all relevant testimony was provided.

Again, the reason for the necessity of this move to postconventional forms of reasoning is to create an alternate, or rather complementary basis for the justification of the legitimacy of justice based in the capacity of action systems to secure private and public autonomy through rights, due to the increasing *complexity* of societies. Far more so than even Durkheim and Weber could imagine, although they certainly indicated this analysis and the dilemmas of complexity and democracy, contemporary societies must coordinate, regulate, and legislate among an enormous diversity of (more and less powerful) *interests* and diverse *value* orientations, or what we could today describe as redistributive versus recognition orientations (following Fraser 1997).⁹⁴

For Habermas, the critical reconstruction of the basis for the rational and legitimate rule of law relies on highlighting and ensuring the fulfilment of criteria such as publicity or

⁹⁴ However, while there is fragmentation and diversity (which postmodern and liberal-pluralist analyses point out), there is also considerable *power* at play. In order to overcome this imbalance in power, an analytic and normative theory of rights, the legal order and adjudication need to justify expanded rights (3.1) and hence access to will-formation (1.2, esp. regarding Cohen and Rogers criteria) as well as a more concrete vision of the necessary rights to help provide equal conditions in different "sites of power."

transparency, procedural fairness, etc. as the primary basis upon which most citizens, despite their varying interest and value positions, could agree to agree upon the regulatory and coordinating legitimacy of a state ... that is, *provided the state remains faithful to the very procedures which give the increasingly legalized system its legitimacy*. (See Kant's negative and positive principles of publicity in Rosen 1993, 181-2).

Since sociology, political economy, and critical legal analyses uncover a great deal of *illegitimate influence* on the legal system to the benefit of certain power elites, Habermas' strategy is to focus, nonetheless, on drawing our critical attention to this site of power. In the eyes of the public, this site of power is seen to have the *potential* to interpret constitutional and treaty bases in a *just* manner and to ensure that those treaties and their overarching procedures are made all that more transparent to public scrutiny. In this way, the validity of a decision taken in this site can be more clearly seen and determined as legitimate or illegitimate by an increasingly critical public sphere.

On the other hand, *Held's strategy* and theory of the democratic legal state, while appreciating the capacity of the legal realm to generate decisions that are viewed as procedurally fair by the public, do not focus on developing as deeply a new philosophical-moral paradigm to legitimize his categories of rights which can be the basis for agreement of *all*. (Nor, more specifically, has he emphasized the *intersubjectivist* paradigm shift treated in the above sections of this chapter.) Rather, he recommends, like Habermas, but contrary to many deconstructive and some Marxist legal theorists (Hunt 1994), the struggle for the legal and, particularly, *constitutional* legal rights as *a basis* for the improvement of the conditions

for autonomy. The struggle for such rights becomes, essentially, not only *a* site, but *rather an extremely important site of contestation* for providing the legal, i.e., legitimate-in-the-eyes-of-"the public", basis for spreading the *content* of justice and for ongoing, democratically-influenced notions of the good life: the bases for securing private and public autonomy.

Held's categories of rights contain three sets which fall uncontroversially within Habermas' framework of the "absolutely justifiable" negative political and civil rights and three sets of more substantive, positive economic, social, and health (environmental) rights.⁹⁵ Held understands each of these rights as coinciding with a site of power and domain of action that each particular right helps empower. First, **political** rights help empower one vis-à-vis legal and regulatory institutions by giving one due process and equal treatment before the law and *adequate and equal opportunities for deliberation*. Second, **civic** rights empower civic associations and the ability to form or join autonomous associations, enjoy *freedom of information*, access to information, pursue symbolic orders and modes of discourse, either individually or in group projects. Third, Held includes **cultural rights** which are included in Habermas' system, but which Held makes explicit as the *freedom of expression and criticism*, toleration of others, and generally oriented towards the development of the abilities and talents

⁹⁵ Held also provides a set of *pacifist* rights concerning coercive relations and organized violence. It includes the right to peaceful coexistence, lawful foreign policy, and accountability of political leaders for crimes, civil or criminal. Although the right to physical security and non-coercive relations is beyond the scope of this study, it brings useful clarity to the conceptualization of the preconditions which one can understand as necessary for private and public autonomy. Because this study does not have the *global* reach tackled by Held and limits itself to *relatively*, and foreseeably *pacifist* neighbours (in the context of the European Union, next chapter), I do not treat this dimension in the text of the study.

of individuals.

The following three more positive and substantive categories of rights help make the above categories of rights actionable. **Economic rights** include a *guaranteed minimum or basic income* with access avenues made available to productive and financial resources (Offe 1996). These rights improve the ability of citizens to pursue economic activity without immediate financial vulnerability. These economic rights differ from **social rights** that include the right to access social welfare programs and services, such as universal childcare, universal education, and community services. Finally, the sixth category includes the **right to health**, which assumes for instance the right to bodily and emotional "*well-being*," control over fertility, the capacity to pursue bodily needs and pleasures, all of which therefore require a clean, nontoxic, *and sustainable environment*.

Although Habermas' constitutional rights have the primary objective of ensuring the autonomy of citizens through their intersubjective capacity, constitutionally and procedurally guaranteed, to legitimate law; and in keeping with the Habermasian notion of the pragmatic source of norms; whereas rights to economic security are necessary to ensure this citizen autonomy and legal legitimacy; owing to the fact that an increasing number of citizens are *de facto* reduced in their capacity to help determine the nature of the laws which govern them due to their diminishing economic, social, and health security. In Held's opinion, it is necessary to be more explicit than Habermas often is⁹⁶ with respect to the necessity to orient the

⁹⁶ For example, Habermas suggests the following: "The idea of a just society is connected with the promise of emancipation and human dignity. The distributive aspect of

administrative power and monetary resources of the economic system of the legal community to many of these implied rights to improve the relative capacity of citizens to make their political, civic, and cultural rights *actionable*.

3.3.2 Justiciable Social Charters as Legal Instruments

I will suggest here that despite considerable and compelling arguments on the dangers of “charter politics,” a justiciable *social* charter would help entrench the substantive and procedural elements for private and public autonomy more explicitly and securely. In short, such a Charter would be a useful legal instrument in the attempt to move beyond the juridifying, even means-testing approaches of liberal and liberal welfare paradigms.

Nonetheless, we should first consider some of the dangers of the rights-based approach to social justice. Honneth has pointed out that there are at least two dimensions to the problem of using rights-talk and relying on the institution of law in general for transformational politics. On the one hand, the legal framework tends to encourage a process of *exclusion and desymbolization* for economic security. Economic rights and security may themselves [2] act as mechanisms of *individualization* and commodification, where systemically marginalised persons are nonetheless “diverted onto the track of private consumption,” aiding in the drying up of their normative ethical potential by state intervention. Critical Legal Studies have extensively argued for this second dimension (Hutchinson 1993; Rose 1993; Cruikshank 1994;

equal legal status and equal treatment --the just distribution of social benefits-- is simply what *results* from the universalistic character of a law intended to guarantee the freedom and integrity of each" (BFN 418).

Bakan 1997). Honneth has even suggested the danger of Habermas' potential aiding in the controlling of the very articulation of categories of rights *for* social justice and *of* social injustice (Honneth 1995, 217). *For* social justice because we need those guides; and *of* injustice inasmuch as feelings of self-hatred, lack of self-respect, -confidence, -worth, dignity and autonomy --all of which emerge from the experience of a lack of economic security and the capacity to sustain critical and creative interaction with others-- when such experiences and feelings are deemed not "relevant" to the current adjudication reasoning processes over the protection and interpretation of constitutional rights. (See Habermas' partial acknowledgement of Honneth's contribution in BFN, 426).

More specifically, in light of the Canadian constitutional experience, Michael Mandel (1994) has made five main arguments against the "legalization of politics" via the use of charters.⁹⁷ First, he notes that under the guise of impartiality, objectivity, rational and technical reasoning in the public interest, judges make highly political decisions that, as a study by Green (1991) has shown, often reflect the values of judges' highly class-specific backgrounds. Mandel's second concern with the juridification of politics is that it has reduced the degree of popular accountability over the government by transferring power to unrepresentative and unaccountable judges. Thirdly, such legalized politics enhances individual and corporate rights over the collective rights of community. This is part of the Americanization of politics by moving away from collectivist traditions of public welfare to more individualistic American

⁹⁷ This summary of Mandel's arguments have benefitted from Dyck (1996, 113-117).

values. Fourth, the legalization of politics is a more costly form of politics and can put political action outside the reach of many popular movements. On the other hand, wealthy individuals and, especially, corporations are making increasing use of the courts to protect their private interests. Mandel's fifth and final point is that citizens can come to focus so much on the negative liberal rights that are entrenched in most charters that they are blinded to the other categories of rights in which they are possibly also interested, such as social, environmental and welfare rights.⁹⁸

With regards to Mandel's crucial points, this study of the usefulness of charters makes two radical assumptions. First, it is not arguing for the *increased* authority of courts *over* legislatures, but rather views charters as simply another instrument to protect social rights. This assumption stems from another even more basic one which is that "Charter politics" would be oriented as much towards the protection of collective welfare and social rights of societies as it would be towards protecting citizens' private autonomy. This is the essential notion of Habermas that private and public autonomy must be *co-eval* concerns of political, legal, and administrative systems. However, studies have pointed out that most charters have

⁹⁸ In his argument against the method of making social and economic rights judicially-enforced as opposed to legislatively-enforceable, Monahan (1993) has suggested that it would be folly to hand over the national or community-level role in social policy to the judiciary. In his words, "[t]he courts are simply incapable of designing complicated and costly national programmes in the social-policy field" (1993, 41-2). However, it is not clear why there needs to be such a dichotomous treatment of the methods and instruments of enforcement. Certainly, while it makes sense to leave the designing of particular social policy programs to the legislature, we should not shy away from using constitutions to more deeply entrench positive rights, which would be *generally* protected by judicial review.

been interpreted with more of an individualist value bias. Judges have even gone so far as to draw on American legal precedents to support their decisions than more collective and socially-oriented value orientations (Mandel 1994; Schneiderman and Sutherland 1997; Bakan 1997).

Nevertheless, my argument for the justiciable *social* charter suggests that many of the decisions have tended to favour individualistic value orientations not simply due to the liberal values or ideology of supreme court judges (although that has been shown to certainly be a contributing factor), but because these judges do not have the *legal basis*, a set of social and welfare rights, to make such decisions. If such a basis existed, then the legal professional would at least have an obligation –if and when confronted– to provide reasoning why they would continue to make decisions favouring more individualistic interpretations of the law over more social and community interests and value-orientations.⁹⁹ However, this strategy of struggling for a legal basis for improved life-chances has been only weakly and sporadically attempted by critical legal theorists, even those with reconstructive and normative research interests.

The social charter is a fairly specific *legal* mechanism, situated within a broader social model and even broader *principles and values* of economic (coordination and) *redistribution*. While the advantage of the principles-based approach is that it resonates more viscerally with

⁹⁹ This notion, of course, stems from the application of the basic principle in Habermas' theory of communicative action concerning the power of a "speech act immanent obligation".

a wider public and thus acts as a tradition-based *anchor* for justice, it is less straight-forwardly justiciable. But this does not mean that the principles or ethico-political approach should be marginalised, as Habermas' writings have tended to do, or at least confusedly do (for example, RG 263). Rather, they should be more explicitly put forth as the background understandings that Habermas himself *overly assumes* (especially for Anglo-American audiences *not* accustomed to the *European* form of social, rather than economically conservative "liberalism"). This would help promote their inclusion as constitutional rights.

Honneth (1995, esp. 213) has commented on Habermas' assumption of the ability of marginalised groups to develop the conceptual tools --despite their more general social exclusion and individualization-- and articulate their experiences of social injustice and demands for a more just social order. Consequently, while rights should not be *finalized* without the input of those affected, a more general, socially- and economically-oriented system of rights *should be formulated* as a *guideline* to marginalised citizens so that they are able to distinguish and generate a motivation for the broader and deeper sets of positive rights. Otherwise, in Habermas' often overly cautious formulation of the issue --which even feminist authors such as Young (1990), but not Fraser (1993; 1997) have fallen into-- there is a conflation of the desire to respect diversity and the importance of providing the proper preconditions for public discourse. And the general preconditions should be oriented towards *opening*, rather than *narrowing* the set of options.

The realization of the growing need for these general and deepened constitutional protections of the economic, welfare, and bodily rights of citizens is becoming especially clear

not so much through *internal* assessments of the pros or cons of judicial versus legislative (legal versus political) methods of enforcement. Rather, its importance becomes clearer with an *external* analysis of the declining power of *national political* actors and legislatures compared to the *legal* treaties that they are negotiating at the *international* level, treaties which are making the latter the masters of national legislative capacities. While some communitarians and non-normativist critical legal theorists have argued against rights-talk and others have more subtly argued the merits of political versus legal methods of enforcing social rights, still others have understood and taken advantage of the declining capacity of national political actors and bodies to legitimately determine the positive and negative rights and obligations of international social and economic relations. They have set out to bring greater precision to international, purely liberalized-trade treaties that are legally binding on national- and subnational-level governments *and their constitutional courts* and the latter's attempts to ensure protections for the environment and society.

The Social Charter Options

Kymlicka and Norman (1992) have iterated several forms that the entrenchment process for categories of rights could take. Generally, it could rely on existing institutional arrangements such as legislatures and administrations that would be oriented more towards fulfilling current commitments to social justice. Or there could be a separate constitutional social charter which would put additional pressures on the governments and administrations

to fulfil the categories of rights explicated therein.¹⁰⁰ The "saturation" and determination of these rights and their administration would be determined via the deliberative model outlined above (3.1-3.2.2).

Specifically, the *options* include (i) improving existing national standards through the *more vigorous* use of federal spending powers; and (ii) establishing *new national standards* for new social programs. These first two options seek to ensure social justice through *legislative* means rather than the *constitutional* entrenchment of particular social rights or principles.

However, some suggest that the above options would not provide sufficient protections in an increasingly decentralized polity and regional and globalized trade environment. Due to interregional and international competition and a lack of cooperation, there could be a "race to the bottom" or "downward harmonization" as each government, at various levels, cuts its standards in order to make its particular territory more attractive to foreign investors (Porter in Kymlicka & Norman 1992, 4 & 8).

The third (iii) option would be to have a monitored but *non-justiciable* social charter. It would be parallel to existing enforceable rights, but it would not itself be legally justiciable in the courts. A new body would monitor the legislation and administration of general principles, specific entitlements, and social programs. This is the model that is used in the European Union which has a "council of experts" to monitor how each of the signatory states

¹⁰⁰ While Habermas does not make these options explicit in his constitutional legal theory, his framework does not suggest that he would exclude such options either.

is maintaining its obligations to the charter.

The fourth (iv) option would be to guarantee some social, bodily, and welfare rights through an expanded interpretation of existing charter rights. This would involve the *explicit commitment to expand the interpretation of existing civil and political rights to encompass the necessary social and economic needs* to fulfil one's political and civil obligations and rights as a citizen.¹⁰¹ Many existing charters and bills of rights could be interpreted in this fashion. For example, Kymlicka and Norman point to Section 7. of the Canadian Charter as being interpretable to require adequate housing, social security, or safe working conditions. Also, Section 15, which guarantees the right to equality could be interpreted to require that historically disadvantaged groups are provided access to public services.¹⁰²

¹⁰¹ There is also the option of the "covenant" approach to securing the welfare of citizens. This approach seeks to rely less on legal than on generating a moral or ethical revision of priorities, and ways of seeing in the society which would resonate with its citizens, and hence act as a source of motivation for resisting change in and at an everyday level. Cf. Taylor 1985 and Honneth 1995 on this non-legal (at least initially) approach, as well as the liberal-communitarian debate regarding the "rights-talk."

¹⁰² The so-called *equality rights* in the Canadian Charter in Section 15 are the following:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

However, as Mandel (1994, 300) has noted, it appears that the Canadian Charter is currently designed to be "capable of opposing every kind of discrimination but class discrimination."

See Finer et. al. (1995) to compare the various *existing de jure* constitutional

The difficulty with such an "interpretive clause" approach is that it is *difficult to predict how judges will use it* (see this jurisprudential issue in BFN, esp. chapter 5). They may use it to entrench social rights, or they may make little use of it, preferring instead to use the jurisprudence already existing around existing constitutional decisions. For this reason and, rightly in Habermas' eyes, judges prefer to leave such decisions to be made in the political sphere rather than leaving virtual legislative choices in the hands of either active or conservative justices.¹⁰³

The fifth (v) and final¹⁰⁴ option of a *justiciable social charter* would not leave social welfare entrenchment to toothless councils or commissioners or to unpredictable judicial interpreters. Rather, new categories of rights would be listed as a new section within an existing constitution. This would make them "straightforwardly enforceable" and provide the highest degree of legal protection for social rights. In addition, "unlike the non-justiciable model, it would be better able to deal with cases of injustice that arise not from the welfare legislation itself, but from its arbitrary administration, or from the [irrational or] unintended effects of other [conflicting goods, or hard cases] legislation." The ability to pursue one's

provisions and "rights" in other countries and supranational-level jurisdictions.

¹⁰³ See, as a positive example in the Canadian case, the opinions of Justice Bertha Wilson on abortion rights (Morton & Knopf 1992, 265-8, 100-3).

¹⁰⁴ Kymlicka and Norman provide a sixth option, that of a "Citizen Charter" stemming from a proposal of the former British Prime Minister John Major. However, this "customer's charter" that provides for rights against suppliers, etc., appears for this author a far less promising suggestion and, in fact, constitutes a regressive step rather than a movement forward compared to the justiciable social charter option.

private and public autonomy, knowing that they go beyond simply political and civil rights to wider forms of conditions of exclusion, would give individuals and historically marginalized groups a greater sense of inclusion and membership in democratic citizenship.¹⁰⁵

To revisit Habermas' example of the feminist Charter of 77 for a moment, that Charter was an excellent example of the attempt by rights activists to go beyond [1] *liberal* rights of inclusion towards [2] *social, economic, and welfare* rights. However, the fact that the Charter did not conceptualize the need for rights as [3] *doing* rather than merely having --the democratic participatory dimension emphasized by both Young and Habermas as an absolutely essential insight in any struggle-- weakened the requirement to maintain democratic control, authoring over the particular conditions of one's life.

However, there is another aspect which is often overlooked in current democratic and "difference" debates and which Habermas' approach prefers to highlight. Namely, for such a charter to receive broad public support and mobilization it must be [4] *universal* and in the aid

¹⁰⁵ The Canadian Charter has arguably helped empower Native and women's groups. However, the benefits for this increased juridical approach have developed their own difficulties. For instance, in the Native communities, the increasing prominence of the legal approach to justice issues has led to the Native leadership being largely held by Native lawyers. However sincere these leaders may be in their efforts to secure the culture and traditions of their people (most notably and radically, their centuries-long refusal to become assimilated into commodity relations over a self-sufficiency economy), it is tremendously difficult for such leaders, schooled in Western legal thought, to avoid assimilation into more Western, legalistic and even American individualistic value orientations and thought-processes. This includes a process which does not continue to return to the grassroots of their people for inspiration and consensus building.

On the other hand, individuals (and groups) are more aware of their rights, and the fact that with the entrenchment of these rights, they have been doing without the conditions which would enable them to lead more fulfilled lives (Mercredi and Turpel 1993).

and interests of all. The second track of implementation would be attached as an additional, necessary requirement. In other words, it is not simply that movements for social rights led to the "feminization of poverty", but rather that the whole social rights discourse was allowed to be ghettoized and those who fought for it were fragmented from the rest of society and labelled as particularist "interests." This is the continuing danger of Young's and "difference" strategies more generally: they fall into the individualizing, ghettoizing, easily categorizable, statistical strategies of capitalist management.¹⁰⁶

Therefore, care must be taken in any historical analysis regarding the reason for the "failure" of broad support for social citizenship rights. If the focus is too narrow in terms of time and place, it may focus on juridifiable and means testing attempts, rather than conceptualizing more broadly and comparatively the more *universal* and de-commodifying potential forms of the welfare state (cf. Esping-Anderson 1990, *supra*).

¹⁰⁶ We should also note, however, that it is not the law-making, but its *enforcement* that is often the problem, especially, in the area of international human rights. In this regard, "cultural difference" is often invoked in the international scene to beg off applying, for instance, international UN human rights. Nation-states invoke the necessity that the international community recognize the "cultural uniqueness" of, for instance, its "Asian values" while basic human, political and labour safety rights are violated (Steiner & Alston 1996, 226-256, & the illustrative issue of CEDAW on social and economic rights in Part E).

In the case of labour rights, women are often the ones in the most vulnerable positions, working in the increasingly popular sweatshops. And the *justification* for the violation of such basic rights is unwittingly provided by left cultural relativist reasoning --or particularised versus generalist, situationalist versus contextual, difference versus sameness arguments, from Gilligan to MacKinnon-- in the West, with tragic consequences for millions of non-Western women and men. It is with an eye to securing the basic human rights of *all* world citizens, not simply the already privileged few, that Habermas's more formal, universal, binding rule of law is oriented, as opposed to the often one-sidedly informal, sometimes navel-gazing "resistance strategies" of middle-class Westerners.

In summary, the social charter is a *legal mechanism* towards ensuring social and economic rights necessary for the securing of the public and private autonomy articulated in Habermas' theory of rights. The rights it provides are necessary means towards

- * *integrating* postnational citizens into federal systems;
- * helping make citizens *competent* for any notion of deliberative democracy as authors and addressees of a democratic *and social Rechtsstaat*;
- * improving the *legitimacy* of the state to help a public of autonomous citizens;
- * removing the sense of "dependency" and "zero-sum" perception of desperate citizens towards the state (BFN 406), and shifting it to include the other major subsystem of the *market*;
- * helping to *protect* the private and public autonomy of citizens from the effects of concentrated private power through the legitimated, public opinion- and will-formed consensus for balanced administrative power;
- * helping citizens to increase their private autonomy and dignity (Honneth 1995);
- * and finally, helping to enhance citizens' ethical-orientation towards a *self-identification* with the meaning of constitutional principles (towards a *Verfassungspatriotismus*) *in addition to* the more traditionally based sources of national-based citizenship identity (for example, that of a *Volksgemeinschaft* rather than a supranational *Rechtsgemeinschaft* (PF 129)).

The usefulness of this legal mechanism, pushed forward by actors in *both* the *autonomous* and *formal* political spheres, suggests itself from the criteria Habermas himself

outlines: the necessity to institutionalize the preconditions for undistorted opinion- and will-formation. It represents a necessary *complement* to Habermas' own [1] communicatively- and procedurally-based justification of a system of rights oriented towards simultaneously securing public and private autonomy. However, without clarity in particular on a set of [2] *economic and social rights* that are (nonetheless) *implied* by Habermas' rights; the [3a] articulation of an enlarged, *politically-orienting* set of rights; and [3b] a *mechanism* to ensure that they are universal, and constitutionally justiciable (the Social Charter), the communicatively-oriented rights to the authoring of rights, from the generation to implementation stages *on their own* would ring hollow for those *most in need* of economic and social rights.¹⁰⁷

Conclusion

The need for a robust "civil society" currently enjoys the attention of many critical theorists. However, the securing of such a broad and strong civic public is too often pursued under the rubric of liberal negative and "human rights": individual political and civil rights, often with the explicit exclusion of the role of the state and the need for democratic systemic mechanisms and procedures and more substantive *social and economic* rights (Fraser and Gordon 1994; Beetham 1993). In addition, Habermas and Young have gone the furthest towards conceptualizing how these full sets of rights could help simultaneously secure the private and public autonomy of citizens through a non-juridifying, intersubjective paradigm at both the *formulating and implementing* stages of those rights. There is also the recognition

¹⁰⁷ Chapter Five will discuss the feasibility of drawing on the economic *resources* of social systems in order to realize such economic rights.

of the need for robust political will in citizens to be guaranteed and augmented through strong public, legal, democratic institutions and institutionalized procedures.

The *two-track* approach can be understood to include two moments. The first track *for citizens* is to generate communicative power to influence formulation and decision-making discourse, i.e., the conversion of communicative power into state power (PPP; BFN). The second moment for citizens is to *ensure* that they are involved in the *implementation* of public policies which affect them.

These authors point towards the need for a more appropriate balancing in research focus from the one-sided liberal and contemporary (American) republican integrationist "concern" for issues of democratic and civic rights (Phillips 1992), that were justifiably fuelled by the aporia in certain Marxian analyses. European theorists such as Habermas and Held have put strongly back onto the understanding of fundamental rights an appreciation of the equal need for social and economic security. As Galbraith has unflaggingly remarked, there is one idea that we must remember, and that is that there is no greater limitation on human freedom than a lack of money.¹⁰⁸ A constant "lack of money" has not only a limiting, but often a devastating effect on all aspects and realms of one's life: from the capacity to participate in the democratic activities of one's community, nation or globe to one's very physical and moral

¹⁰⁸ As Galbraith puts it, "there is, first, the absolute, inescapable requirement that everyone in the good ... society has a basic source of income. And if this is not available from the market system ... it must come from the state. Nothing, let us not forget, sets a stronger limit on the liberty of the citizen than a total absence of money" (quoted in Held 1995, 253).

well-being.¹⁰⁹

Therefore, while Habermas' abstract, largely deontological *justification* for an intersubjectivist conceptualization of social, political, economic and environmental rights provides a significant advance on the liberal and "materialized law" stemming from the philosophy of the subject, the *substantive clarity* of Held's categories of rights to help offset the economic and globalized sites of power is essential. The *justification* of social and economic preconditions and *security* for participation in democratic fora in increasingly complex and often illegitimately power-influenced opinion and will-formation processes represents *an important extension of the "system of rights" that Habermas envisions as essential for a robust public sphere and citizenry to be able to securely see themselves as meaningful authors and addressees,*

Since there are clear indications that the organization of political, legal, and economic systems are moving to such higher levels of abstraction, *in addition to the dangers* that such a move has (already) presented, there can also be support for Habermas' thesis that such an increasingly complex form of organization will have to rely on a citizenry *equally capable of understanding and communicatively interacting* on the basis of less concrete, more abstract identity forms and symbols. This capacity, in turn, will depend on an improved cognitive capacity for such abstraction --which requires knowledgeable citizens capable of *apprehending*

¹⁰⁹ For example, socio-economic status is such a major factor in determining the life-chances of individuals that medical researchers look to vitamins and minerals as other factors rather than what is so patently and scientifically proven as the leading factor because they consider it simply overwhelming.

more abstract sources of danger to democratic principles and of being *motivated* to maintain social cohesion in posttraditional, multiperspectival, overlapping, fluid, contingent environments-- and on the legitimacy of norms *codified* in supranational political and judicial institutions (Preuß 1995, 1996).

It is argued that Habermas provides an insight into this larger potential dynamic of modernity, a dynamic which requires not only a *renewed system of rights* for the protection of negative liberties via securing *private "freedoms"*; but also substantive conditions to improve the communicative and cognitive capacities of postnational citizens and their public, democratic institutions, i.e., *public autonomy*. Consequently, a new *paradigm of law* which protects both the liberal, "subjective", and even moralized Kantian notion of autonomy, *in addition to* the social, in the French rather than American "republican" concept of the necessary conditions for the meaningful exercise of autonomy is necessary. This paradigm acknowledges that *both* negative and positive rights are required to fulfil the twin requirements of increasingly postnational citizens to attain the communicative competence and integrative motivation within ever more complex political and economic subsystems and lifeworld interactions.

Now that feminists, ecologists, anti-poverty movements, etc. have articulated some of the broader needs of citizens, as well as that of the environment, those needs must be brought together as a powerful *constitutional set of rights* based in a new legal paradigm which utilizes deliberative processes. These deliberative components would help provide the understanding that environmental poverty, racism, health, and critique are problems and needs which respect

no boundaries and which must be *universally* provided for, with democratic, intersubjective control of those services and programs *continuing* down to the implementation stage to particular groups and individuals.

The following chapter attempts to show how these improved categories or heightened *standards* of rights may stem not simply from naively normativist *ideals*, but from empirically motivated, *presently developing alternatives* to liberal political and civic or the predominant Anglo-American, negative conceptions of rights. We will see how societies can and do continue to unfold these heightened standards of rights towards securing the private and public autonomy of citizens in spite of and, perhaps due to, the increased complexity and capacity for "Great [structural] Transformations" in political, economic, and public spheres.

4. The European Social Model & the Conditions for Citizenship

In the wake of what was popularly conceived as an illegitimate, elite manner in which the 1992 Maastricht Treaty was negotiated, there have been calls by many Member States, European Union (EU) institutions and autonomous groups to find means to "bring the Union closer to its citizens." While such measures include improving the *democratic* procedures and rights of citizens (Chapter Two), the inclusion of a "*social dividend*" is also seen as important in bonding the will of currently fragmented and nationally oriented citizens to the more *abstract*, supranational political and economic coordinating structures of the European Union. This notion of a significant social dividend was partially instituted as a "Social Charter" to provide the social and economic security considered an important element for "social cohesion."¹¹⁰

This recognition of not only the political, cultural and civic freedoms, but also the social and economic preconditions for social cohesion and citizen participation in increasingly complex societies represents an important illustration of the "stages", or really, the back and forth struggle towards the development of a system and categories of rights within an intersubjective paradigm of law that Habermas envisions as essential for a robust public sphere. These features are essential to help autonomous publics acquire the time and capacity to exercise influence, not only on the institutions of the nation-state, but of increasing importance, on the expanding *supranational* systems of governance such as those of the European Union.

¹¹⁰ See Offe's critique of the notion of a "social dividend" (1996, 220, n.2).

This Chapter will focus more on the *reconstructive* efforts to pursue a European Union which entrenches social and economic rights rather than add to the literature which usefully highlights, though sometimes one-sidedly, the real *dangers* of an integrated and supranational level of social and economic policy coordination. Without repeating a similar lop-sided examination except on the opposite side of the critico-normative coin, I begin this chapter with a sketch of the recent historical attempts to improve the conditions for European citizenship from a social *charter* to a justiciable, supranational social and employment *chapter* (4.1), especially in light of the 1997 Amsterdam Treaty (4.2). Towards the end, I consider the movement towards *reduced work time* in Europe as a viable means towards coordinating the essential ends of providing not only economic security, but rather economic security through meaningful labour. This policy initiative --*underpinned* by a constitutional obligation for legislators to realize the requirement of providing favourable conditions for the economic and democratic (private and public) autonomy of citizens-- is conceived to free up time for citizens to engage in cultural, civil and political *interaction and participatory life* (4.3).

The struggle for reduced work time is considered here as a pragmatic means to achieve greater balance between *labour and interaction* made increasingly *viable* due to the conditions for its coordination. I suggest that the emerging EU action systems may act as a potential *regional-level public policy forum for the coordination of reduced work time* towards significantly alleviating one of *the* looming crises of "disorganized capitalist" societies: unemployment (Offe 1985; Gorz 1989; Keane & Owens 1986; Keane 1988; Offe 1992; Rifkin 1996; Offe 1996).

Two politico-historical events make such a potential supranational policy coordination more politically attainable today: the outcome of the 1996-7 IGC, or "Maastricht II" negotiations in Amsterdam, particularly concerning the "Economic Pillar" negotiated by the new Jospin government in France. Secondly, the releasing of the "drag effect" on attempts to integrate *employment and income* protections in European decision-making processes from 1979 to 1997 due to the presence of a *libéralisme sauvage* regime in the UK. And more positively, the ascendency of a government in France explicitly committed to *some form of* reduced work time.

The summary argument in this chapter is that the "rationality disturbances" or disjunctures in law, economy, political decision-making, identity, culture and even (international) security (Held 1995) pointed out in the earlier chapters make *conceptualizing citizenship rights* issues by critical social theorists at a [1] *constitutional and* [2] *supranational level* essential. This builds on Habermas and others' attempts to take back the power and the accountability of the state or, more relevantly, *supranational systems of governance*, as well as reorient constitutional "rights talk" from encroaching neo-, and liberal-minimalist definitions, and to those non-normativist critical legal theorists who have dismissed the administrative power of the legal state as an admittedly Janus-faced, but nonetheless potentially *non-juridifying* site of struggle. Going beyond another mere "thought experiment" (LC 111-117; TP 41), this chapter uses the deepness of the emerging "European experiment" as the social, political, and legal model to best exemplify the democratic problems and *possibilities* that present themselves to critical democratic and social theorists at this increased

level of complexity.

4.1 From a European Social Charter to a Constitutional Chapter

The first constitutions to refer to the protection of fundamental rights were the Virginia Bill of Rights (1776) and the French *Déclaration des droits de l'homme et du citoyen* (1789-91). They largely formulated a *classic* conception of liberal rights which sought to provide the citizen with an area of (economic) freedom from state intervention (TP, chap. 3; Preuß 1995). However, this realm for *laissez-aller* regarding economic activity soon proved to be insufficient for the majority of the population who "lived and died in poverty and in circumstances unworthy of man" (Betten 1996, 14). New types of fundamental rights were demanded by labour, for instance, to create better living and working conditions which necessitated, *contra* the basic aim of the liberal conception of the role of the minimal state, intervention in the economic activity of society.

However, the liberal state developed a schismatic treatment between civil and political rights that could be "straightforwardly justiciable" (i.e., made the subject of litigation) and economic and social rights. The latter rights were not usually defined as rights of the individual, but as "instruction norms" to the government. This gave them a "policy" or "programmatic" character that depended on active government (and larger favourable socio-economic circumstances) and that made them non-justiciable (Betten 1996, 15).

This schismatic treatment of civil and political rights versus economic and social rights continued in the twentieth century. While both categories of rights were included in the United Nations' Universal Declaration of Human Rights, the document itself is a legally non-binding

instrument. When pressure by socialist countries sought a binding international instrument which would acknowledge the *interdependence* of the two categories of rights, certain Western countries demurred. The outcome was that two separate instruments were created, with the International Covenant on Civil and Political Rights on the one side, and the International Covenant on Economic, Social and Cultural Rights, on the other (*ibid.*; de Villiers *et. al.* 1988).¹¹¹

A parallel debate concerning the two categories of fundamental rights occurred at the European level with a similar outcome. On November 4, 1950, civil and political rights of citizens were included in the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). On the other hand, social rights were included in a much weaker legal instrument signed eleven years later: the European Social Charter (1961) (Betten 1996, 16).

The signing of the Social Charter by the Council of Europe had little legal significance,

¹¹¹ This should not be interpreted as a simple East versus West cleavage, but rather one influenced by social visions. For Roosevelt in the United States had proposed a second Bill of Rights at the national level which would have paralleled the rights proposed by the "socialist" countries at the international level. Unfortunately, due to FDR's death, and the incumbency of an administration obsessed with the "Communist menace" (an obsession which only amplified the potential for such a logic to increase through closing down communicative exchanges and trust building) the more socially-oriented bill of rights not only became marginalized at the international level, it suffered the same fate at the national level in the US. The point is that such struggles for rights have, nonetheless, been closer to potential fulfilment, even in, what Che Guevara has called, "the heart of the [capitalist] beast," the US, than one often imagines. This signals the importance of strong, "positive-active" political leadership at the national level as *a dimension* of emancipatory struggles for equal economic, social, welfare, and bodily rights (Elgie 1995, 10-12).

especially compared to many of the social democratic and even socialist *national*-level statutory and constitutional provisions that had already established minimum standards for health and safety at work and for gender equality. In fact, social policy coordination at Community level was not a high priority for the Six Member States in the first 12 years or so of the European Community, and the only area of real activity was coordinating social security systems for migrant workers exercising their Treaty-given right to freedom of movement.

Initially, in cases brought before the European Court of Justice, the Court rejected claims of a violation of fundamental rights, suggesting that such rights had no basis in the European-level Treaties in effect at that time. However, the Court made an important *volte face* when it overruled its own case law in the 1969 *Stauder* case, arguing that fundamental rights were indeed enshrined in the *general principles* of Community law. It was important, Betten suggests, because it "introduced firmly the idea that, although there was no express reference to fundamental rights, their protection was implicit in the general principles of Community law [and international treaties to which they were signatories]. From then onwards, the Court appeared to be determined to strengthen the basis for this protection" through the development of its own case law (Betten 1996, 5).

While the Court worked to develop a coherent legal basis for fundamental rights, the Italian and the *Bundesverfassungsgericht* (the German Constitutional Court), especially in the latter's "Solange" decision, expressed doubt as to the supremacy of European Community law. They were not legally wrong in this argument since the Community lacked a codified and unambiguous *catalogue* of fundamental rights. The German court concluded that a ruling by

the Community court on these rights could not be *directly* applied to German authorities if the ruling infringed on the constitutional and, essentially, liberal rights of German citizens.

This challenge and the dangerous legal precedent by the *Bundesverfassungsgericht* led the European Council to act. It made a *political* statement "expressing the determination to defend the principles of representative democracy, the rule of law, social justice and respect for human rights as basic elements of the European identity" (Betten 1996, 6).

Things began to move in the early 1970's when the *Commission* proposed a series of "Social Action Programmes" that launched *legislative* initiatives in the fields of employment law, equal opportunities, health and safety at work and the development of the European Social Fund (ESF). These initiatives stemmed from the lack of legal grounds on which the European Court of Justice could determine the obligations of Member States to fulfill fundamental rights in cases brought before the Court.

Concern that harmonisation of health and safety regulations could result in a decline in some national standards (the "uploading" of responsibilities without the same national-level accountability) led to changes in the *Treaty's* provisions¹¹² through the Single European Act

¹¹² In Chapter Two we took a brief review of some of the strengths and limits of the current *procedures and institutions* responsible for interchange relations in the EU, and their capacity, for instance, to introduce new social and constitutional agendas. However, one should also be aware of the extensive *treaty and legal* bases –i.e., the "genus" for the "species" (Smith 1991, 102-3)– of policy-making. These treaty bases, for *social policy* in particular, can severely limit, *or enhance* the room for maneuver on social policy issues. These treaty bases include Articles 2,3, 39, 48-51, 100-102, 117-127, 130a-e and 235, plus Protocol (No 14) of the Treaty on European Union, and now the Appendixes to the 1997 Amsterdam Treaty.

in 1987. These provisions stated that harmonisation should be based on a high level of protection, and if a measure threatened a decline in its national standards, a Member State would not be required to apply it. With the enlargement of the Union, poorer regions and countries benefitted from the "upward harmonization" in their social and environmental standards, often significantly subsidized by the richer Member States in the Union through collective structural development funds.¹¹³

¹¹³ There are four main *instruments* and *institutions* (cf. Kymlicka & Norman 1994) for a supranational system of coordination: the *legal* basis of the Charter, the *legislative* arm, the institutionalized social *dialogue* and the use of community *funds* towards upward harmonization. While the first three were discussed in Chapter Two, we can consider here for a moment the importance of the European Social Fund (ESF).

The ESF is an important component of the EU's "Structural Funds" which also include the European Regional Development Fund (ERDF) and the Cohesion Fund. The volume of these funds was doubled between 1988 and 1993, and is set to double again by 1999. In the 1994-99 period, the ESF's share of the total ECU 156 billion allocated to the funds will be around ECU 47 billion. Around 45% of spending is concentrated in seven "absolute priority" (see Held's differentiation between ideal, attainable, and urgent autonomy needs (1995, 206)) zones containing altogether about one sixth of the Union's working population. Some 60% of these resources will go towards the development and structural adjustment of poorer regions, devoted to structural policy for the development of infrastructure, productive investment and human resources (DG 5).

More particularly, priorities for the ECU 5.6 billion spent by the ESF in 1995 were converting regions seriously affected by industrial decline and combating long-term unemployment. The Funds' general aims include: helping the long-term unemployed back into work; support the integration of people excluded from employment e.g. women and the disabled; equality of employment opportunities between men and women; helping workers to adapt to industrial change and to changes in production systems; strengthen and improve *education* and (undifferentiated) "training" systems (DG 5)

While NAFTA for instance also had such instruments and funds available to help with "structural adjustments" with the advent of continental free trade, those instruments and funds were little used. The DG 5, also notably encouraged by the EP, has made better use of the availability of such funds. The NAFTA treaty has no such corresponding multi-level governance institution such as the EU's parliament which devotes itself to the just distribution, and context-sensitive *determination and implementation* of programs, monies and services

The launch of the single market programme in 1985 was followed with an understanding that steps were still needed to raise the quality of social legislation. By December 1989, the final draft of such an agreement passed the European Council 11 votes to 1, with Britain's Margaret Thatcher casting the dissenting vote.

The "Community Charter of Fundamental Social Rights" (or, more commonly, the European (as opposed to the earlier Council's) Social Charter) introduced new possibilities for the development of the social dimension. It provided for the adoption by qualified majority of measures in areas such as conditions at work, consultation of workers and so on. The agreement also set out a more highly-defined process for the consultation of the "social partners" in the preparation of proposals for social legislation. It also gave them the option of reaching European-level *contractual agreements* which could take the place of legislation (Bercusson 1990; Burrows & Mair 1996).

As discussion of economic and monetary union progressed, the so-called "social dimensions" of European Union enjoyed more attention. This was due principally to the increasing influence of the European Parliament which was dominated by left and left-of-centre parties. Also, by the end of 1988, the former French Minister of the Economy under Mitterrand, Jacques Delors, became President of the European Commission. He campaigned

to its constituents affected by the pressures of supranational integration. Such determinations of funding and implementation would need to be sensitive to issues of rural versus urban needs, technological fixes versus more organic and self-sufficient, local lifestyles and economies. In other words, *indigenous* solutions to solving problems caused by, for example, context-insensitive policies such as the so-called "Green Revolution" approaches to development.

vigorously for a package of social welfare guarantees to be realized *in tandem with* the implementation of the common market (Ross 1995).

Delors promised a "social Europe" based on "industrial democracy." In the spring of 1989, conservative opposition was defeated as the European Parliament voted for drafting a "Social Charter." At the Maastricht Intergovernmental Conference (IGC) in May of 1992, the advance of the Social Charter was hindered by Britain's continued refusal to respect its legality. By withholding accession to European Community social policy, Britain drastically undermined the Charter's influence.¹¹⁴ In any case, many were disappointed with the Charter as it still remained a "Solemn Declaration" to emphasize that it was largely a *political statement*, rather than a straightforwardly legally binding instrument (Monahan 1992, 22).¹¹⁵

Nonetheless, the Charter's influence was greatly strengthened from its original form in 1961 by its appendage to the Maastricht Treaty in 1992. Since that time, the Charter has had the "expanding" (Lefort 1988) and *Drittwirkung* (third-party) effect that its promoters had

¹¹⁴ Because the British government refused to endorse the "social chapter", it was attached as a protocol to the Treaty and excluded Britain from its effect. The German Chancellor Kohl orchestrated an agreement that the 11 could use the Community institutions - without the participation of the UK - to achieve their growing ambitions for social policy. However, this agreement also set a problematic precedent for opt-outs (and cop-outs; Duff 1994, 22 & 341) in the future (Bercusson 1996).

¹¹⁵ Although it clearly does not have the same legal weight as civil and political protections, there is some disagreement on the relative legality of the document. Compare Betten (1996, 11) and Bercusson (1996, Introduction). The Social Chapter is still not the entrenchment of an actually supranational-level social welfare system. Rather it is a treaty document which provides a binding *general agenda* and guidelines to reduce the possibility of regional disparities stemming from lopsided promarket agendas. It is a counter-weight to the free trade agenda which is "opening up" markets to competition in order to ensure that basic social and environmental standards are also in effect *at that same level*.

hoped.¹¹⁶ For instance, it has been responsible for *encouraging* the launching of programs to help recent immigrants and part-time workers; provisions for education and training; the free movement of workers; the right to collective bargaining; the right to strike; worker participation; a continental minimum wage; adequate health and safety standards for workers; a shorter working week; stronger regulations on child labour; and civil rights for women, minorities, the elderly, and the handicapped; environmental protection; economic development programs in poorer regions; and helping the Community's fifty million citizens still living in poverty (Burrows & Mair 1996; Bercusson 1996; Wedderburn 1995).

Indeed, "The Community Charter of Fundamental Social Rights for Workers" within the Social Charter has served as a springboard for a number of progressive EU policy initiatives to entrench EU-wide citizenship rights. Initially largely a statement of intent, implementation of the Charter formally falls into the policy-making jurisdiction of the European Council (Burrows & Mair 1996; Bercusson 1996).

As the Commission admits, "Europe's model of social welfare has done much to maintain social harmony" over the last half century (Commission 1995). Its preservation

¹¹⁶ According to Rehg, the "ideas of *Drittwirkung* and *Ausstrahlung* refer to the effects that constitutional values and rights have on all areas of law. More specifically, *Drittwirkung* concerns the issue of whether basic rights protecting the individual from state encroachment also apply in areas of private law, i.e., to relationships between individuals" (Rehg in BFN, 560 n. 26). Nonetheless, while the doctrine that basic rights have a "radiating" and "third-party effect" can be interpreted as a positive dynamic to constitutional values (BFN 403), it also has the potential to *seriously undermine* other "constitutional values" of a different tradition, namely one oriented towards creative social policy over the supremacy of private property rights (Schneiderman 1997).

ostensibly remains a top priority for the Union and its Member States, despite the downward pressures on costs and social spending imposed in part by global competition. These pressures have intensified during a period in which rising unemployment and an ageing population are making greater demands than ever before on budgets in the Union.

For instance, in addition to high *direct* costs for wages, the *indirect* costs vary between countries with their respective social security systems, such as the costs of compliance with health programs and labour standards. The result is that enterprises in countries with lower direct and indirect labour costs are seen to have a "competitive advantage" over Member States (MS) with higher social standards. Some would argue that such advantages may be offset by better infrastructure programs in a MS, such as a better educated and trained workforce and more developed transport and information structures.

Nonetheless, as Bercusson (1996) points out in *European Labour Law*, MSs fear that "social dumping" will begin to occur as the result of "social policy regime competition". MSs will

be under pressure to reduce their labour and social standards in order to ease the burden of high indirect wage costs on enterprises. Enterprises, particularly multinational enterprises, will be tempted to locate new investments or even relocate existing establishments to countries where lower labour and social standards entail lower indirect labour costs. (Bercusson 1996, 75.)¹¹⁷

¹¹⁷ The following tables illustrate the dilemma (from Bercusson 1996, 75-6).

HOURLY LABOUR COSTS IN INDUSTRY IN THE EU, 1990 IN ECUS

In November 1993, when Delors was still President, the Commission published the *Green Paper* on the future of European social policy as part of a wide-ranging consultative process. It was clear to Delors that European citizens needed to feel that the Union and social Europe are of greater relevance to them than in the past (Smith 1996). The key messages produced by the consultative process and contained in the Green Paper were that there was

a distinctive European social model based on democracy and individual rights, free collective bargaining, a market economy, the need for equality of opportunity for all and the importance of social welfare and solidarity. (Commission 1993. My emphasis.)

Germany	20.08
Netherlands	17.47
France (1988)	15.27
Luxembourg (1989)	14.48
Italy (1988)	14.24
UK	12.20
Greece (1988)	5.24
Portugal	3.57

THE STRUCTURE OF LABOUR COSTS IN INDUSTRY IN THE EU, 1990				
Country	Direct cost	Of which, direct remuneration	Indirect cost	Of which, social security
Denmark	96.2	83.1	3.8	3.0
UK	86.8	84.2	13.2	11.5
Ireland	82.2	70.5	17.4	14.9
Greece	80.0	61.0	19.0	19.0
Germany	76.3	56.0	23.7	21.5
Portugal	74.2	56.0	25.8	21.7
Italy	70.0	50.3	30.0	26.7
Belgium	69.5	49.1	30.5	28.9
France	68.0	51.4	32.0	28.6

Europe, like most other international regions, is going through profound social and economic change. This was evidenced from the increase in global competitive pressures, the spread and increased use of new technology, the new ways of organizing work, changes in Europe's population structure and the rise in costs of health care and pensions. Specifically, the *Green Paper* concluded that *unemployment* in Europe was a *structural* problem, not a cyclical one, and should be addressed as such.¹¹⁸ The Commission argued that increases in GDP, which is only a *general* measure of economic productivity, were not enough; they had to be accompanied more particularly by a rise in employment.

In July 1994, the Delors Commission published its *White Paper* on European social policy, which contained its proposals for future directions. It argued for a new *mix* between *social and economic* policy. It insisted that competitiveness and social progress could flourish together and that Europe needed above all an "adaptable" educated and "motivated" workforce, something that only social policy could help create.¹¹⁹ The main themes of the

¹¹⁸ The issue between the cyclical and structural nature of employment is prone to misunderstanding. Whereas promoters of the unfettered free market approach also suggest that there are structural problems, they are referring to wage and labour contract issues, etc., while also suggesting that the unemployment problems are not an unsolvable problem stemming from the nature of capital production process. Rather the labour market forces will eventually provide equilibrium in the system again. On the other hand, Delors was suggesting that although a natural result of the market system, unemployment problems will not "naturally" work themselves out through labour market forces on their own. Rather, the capacity for individuals to regain access into the changing labour market would require the intervention of the state to buffer the resulting hardships and provide services and education for transitions into new labour markets.

¹¹⁹ See also the Environment Commissioner's proposal (Bjerregaard 1996) on the need for *integrated environmental policy* commitments.

White Paper were *employment*; how to develop the *legislative base* for it; and the vital need for a society in which *all* were active, all could contribute (Commission 1994).¹²⁰

¹²⁰ In April 1995, the Commission adopted its third action program since the 1970s, this time covering the period 1995-7. It had three main messages: Social policy was at the heart of the process of European integration; the extent of socio-economic change required a "dynamic and flexible" European vision; "*social and economic policy needed to be more closely aligned*" (Commission 1995. My emphasis.)

Unfortunately, acting often more from a one-sided unfettered market rather than a mixed market perspective such as that of his predecessor, the key elements of the Commission's strategy under Jacques Santer's leadership contain some predictable neo-liberal proposals, *viz.*, strengthening *competition* and removing protectionist barriers of all kinds completing the single market "is the proven way to increase economic dynamism, investment and job creation" (by contrast, Held (1995, 280) calls for strict limits of public sectors for instance); encouraging *entrepreneurialism* through policies for aiding and strengthening small and medium-sized enterprises; through economic and *monetary* union - a single currency will complete the single market, bring greater price stability and benefit both producers and consumers. In satisfying the Treaty's conditions of membership of EMU, Member States are supposed to achieve lower interest rates and higher job-creating investment; a European Employment Action Plan, endorsed by the European Council, which asks Member States to use education and training to make people more employable; reduce non-wage labour costs (see table).

The last proposal is buried among other, more positive elements, such as the need for a greater concentration of the EU's Structural Funds on innovative job-creating activities, investments with access to the EIB, and target measures on those groups worst hit by unemployment. It is precisely this approach of hiding more regressive policies with more positive ones that *makes the work of autonomous groups so essential*, not to allow the slippage of such far-reaching proposals to simply slip by unnoticed.

However, it is Habermas' notion that if administrative institutions themselves were better separated from the logic of money, they would be better able to carry out their functions in more effective, and less distorted ways. If this form of separation was better procedurally and constitutionally instituted, citizens and autonomous publics could have more confidence in their institutions to carry out the administrative functions according along the criteria of better securing private and public autonomy, rather than according to one form of subsystemic reasoning.

Therefore, and more generally, while there is some agreement to move forward with the EMU by many social democrats and labour in Europe (MacShane 1996; Zwickel 1997), they argue that it must not be done at any cost. There is the need to have democratic institutions which can publicly determine and monitor the just mobilization of EU-level

4.2. Maastricht II: Its Potential for a More Social Europe

With around 10% of its work force without a job, *unemployment has become the EU's most serious domestic political, economic and social problem, even crisis*. The underlying trend has been worsening since the beginning of the 1980s, not only during recessions but also during periods of rising economic output. Its root causes lie in international structural changes, and even the Commission admits that economic growth alone cannot solve the problem (DG 05, 1996).

However, instead of another well-intentioned but legally non-binding "action plan" from the European Commissioners, the need for the *constitutional and justiciable entrenchment* stemming from the *Council* was needed. This would allow for the *supranational* coordination of economic, regulatory, and social policy initiatives aimed at improving the social and environmental condition of the increasingly borderless European landscape.

The European Council IGC¹²¹ meeting of 16 and 17 of June 1997 in Amsterdam

administrative resources and funds for the *social* dimension.

¹²¹ Although *IGCs* are, as the name suggests, conferences *among governments* without autonomous publics or even the EP at the table, there were nonetheless intense briefings and opinions offered by the latter. For instance, with their more or less detailed recommendations the autonomous coalition group, VOICE, represented over 300 groups.

The corporate sector also made its interests clearly known. However, a wide variety of other groups also communicated their positions, including labour, NGOs, autonomous groups and coalitions, the EP and political groupings therein, as well as the "opinions" of *national* and subnational (e.g., the German Bundesrat) parliamentary committees on the IGC, as well as the recommendations of the EU's *Commissioners*, and the specially appointed Reflection Group from the Commission (Schmitter & Streeck 1994).

concluded with agreement on a draft Treaty¹²². Building on the conclusions of the December 1996 Dublin European Council (see 2.2), agreement was also reached on two major Council Resolutions, attached as Annexes to the Presidency Conclusions, towards facilitating the passage to the third stage of Economic and Monetary Union.¹²³ Due largely to intense (*representative*) pressure from the new French government of Lionel Jospin, and *complemented* with tens of thousands of demonstrators against a *Europe des banquiers* (Beuve-Méry & Rivais 1997), the European Council was obliged to put particular emphasis on commitments towards improving the employment situation and adopted to this effect a "Resolution on Growth and Employment." The Amsterdam European Council also agreed to incorporate the Social Agreement into the new Treaty. This was also made more possible with the new Labour government of Tony Blair which finally signed the Social Charter on behalf of the UK.

In addition to these two significant advances on the position of the social dimension

¹²² The Intergovernmental Conference, meeting at the level of Heads of State or Government, reached agreement on the draft Amsterdam Treaty used here. The final legal editing and harmonization of the texts was completed and signed in October 1997 in Amsterdam.

¹²³ The first Resolution reiterates "the firm commitments of the Member States, the Commission and the Council regarding the implementation of the Stability and Growth Pact." This was done to signal not only to the new French socialist government, but also to international financial and corporate bodies that, despite the inclusion of the new title on Employment in the Treaty, that the strong monetarist criteria towards the eventual third stage in the EMU would remain. The Council draft is tireless in reiterating its view that "Sound macro-economic and budget policies go hand in hand with strong and sustainable growth in output and employment. Both Resolutions contribute to macro-economic stability, growth and employment" (Council 1997).

within the European legal framework, more significantly for the following discussion, a new, more precise *title on Employment* was included in the Treaty. This inclusion had been long advocated by social and employment activists in Europe.¹²⁴

Recalling the Commission's initiative for "Action on Employment: A Confidence Pact" and the Dublin Declaration on Employment, the European Council adopted the following *political* commitments: "to give a new impulse for keeping employment firmly at the top of the political agenda of the Union. [Secondly, s]tructural reforms need to be comprehensive in scope, as opposed to limited or occasional measures, so as to address in a coherent manner the

¹²⁴ This *title* on employment does not have the same legal basis as a separate *chapter* on employment however, as some advocates desired (see MacShane 1996).

In the general conclusions from various forums on social and employment policy attended by "the social partners" the following points were made. It was considered that the *IGC must include specific chapters on employment and social policy* in the Treaty, with a particular view to social and human rights following the proposals of the *Comité des Sages*. Also, all participants emphasized that *social policy was a means to achieving economic goals*.

Concerning the *democratic* character of the struggle towards ensuring the integration of such a social policy dimension into economic policy decisions, it was recommended that the European Platform of NGOs should be maintained and developed for the long-term. *NGOs must communicate better with each other in order to be able to participate with European institutions*. The Social Policy Forum should be repeated on a regular basis. Finally, the NGOs want to consolidate their position in the decision-making, through more structured partnership with Community institutions and the social partners. The civil dialogue should complete the social dialogue (*Comité des Sages* 1996).

Regarding the final conclusion, Habermas would warn against the bureaucratization and "de-autonomization" of publics as they move closer to the realm of structured decision making. While Habermas considers the increased presence of members of civil society in the process of opinion formation important, he nonetheless would agree with those who highlight the dangers which accompany such inclusion. But rather than suggesting that such inclusive strategies should be avoided *tout court*, he simply suggests that *in addition to* the strategy of civil society and autonomous publics to have their interests and values influence the decision-making considerations, autonomous groupings must also be genuinely maintained.

complex issue of incentives in creating and taking up a job" (Council 1997).¹²⁵

They also acknowledged that economic and social policies are mutually reinforcing. "This approach [...] provides the basis for an economy founded on *principles of inclusion, solidarity, justice and a sustainable environment* and capable of benefiting *all* its citizens. Economic efficiency and social inclusion are complementary aspects of the more cohesive European society that we all seek" (Council 1997. My emphasis.)

The New Economic Pillar in the Treaty

More precisely, the Treaty, in particular Articles 102a and 103, provides for *close co-ordination* of the Member States' *economic policies*, referred to in Article 3a of the Treaty. While primary responsibility in the fight against unemployment was still left with the Member States, the Amsterdam Council recognized the need both to enhance the effectiveness and to broaden the content of this co-ordination at the European level, focusing in particular on policies for employment. To this end, several steps are said to be necessary.

The broad guidelines of the economic *policies* will be enhanced and developed into an effective *instrument for ensuring sustained convergence of the economic performances* of the

¹²⁵ The "commitments" to keep employment at the top of the political agenda are not a small point, given the obsession with inflation over employment concerns by international financial markets (see 5.1). However, the issue is *how* to keep the signatories of these non-justiciable commitments to their *word*. Secondly, both the structural orientation and comprehensiveness of such commitments (as well as the implied *supranational level*) are very important. However, it is a matter of which *kind* of structural reforms are considered, for instance, one's which merely attempt to create "full employment" regardless of the social costs (for instance increased stress and long-term employment security) or the environmental costs (due to the continued orientation towards growth in consumer-capability and economic growth. Gorz 1989).

Member States. Full attention should also be given to training and education systems including life-long learning, work incentives in the tax and benefit systems (para. 3.)

The Council instituted the taking of multi-annual employment programmes into account when formulating the broad guidelines in order to strengthen their employment focus. The Council then "may make the necessary recommendations" to the Member States, in accordance with Article 103 (4) of the Treaty (para. 5).

This enhanced co-ordination of economic policies is meant to complement the procedure as envisaged in the new Title on Employment in the Treaty, which provides for the creation of an *Employment Committee* that is asked to work closely together with the previously established Economic Policy Committee (para. 6).

The Amsterdam Council further clarified the need to *complement national measures* at the EU level by *systematically* examining all relevant existing Community policies, including Trans-European Networks and Research and Development programmes, to ensure that they are geared towards job creation and economic growth (para. 7). The Commission is to make the appropriate proposals (para. 10).¹²⁶

¹²⁶ In subsection 9, they state the wish to put some funds behind these initiatives. "*Whereas* the task of the European Investment Bank, as stated in Article 198e of the Treaty, is to contribute, by having recourse to the capital market and utilizing its own resources, to the balanced and steady development of the common market in the interest of the Community, *we recognize the important role of the European Investment Bank and the European Investment Fund in creating employment through investment opportunities in Europe*. We urge the EIB to step up its activities in this respect, promoting investment projects consistent with sound banking principles and practices, and more in particular:
- to examine the establishment of a facility for the financing of high-technology projects of small and medium-sized enterprises in cooperation with the European Investment Fund,

This overall strategy will maximize our efforts to promote employment and social inclusion and to combat unemployment. In doing so, job promotion, worker protection and security will be combined with the need for improving the functioning of labour markets. This also contributes to the good functioning of EMU. (para. 11)

In its final statements, on a "Renewed Commitment" to the above issues, the European Council "invites all parties, namely the Member States, the Council and the Commission," to implement these provisions "with vigour and commitment" (para. 12 & 13). The Council recommends *social dialogue* and the *full use of present Community law concerning the consultation of social partners, including, where relevant, in processes of restructuring*, while taking into account national practices.

Together, the 1997 European Council and these policies, in particular, allow the Member States to build on the strengths of the European-level co-ordination system to construct economic policies within the treaty-creating capacity of the Council so as to create meaningful employment and pave the way for sustainable development.¹²⁷

4.3 Work and Interaction: A Viable Initiative Mediated through the New Amsterdam Constitutional Provisions

The notion of more evenly distributing the time for work is a notion which has a

possibly making use of venture capital with involvement of the private banking sector;
 - to examine its scope of intervention in the areas of education, health, urban environment and environmental protection ;
 - to step up its interventions in the area of large infrastructure networks by examining the possibility of granting very long-term loans, primarily for the large priority projects adopted in Essen" (Council 1997).

¹²⁷ Whether the Social Charter is now a Social Chapter, integrated into the revised Maastricht Treaty, its status to provide a legally binding *treaty basis* for efforts to alleviate unemployment is still unclear. For now it appears that the *title* on employment is the strongest recourse for legal action.

"utopian" history, revived in the 1880s with the Cuban-born son-in-law of Marx, Paul LaFarge (Keane & Owens 1986). However, recent and growing interest in its realization stem not simply from *normative ideals* but increasingly from the facticity of *the* emerging social crisis in highly developed, late capitalist countries: persistently high and increasing unemployment (Gorz 1985, 1989; Keane & Owens 1986; Keane 1988; Rifkin 1995; Offe 1989, 1992, 1996). But its strength is not based simply on issues of redistributive justice (through redistributed working time), but also for a cultural-revaluation for *all* who work in terms of how they view work and its relative position to other social and political activities.

In Europe there are over 18 million citizens unemployed with millions more desiring secure, meaningful, and adequately waged employment. German unemployment alone after reunification remains around 4 million. Due to the pressures of global competition and technological advancement, over 300,000 jobs in the auto industry alone are expected to be eliminated. Germany's 80 million citizens make up 23 percent of the European economy's consumers, and its economy accounts for over a fourth of the EU's GNP and over a third of its operating revenues. The unemployment rates in France, England, Italy and Belgium all remain also over 10 percent (Offe 1996; Eurostat 1997). Former Chancellor Helmut Schmidt has warned that the *implications* for the German people and the global community stemming from this employment crisis are dire: "'If we cannot overcome this [problem],' said Schmidt, 'we must be prepared for anything'" (Rifkin 1996).

The call for a shorter workweek is increasing in Europe. In Italy, the unions are using the slogan "*Lavorare Meno, Lavorare Tutti*" --Work Less, and Everyone Works. In France,

the late President François Mitterand, and now Lionel Jospin, Prime Minister and leader of the Socialist Party have been favourable to the four-day workweek. Even French President Jacques Chirac has put forward his own version (MacShane 1982; 1996, 20).

The dilemma is that too many "moderns" put in long and stressful hours of *work* while increasing numbers do not have enough work. On the other hand, the time left for non-work related *interaction*, or merely creative thinking and leisure is reduced for those with the increasing workload. And those who have no or too little work lose a source of self-realization and interaction. But just as significantly, citizens overstressed from overwork, or populations *fearful* in the face of downsizing are, as Habermas has noted, "more susceptible to the Le Pens and Schönhubers, to nationalism and xenophobia" (BR 145).¹²⁸

Whereas freedom from work and the life of leisure and public and civic service was the norm for the Patricians in Rome and whereas this notion of free time (to use Arendt's (1958) terminology) for the *vita contemplativa* and particularly for the *vita activa* appears somewhat assumed in much civic republican political theory, it has remained elusive for the majority of citizens. They remain *increasingly* bound to work, no, *labour* in the sense of becoming an *animal laborans*, subject to their *corvée*. And they are obliged to engage in this in order that they may achieve some time for their leisure if they can manage any at all.¹²⁹

¹²⁸ However, one should compare Habermas' ignoring of an interviewers' questions regarding timesharing ideas (BR 141-2) and his evasive response even to *direct* questions regarding the importance of a Basic Income policy (BR 140; 150, 156).

¹²⁹ For a comparison of the relative amount of vacation time secured by most European workers compared to North American workers, see Coopers and Lybrand's (1995) *The International Guide to Social Security*. As an example, French workers have won the

Yet, as Habermas notes, the freedom from work and the realm of production, for the purposes of interaction, are just as important as the freedom and ability *to* work and achieve self-realization and solidarity (Keane 1975). This is the basis for Habermas' argument with (the later) Marx: whereas Marx developed a notion of subjectivity and solidarity, leading to a form of class consciousness as arising necessarily and rather one-sidedly from the realm and social relations of *production*, Habermas argues that one needs the time and space removed from such technical and strategic orientations to *interact* in other realms not merely oriented towards such technical imperatives (PDM 63-82; TCAII, sec. VIII, 2, esp. 340-1; Honneth 1995 chap.2).

Labour can be a pleasure when machines take over the most burdensome toil. What certain professionals have already been able to enjoy can be enjoyed by many more citizens through the proper use of technological capacities. Over a hundred and thirty years ago (the early) Marx imagined how it would be in *The German Ideology*, drawing on the amusing model of a country gentleman. The ideal society would be one

where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd, or critic. (Cited in Brown 1995, 394)

Women would benefit perhaps the most from this model considering the fact that they

right to five weeks paid holiday compared to the *official* average of 2.5 weeks for North Americans.

have continued to have to fulfill a "double day". But men would also be more liberated to spend more time with their families rather than simply at work and, like women, they would be freer to spend more time on other activities in the pursuit of their public and private autonomy rather than being obliged, due to a lack of options, to remain one-sidedly in either economic and/or familial activities (Brown 1995, 395; Friedan 1997).

The conditions to make that civic, cultural, and political interaction time more *widely* available is possible today through the *combination* of [1] technical capacities and [2] political will to change employment and social policies. [1] It has become more technically possible due to the increased productivity in the labour environment. Due to attempts by producers in market economies to reduce their labour costs and the steady improvement in *labour replacing technology*, the *productivity* of creating consumer goods has increased since the turn of the century. For example, in 1912, 4,664 worker-hours were required to build a car, yet ten years later the Ford assembly line could build one in less than 813 worker-hours. American productivity has more than doubled since 1948, meaning that we can now produce the same standard of living in less than half the time it took in 1948.¹³⁰

In spite of this, Americans and, particularly, women are working longer hours today than they were forty years ago (Rifkin 18, & 223). After almost two hundred years of labour saving machinery, *some* people are working harder than ever. Rather than technology liberating us, it is increasingly enslaving us. Can work hours *somehow* be redistributed from

¹³⁰ See Brown (1995, 98) for a chart to demonstrate the dramatic productivity savings due to technology in the Toyota car industry.

those who have too much and do not want to work as much to those who want to work more? Particular European countries such as Germany and France are leading the way with this policy proposal.

The crucial question is no longer whether it is technically possible to reduce workhours but rather a [2] *political* question of *how* it can be made possible. How can the balance between work and time for civic and political interaction, self-realization and contemplation be politically achieved? What would it look like? What *levels* of action systems would need to be mobilized? And what political and *legal basis* would be involved at these various levels in the commitment and interpretation for the implementation of such a policy? This involves consideration of both at the *macro-policy and "framework laws" level* --for instance ensuring that job security, fair wages, etc. are constitutionally guaranteed--, and at the *implementation stages*, where individual workers maintain some reasonable autonomy on determining the numbers and scheduling of the hours worked. With the advances at the European Council level to use the full administrative power of the EU towards improving the social and employment condition of citizens, a new historical, political, and legal basis for achieving meaningful social life is emerging.

On the other hand, implementation negotiations differ from the overarching constitutional level negotiations that set out the general "rules of recognition". Instead, *contractual* labour negotiations are needed to *continue* with the employer, not only with

government.¹³¹ It is best that, as in the EU case, contractual negotiations are *mediated and monitored* by new *supranational administrative systems of coordination*, through the Economic Policy Committee and Works Councils meetings, which have *facilitated* more contractual forms of negotiations or initial "understandings" between employers, and employees' representatives.¹³² In the EU, administrative power has been used to reduce costs to *employers* on the one hand (and this has been committed to in the 1997 European Council document) while, on the other, *protecting employees from unfair wage or even job losses* due to work share programs and negotiations (Gorz 1989; Rifkin 1996). The latter point is critical.

Held (1995, 254) suggested before the Amsterdam Summit that the provisions of the Social Charter in the Maastricht Treaty "fall far short of the determination of what is necessary to secure a common structure of political action." However, the French government's intervention in the Amsterdam process called for precisely what Held suggests is essential "if democracy is to prevail": the rearticulation of key groups and associations of the economy with political institutions "so that they become part of the democratic process --adopting within their very *modus operandi* a structure of rules, principles and practices compatible with democracy". The intervention of the Jospin government into the treaty process was precisely oriented towards the recognition that *the biases in the corporate-dominated economic and*

¹³¹ However, as the new British PM has pointed out, such contractual, non-legislatively guided industrial programs have not proved effective in the past experience.

¹³² It must be recalled that although the Work Councils are a useful forum for the development of, for example, timesharing ideas, this "Euro-corporatist" tripartite structure is insufficient on its own. It will certainly require other fora to bring in other social groups to build a broader social consensus on its usefulness.

*financial systems require not merely state, but supranational systems of regulation to compensate for the one-sided economic and "private good" orientation in decision-making processes (251).*¹³³

Held calls for "involvement in the determination of the regulative rules of work organizations, the broad allocation of resources within them, and the relations of economic enterprises to other sites of power" (253). This "involvement" would entail negotiation and bargaining between the relevant groups concerning, for instance, work methods and income levels. Such negotiations would need to become a routine and durable basis for understanding among these economic actors.

In addition, the ability for such "employment" policy programs would work best with *international* agreements rather than simply national level agreements.¹³⁴ Due to the capacity for capital flight such rearticulations would not be viable either at the national level or even in a coordinated regional level. Political institutions must become involved to ensure that economic activity becomes integrated, accountable to *formal* and reconstructed democratic procedures.

On the other hand, the advancement of workshare may initially be by *contractual negotiations* on a micro labour *site* by site basis. However, it could then move to meso-level

¹³³ Held suggests that what is at stake is an economic system that is "neither simply planned nor merely market oriented but, rather, open to organizations, associations and agencies pursuing their own projects, subject to the constraints of a common structure of political action and democratic processes" (251).

¹³⁴ Such an agreement was actually passed in both Upper and Lower Houses in the US in 1932, but was finally vetoed by Roosevelt, ultimately to his own regret (Rifkin 1996).

company by company and then *sector* by sector basis (for instance, beginning first in certain *public* sectors (such as in Canada's Hydro Quebec) or *private* automotive sectors as they already have begun at Volkswagen) *while at the same time* ensuring that the particular interests of the workers and their different life needs are compatible with this strategy to increase the balance of work and interaction and reduce unemployment.¹³⁵ However, they would best need to proceed to a constitutionally-guided and legislative framework to ensure their stable and effective coordination. This would also help to ensure that the needs of *all* citizens to meaningful work and interaction, not simply those currently fortunate enough to be represented by unions, for example, will have the requirements for democracy, solidarity, and justice respected and acted upon.

In terms of *barriers* to the notion of workshare, considerable popular will- and opinion-formation would be required to overcome several fears: for example, the fear to one's job security and, more structurally relevant, the fear that such a policy may entail the danger of job loss or unacceptable loss in wages (Keane & Owens 1986; Offe 1996, esp. chapter 6); the current work ethic, which views work as central to the identity of many; the attitude towards the length of time that one "should" be working, since it is difficult to get over the attitude

¹³⁵ In 1993, Europe's largest automaker, Volkswagen, and its workers adopted a four-day workweek (or minimum 29 hour week) to save 31,000 jobs that were threatened by a combination of stiffening global competition and new technology in the workplace which had boosted productivity by 23 percent. This contractual, not legislated, agreement made Volkswagen the first *global* corporation to move to a thirty-hour-or-less work week. The results of this experiment have been promising. Not only have tens of thousands of jobs been saved, but also the productivity and profits of the employer have increased.

orientation of working somewhat on one's job for part of the day or week, and then for the rest of the week on some other civic, contemplative, health, or leisure activity; people's psychological orientations (again often, but not always stemming from the fear for one's job security) are sometimes an all-or-nothing orientation.

However, this is also a structurally induced fear spawned by employees' intuitive and lived understanding of the *current logic of labour exchange*. As Beveridge noted:

For the man who wants to work once and lie in bed for the rest of the week the labour exchange will make their wish unrealisable. For the man who wants to get a casual job now and again the exchange will gradually make his mode of life impossible. It will take that one day a week he wanted to get and give it to another man who has already four days a week and so will enable that other man to get a decent living. Then the first man will be thrown on your hand [Beveridge is replying here to a question by Professor Smart] to be trained and disciplined into better ways. (Quoted in Gorz 1989, 213 n.17.)

In addition, there would be resistance in the [1] political and the [2] economic realms. As we have seen, the logic of *political* representativeness and elites, in particular, continue to have a *national* orientation towards their economy's "competitive position" vis-à-vis other national economies rather than a more *constructive, postnational, coordinated orientation*. This stems as much from the constraints put on them by the logic of the representative democratic electoral system that promotes short-term results (within two to four years) rather than a longer term view.

However, this measure is conducive to even shorter-term limits since the re-employment of workers may be immediate, although the longer-term effects on the employment figures may be less dramatic. The *electoral* concerns of the national politician who

makes her policy choices short-term solutions is dramatically accelerated with the short-term *profit* and turn-over interests of employers in the "turbo-charged" and "stateless" late capitalist economy, particularly of the Anglo-American model.

Nonetheless, the above can politically be used to make even more obvious to the political leadership and the citizenry the *requirement for supranational levels of coordination and regulation of economic activity by political systems*. And the *basis for the decisions of such coordination would be democratic public (administrative) law* --i.e., popularly accessible, transparent, non-arbitrary, impartial, positive democratic law-- determined decision-making processes (3.2, 3.2.2 for individual influence and implementation stages and levels. See also Held 1995, 201). This contrasts with some current trends toward *simply economic rationality* --i.e., the unregulated, non-politically and strategically (and more broadly, communicatively consensus based) politically and legally mediated, systems-functioning logic of "the market" as the basis for the economic system's own decisions concerning which (non-politically mediated) decisions should be taken (Pusey 1991).

In the end, the importance of *deliberation* in this program becomes clear (Held 1995, 144). Such deliberation would be required at the level of [1] a *broad social dialogue* to generate and slowly create a *consensus* of the *general* benefits and need of such a program and its change in values from a strict (*full time*) work ethic, hyperconsumption, and even meritocracy and individualist notion of "possessive jobism." [2] The postnational systems and their identity formation, with their necessarily concomitant "decentration," their capacity to encourage thinking and reasoning more abstractly beyond narrow and particular interests, one-

sided monetary, "risk", or national economic cost-benefit analyses of changes and decisions. The postnationally coordinated, politically integrated social, political, monetary and economic system can also be used to encourage an increased sense of shared meaning of the value of not simply work, but also *interaction* time. Emphasis can be put on the civic, health, environmental, and other less tangible benefits that can be gained within a more interdependent, intersubjectively influenced system of self-governance.

This consensus-oriented deliberation at the supranational social level would continue in the form of *negotiated bargaining* both in the political and economic spheres (see BFN 6.3 on the distinction). Negotiation would increase *as the basis to decide*, initially by company, in which all workers can help decide, but also by sector (as with much current statutory legislation), and then at a regional level, which the EU's Work Council's have initiated.¹³⁶

Therefore, in addition to the society-wide consensus-building, there would be a *two-track level* of negotiations for rights and duties concerning the workshare program: first, negotiations at the supranational and national political and administrative coordination level (rules of recognition); and, second, negotiations at labour site, company, and sectoral (industrial, public, service, etc.) levels. These negotiations would negotiate over the implementation of such a program given the current conditions, and contexts of employees and

¹³⁶ However, the later are still without sufficient political support at the European Council level to use the enormous potential administrative power of the supranational systems of coordination to help facilitate fair negotiations between the growing relative power of large employers vis-à-vis employees and their unions. However, this still lagging political support may change with the new employment obligations entrenched in the Amsterdam Treaty.

employers.

Preliminary Summary of Arguments

We may take a moment now to summarize some of the arguments made to this point. Positive and negative rights towards the securing of citizens' public and private autonomy today can only be *viably* safeguarded, coordinated and regulated at the supranational level and via constitutional, binding legal protections. While today a social and political consensus on taxation for providing the necessary funds to help secure the private and public autonomy of citizens (through a Basic Income (BI) for example) would be difficult to achieve (see 5.1), the use of *workshare* is more readily amenable to a broad *consensus* in the *political, social, and even economic* spheres as it would not rely on increased forms of revenue collection. It too, however, would benefit from supranational forms of coordination.

These supranationally coordinated *policies* stem best from constitutional *rights*, not merely *political* commitments, to orient at both the national and subnational levels the securing of citizens' private and public autonomy (4.2). The conceptual process of opinion- and will-formation for such policies would be based on the *two-track* model (1.2, 3.2). It would be two-track in two senses. First, between citizens and their representatives, and supranational institutions and programs on the one hand, and secondly, between citizens within particular social contexts and the interpretation of the administration of economic, social, civic, bodily, cultural programs to their particular need interpretations on the other.

In other words, in the interests of maintaining *private autonomy in a milieu of public autonomy*, citizens would be given greater opportunity to decide, *at the moment of the*

implementation or administration of federally funded and coordinated programs, the particular character of goods and services they receive, for instance, in the type of health care or housing (3.2.2).¹³⁷

In keeping with the concern for ensuring the autonomy of citizens to decide the particular character of the types of, for instance, health care that they are to receive (in-house homeopathic and preventative, and/or more "traditional", invasive, centralized hospital-based care, etc.), sight must not be lost on the need for the public's state institutions to have *adequate resources* to regulate the "externalities" caused by economic activity (5.2). For example, environmental emissions by industry are an increasing source of poor public health. In particular, notions that we live in a "post-industrial" period notwithstanding, toxins, from waste and industrial production and transportation account for an alarming source of the rise in cancers. The harm wrought on the life chances of citizens on their potential private and public autonomy, by these health altering substances is awesome. The proper funding and

¹³⁷ An excellent and relatively uncontroversial example of how the *administration* of federal programs can and has worked is through the publicly-funded cooperative housing programs. One of the essential differences is between the experience of traditional approaches to public housing --which led to large and often alienating projects with a corresponding loss of meaning for individuals-- and publicly aided co-operative housing projects. Both are aided with public funds to help provide decent housing for potentially vulnerable members of a society. However, the dynamic which changes the essential nature of the social relation between the two conceptions of program provision is that in co-operative conceptions, homeowners are intimately and democratically involved in decision-making processes. They are involved in the authoring of their collective and private existence in the co-operatives, in the same way that they would be if they owned a home, for instance. They are, however and in addition, "owners" who work cooperatively in a self-and-reflexively constituting manner by making decisions that affect them (Galligan 1992).

regulation of "externalities" from transnational economic activity again can only be sufficiently achieved at the supranational level.

The *increased funds* available through workshare policies --due to reduced unemployment payments by the state as well as the increased purchasing and thus taxation base available-- release more funds for the implementation of broadened categories of rights, particularly though not exclusively, for positive rights. The need for secure forms of funding for the maintenance of political and civil rights is also clear in, for instance, the holding of certain fora for communication and public enquiry.

Nonetheless, such rights require the consideration of sources for their actualization *beyond* that which would become available from workshare. This is due to the trend of increases in technological efficiency: we must admit that eventually the supply of jobs will outrun the demand, period. It will also necessitate an increased appreciation for the separation of income from employment (Offe 1996; Gorz 1989).¹³⁸

Therefore we must conceptualize the supranational coordination and taxation of

¹³⁸ Also the importance of *environmental sustainability* is an enormous factor in egalitarian models (Penz and Drydyk 1997). In other words, quite aside from whether increased economic equality is possible, is it desirable if the rate of consumption of non-renewable resources --including air and water-- continues alongside not only national, but *international* economic security? The case of China's one billion inhabitants provides the most sobering example, but it is there alongside the ethically-void attempts by the corporate and many national political elites to bring the former Eastern Europe and so-called "Third World" countries within the (hyper)consumerist lifestyle. This is why this study has emphasized a certain degree of economic and employment security towards the end of increased *interaction and self-realization* with the assumption that it would not fulfill those ends at, to give it a four-letter-word, the mall.

productive and financial activity, through which more funds would be available, by way of example, for the proper *forums for interchange and communication* of citizens' opinions at the supra, national, and local levels of the legal and regulatory institutions and authorities. Better funding would also need to be available to provide for the goods and services that are the preconditions for the well-being of its citizens.

These funds would draw on taxation made viable through technological means (such as the "bit tax" and the "Tobin tax") of the new wealth created through the historically unfolding and social-scientific improvement of technical knowledge and instruments of production. *Technology* has a positive *potential* towards the goal of a more equitable goods distribution and just social relations. In addition, *current technology actually makes it easier to regulate the current computerized financial flows and speculative trading* if such regulation was provided for in binding international agreements. However, citizens have not yet put on the political pressure for an insistence on this international level of responsibility. They are even beginning to retreat on this at the national level. Instead, we could use our technological and political sophistication to regulate the disorder and irrationality of the current global market system and unregulated, wildly fluctuating monetary trade. (Of course, we must avoid the illusion that, what problems technology may create, new technologies can also repair. This notion of the "technological fix" (Leiss 1978) is a recurrent hold back to a faith in the boundless healing power of science. Although a notion that *all* technology is not useful needs to be increasingly problematised (cf. KHI on the *three* forms of knowledge necessary for human development. 16 June 1998)

Held (1995) argues that *international money markets* are now responsible for over one trillion dollars in trade speculation a year. While this money is not taxed, for instance, it is a volatile source of destabilization for national, and consequently even regional and international economies. Yet, precisely because they merely engage in speculation, an activity which occurs through and is dependent on technological communication lines, they would be *the easiest to regulate through the use of technology by governments* that can keep track of transactions (Saul 1996, 147-8).

However, again, the coordination of such taxation would be required at a supranational level. At a minimum, such funding cannot continue to rely on the dwindling personal tax bases of the middle and working classes, nor on increasingly limited economic policy capacities at the nation-state level. We will consider this dynamic in the following chapter.

Conclusions

The European Social Chapter that was discussed above is not an ideal document. At best, it represents a major compromise with corporate and (more recently) monetarist priorities (Schmitter 1996; MacShane 1996; Ross 1992).¹³⁹ Yet, it does provide a useful base for

¹³⁹ The EMU and the Stability and Growth Pact provide the language which foster the monetarist obsession with a *non-inflationary* macro-economic environment. Such a policy is ostensibly there towards strengthening the conditions for economic growth and employment opportunities. "Within the *framework* of sound and sustainable macro-economic policies" and on the basis of an evaluation of the economic situation in the EU and in each Member State, more attention will be given to "improving European competitiveness as a *prerequisite* for growth and employment", so as to, among other objectives, "*bring more jobs within the reach of the citizens of Europe*". In this context, special attention should be given to labour and product market efficiency, technological innovation and the potential for small and medium-sized enterprises to create jobs. ... and reducing non-wage labour costs, in order to

entrenching and making possible through its precedent¹⁴⁰ an influence on the future expansion and deepening of social and economic citizenship rights at the European level.

In addition, and really more importantly, it acts as a useful example of "the possible" at a more international level, beyond European borders. By way of contrast, other *regional* agreements which are competing for the *global* level do not even pretend to address these social, cultural, labour, environmental rights with any depth¹⁴¹.

increase employability."

In addition, *taxation* and *social protection systems* should be made more "employment friendly" and by that improving the functioning of labour markets. The European Council stresses the importance for the Member States of "creating a tax environment that stimulates enterprise and the creation of jobs" (Council 1997).

Given the very general wording of the above guidelines and policies on taxation and social protection systems are not necessarily oriented against the objective of attaining a more social Europe. They could be interpreted by legislators and policy-makers to mean, for instance, that taxation measures should encourage worksharing by employers, and that those worksharing measures are part of a coordinated economic and political plan to improve the social protection system (see Gorz 1989; Rifkin 1996). However, the currently dominant agenda is not oriented toward this form of holistic policy coordination and interpretation.

¹⁴⁰ Of course while "precedents" are useful as historical artifacts and legal tools, they should not be made too much of as political tools. The precedent of the International Covenant certainly demonstrates this. However, it remains a strong reminder, and even a smoldering pandora's box to the hypocrisy of the current direction of states.

¹⁴¹ The (North American) Free Trade Agreement (NAFTA) and the Asian-Pacific Economic Cooperation (APEC) are the two other, dominant models. It is hoped that the EU example could have a "spillover" effect, to act as a catalyst to justify and mobilize public opinion for a North American FAIR Trade Agreement (see Chomsky 1995).

However, a sobering list of the other global, powerful, increasingly and blatantly purely economic agreements and blocks which have the capacity to *override* social, economic, or environmental protections include the following: Free Trade Agreement for the Americas (FTAA); the International Monetary Fund (IMF); the Multilateral Agreement on Investment (MAI; proposed); the Multilateral Investment Agreement (MIA; scuttled by Third World countries); the Organization for Economic Cooperation and Development (OECD); the Trade-related Intellectual Property Rights (TRIPS); the World Bank; the World Trade

Unlike these treaties, the European Union's institutional framework has shown that it is not only capable and (gradually more) effective (as a *supranational* legislative and administrative power) of providing a supranational *legal* framework for properly *regulating* economic and labour policy as well as *funding* for the remedies (helping workers to adapt to technological changes for instance) for putting the unemployed back to work. It also provides the framework for showing how these rights could be coordinated in *other* regional areas, beginning at least in North America.

Certainly, there are several problems with the current European social model. Outstanding are more universal protections and reallocations for the access to a basic income for *all citizens*, not simply the employed. A longer term goal is to make the Social Chapter fully justiciable into the European Community constitutional pillar of the EU.

These dimensions may be viewed as the latent object of Habermas' more theoretic and even philosophic work: *justifying the legitimacy* (political and social need for) of *justiciable, universal* (for instance, not just workers) *postnational* conditions for private and public autonomy. However, even more relevant today is that these systems of action which influence and determine the proper public norms of distribution, regulation, and coordination would be not merely at the nation-state level --which Habermas' BFN still tends to emphasize--, but rather *more appropriately at a democratically accountable and authoritative supranational institutional level*. The system of citizenship rights that aim at securing private and public

autonomy can be better *legally and politically* prescribed, protected (proscribing national environmental policy for example), *regulated, coordinated, and funded* at the *supranational level*.

The short- to medium-term challenge towards the above end in the specifically European context is to increase the power of the proportionally elected MEPs and, with it, the ECJ's jurisdiction to handle "hard cases" in the interpretation of treaties and citizenship rights issues. All of this should continue to unfold via a "social dialogue" that goes beyond, however, the [1] elite, [2] Euro-corporatist (Gorges 1996), or even more broadly, the social contract model (Newman 1996) (institutionalized for instance in the Work Councils at the EU-level).

Instead, Habermas' *postnational, intersubjectivist* paradigm of constitutionalism, oriented as it is towards securing private and public autonomy, is a more appropriate and radical *long-term* goal. This long-term goal towards a postnational, intersubjective paradigm of law can be *institutionally helped* through *influential*, not merely "advisory" regional and local, economic and social bodies such as the ESC, COR, ECJ and, above all, by the EP.

In addition to these bodies and institutions, however, none of the social dimensions of European integration would have been included into the integration process without the persistent and highly knowledgeable, sometimes direct, even civil disobedience actions of labour and social movements, *which insisted on the inclusion of the alternative social dimension* into the capital and "corporate-rights" agenda. Could the rights --their breadth and legal form-- have been even stronger if there had been a more focussed, concerted effort to promote their *positive*, alternative-rights bundles to citizens and sympathetic officials?

If a postnational "European" identity is to become legitimate, there is a need in the EU integration process to institutionalize more EP and citizen participation, particularly in constitutional or Treaty decision-making. The normative and empirical legitimacy consequences of this lack of both supranational representation and direct participation of autonomous publics toward consensus building through social dialogue in the public sphere has been observed from the *petit oui* the treaty received in France and its outright rejection in Denmark and Norway¹⁴².

However, critical social theorists must recognize that elites, economic, political and otherwise will do their best to dominate such extraordinary, foundation and agenda-setting historic *constitutional moments*, and will saturate the agenda with platitudes to conflated "bourgeois-homme-citoyen" rights (STPS 111).¹⁴³ These rights have largely been offered in the form of increased *consumer* and civic *freedoms*, without necessarily increased *powers* for the supranational representative EP institutions, without transparency into the workings of the most institutionally powerful bodies, especially the Council, and without *accountability to the communicative power stemming from the social dialogues and consensus of autonomous publics*.

¹⁴² See also Simone Chambers' (1996) Habermasian analysis of the results of a lack of national consensus-building in the Canadian Charlottetown constitutional *débâcle*.

¹⁴³ See Michelman on this empirical fact, despite Habermas' *normative* protestations (BFN 277). Habermas suggests that such opinion- and will-formation should be an *on-going*, not extraordinary, event. However, this is in keeping with his rather ideal notion of consensus formation in general, with its marginalization of hard moments of negotiation and political bargaining (BFN 6.3).

With the enlargement of the Union, poorer regions and countries benefited from the "upward harmonization" in their social and environmental standards, often significantly subsidized by the richer member states in the Union through collective structural development funds. However, this funding by the *relatively* richer countries, Germany in particular, is becoming more contentious domestically (see "Steuerreform" in *Die Zeit* 1997). There are two dimensions to the nature of this resistance. On the one hand, there are those who are not, for ideological reasons, supportive of the redistribution of funds either nationally or internationally. On the other hand, there are those German citizens who, due to the *worse employment* situation in the country since the end of WWII, are, in Habermas' words, beginning to "cool" towards their own political leadership's international and, specifically, EU-level orientation over a national-level orientation (BR 39). Because of their more vulnerable economic position, the already unemployed and those in fear of unemployment are more psychologically open to anti-postnational orientations.

As authors as diverse as Offe (1996), Keane and Owens (1986), Gorz (1989), and most recently, Betty Friedan (1997) have noted, the struggle for workshare should not be understood as just another "single issue" policy initiative. Such initiatives are often competitive with other important policies, or may not take into account the implications of such policy proposals on other social and environmental dynamics¹⁴⁴. Nor should the struggle for

¹⁴⁴ For instance, these include: certain labour struggles which have focussed narrowly on increased material security without interests for non-material issues; environmental battles which have not made complementary and viable proposals for the economic security of those affected by hoped-for environmental protections; struggles to provide women the "freedom"

workshare be confined to an "employment issue" since its freeing up of time time is also a quality of life and participatory issue. In addition, although such a policy initiative would work within the confines of the current capitalist system, it would take this position critically with, on the one hand, the intent of reworking the logic of economic rationality (the "*negative*" objective). But more positively, it takes this position in the knowledge that it can help make more viable many of the positive and negative rights argued for in liberal-communitarian debates and affect the sites of power discussed more generally earlier.

The sites of power and the negative and positive rights potentially improved include: the potential time for *political* participation in public agenda-setting and debate; the time for the development of one's *cultural* abilities and knowledge; the time to be more involved not only in primary socialization activities, but also in *civic* groups and projects at the community and global levels; better access to meaningful *work* and/or a fair income; improving the financial stability and access to the right to universal *services*. In other words, the benefits of timeshare are that it can increase the *meaning* of social labour and the meaning of activity in civic, political, familial, bodily and contemplative activity *outside* of the realm of production. It can also maintain *freedom* from economic want, providing a sense of control through stabilizing one's source of income, as well as meaningfully and *practically* increasing the ability for citizens and autonomous publics to act on their civic and political values and interests (Gorz 1989).

to work that provides the basis for an increased pool of labour and that undermines the capacity for those women who do not wish to seek employment outside of the home.

In Chapter Five we will consider further some significant barriers and possibilities to not only workshare policies, but also more broadly consider a research project oriented towards complementing the conditions for a supranational political economy of citizenship which would complement such regional-level policies and constitutional orientations such as the ones that were discussed above.

5. Considerations for World Citizenship

For reasons of state the government is [...] authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens. (Immanuel Kant in *The Doctrine of Right*, 6:326)

As Kant realized, basic rights require [...] an international, legally administered 'cosmopolitan society'. For actionable rights to issue from the United Nations Declaration of Human Rights, it is not enough simply to have international courts; such courts will first be able to function adequately only when the age of individual sovereign states has come to an end through a UN that *can not only pass, but also act upon and enforce its resolutions*. (BFN 456. Emphasis in original.)

Habermas' work has been prodigious, and his culminating major work, *Between Facts and Norms*, has provided guidelines for a normative, legitimate, legal and political order oriented towards securing deep cultural and civic development. Subsequent essays have built on the basic national-level democratic and rights framework initiated in BFN and signalled the importance of focussing critical and normative attention to the *international and cosmopolitan* level to achieving the practical intent of just social relations. He has always considered the problem of economic power as an often illegitimate source of influence over the formal institutional and informal will-formation in civic society. He has recently signalled this as an increasing problem in light of the supranational trends that are leading to the structural transformation of the economic and public sphere. His understanding of the potential impact of unregulated, increasingly deregulated, and certainly poorly coordinated economic power on the well-being of the lifeworld and political subsystems draws attention to the importance

to provide a research-orienting understanding of not only the currently dominant alternative, but also the attainable alternatives for coordinating and regulating economic power at national and supranational levels with a view to enhancing the active exercise of citizenship and democracy.

With regard to the EU and the possible achievement of basic democratic and social rights, this chapter continues part of the discussion from the previous one by considering some of the barriers to the reconstruction of a supranational constitutional regime oriented towards the equal protection of democratic, civic, social, labour, and environmental rights. I will argue that while the EU can act as a model in this regard it could also do more: the EU itself, *if* it is successful in entrenching democratic, social, civil, and environmental rights in its regional level constitutional frameworks, can also act as a *wedge* in preventing the movement towards the *de jure* entrenchment of pure economic rationality in political and legal decisions at the international level.

In this fifth chapter, I will describe (5.1.1) some aspects of the current neo-liberal agenda, its global character, and the impact of this *political economy* on the viability of deliberative democratic projects. I argue that neo-liberalism and its fiscal policies of monetarism have been instrumental in leading to the downloading of *funding* for programs and institutions necessary for social integration and democracy. I highlight the distorting effect that this extreme form of economic rationality and power is having at the *international level* and consider its implications for Habermas' theoretic and more concrete (for example, the European) constitutional, procedural, democratic models. From this political economy

perspective, I shift to (5.1.2) signalling how that neo-liberal agenda is attempting to be entrenched at the international level rights of pure economic rationality in internationally binding legal regimes. Thirdly, (5.2) through further justification from the recent work of Habermas and Held, we are pointed toward the need for what Held refers to as *cosmopolitan democratic law* underpinning any regional or international normative agreements. Finally (5.3), we will consider how “the EU”¹⁴⁵, or rather, the model of a socially and environmentally responsible Europe described earlier, can act as a wedge to prevent its full-scale entrenchment. Whereas other studies have looked at the experience of the political and economic integration process in Europe to draw lessons on their own constitutional debates (Leslie 1991; Monahan 1992; Doern 1993; Leslie 1996), this study looks at the lessons of European political and economic integration as a legal framework for more supranational, international, and even cosmopolitan level agreements.

5.1.1 The Implications of Economic Models on Deliberative Theory: The Legacy of Neo-Liberal Monetarism

The two dominant and contending economic models of the proper role of the state vis-à-vis the economy and the obligations of both to contemporary Western societies are the neo-liberal and the mixed-market models.¹⁴⁶ Since the early 1980s however, the neo-

¹⁴⁵Especially under the leadership of the Commissioner of DG1, External Relations, Leon Brittan, “the EU” has also been a keen ally of those attempting to entrench such purely economic rights at the international level. He has been pursuing this agenda first and foremost with the US as a wedge into the larger world market system.

¹⁴⁶ Esping-Anderson (1990) provides a more detailed typology of economic forms. Habermas' (NR) typology is less useful towards appreciating the nuances *within* market economies. Nevertheless, BFN's typology of liberal, social welfare, and rational choice models

liberal/conservative model has achieved a displacing ascendancy over the post-war mixed-market model that had made some progress in correcting the worst effects of the market system. As Habermas notes, it was not capitalism but the democratic welfare state that won the Cold War (BR 157).¹⁴⁷

Neo-liberal capitalism is a particular vision of the market economy which rejects the "New Deal" form of liberalism begun in the US with FDR, in Germany with Bismark, and in England with Beveridge. More specifically, however, *monetarism* is the fiscal model which, while first introduced as part of the neo-liberal/conservative revolution in the UK, has provided the rational framework of the neo-liberal social, legal, economic and political "revolution" in most Western societies. It is useful therefore to review the logic of monetarist fiscal policy and its effect on notions of the proper relation between the subsystems of the state, the economy, and society.

For monetarists, *inflation* is "the devil", the number one enemy to the functioning of the market, not, for instance, social "externalities" such as unemployment (Luttwak 1997,

inter alia) provide highly-detailed and abstract political and legal models.

¹⁴⁷ Here I consider the dominant economic model in *capitalist* society, rather than the socialist, communist, or fascist models (see NR or Brown 1995 for these models). I take this focus since there is much work which needs to be done even within the less ideal, but nonetheless dominant, capitalist economic model. For the moment *at least*, as Habermas suggests, we must work towards a *more* democratic, just, and less juridifying form of a mixed-market economy (NR; BFN; BR 140-1). Instead, Habermas suggests that the arguments to critique the *relatively radical* modifications of the market model must be made clearer for public debate. The variants, details and interchange between a regulatory and deliberative state and society, and a (mixed-)market economy which invests in social, environmental and labour. protections are also woefully lacking clear voices, even when the arguments for those positions are provided by, or *forced* onto the public forum.

220). For monetarists, inflation is said to be caused by an oversupply of money in the system. One must reduce the inflation rate to a level that is similar to other national competitors, and the way to do that is to reduce the inflationary effects of excessive money supplies in the system. Too much money in the system will lead to "too much money chasing too few products," causing increased prices and inflation (Brown 1995).

To reduce the quantity of money in the system, monetarists seek first to discourage private persons and firms from borrowing money. In order to make borrowing "less attractive" they increase interest rates. They also seek to cut government spending since much of government revenues comes from borrowing (see for example, the EIB in section 2.1 *supra*).

The next step in the strategy to reduce the interventionary role of government and increase the role of the private sector in society is that once there is less money and credit available to firms and public authorities, both the private and public sectors increasingly have to resist any wage demands or face bankruptcy. Therefore, it is an important part of the strategy to weaken mechanisms which may help strengthen, or really, would have helped *balance* the bargaining power of employees and their unions through government legislation. Consequently, those individuals, firms, and even governments (all levels) that do not bow to the logic of this reduction in wages will "price themselves out of jobs".

The final stage of the strategy is economic growth, which is supposed to follow, boosting the demand for goods and services of the private sector. "Rationalized" firms are able to compete with foreign or global rivals in home and export markets. Profitable parts of the public sector are privatized and the "wasteful and inefficient" public services are forced to

emulate private sector rationales. The objective, according to Brown (1995), is nothing less than a complete reversal of the notion of virtually *any* form of social and *public* provision and a return back to a uniquely *market* model of *private* producers and consumers.

In *The Unconscious Civilization* Saul (1995) has summarized this economic strategy as follows. First, monetarists suggested that if *inflation* was controlled, we would have prosperity. Then, we were told cuts needed to be made in the fat of the *private* sector. Then when that did not generate the expected economic growth they argued that what we needed was increased, unfettered and competitive *trade*. Consequently, we were told that economic competitiveness and prosperity would lie in cutting the fat in the *public* sector: this is surely what will make the market system finally work like the Smithian clock if only left to self-regulate itself!

However, as Habermas notes, *pace* Luhmann, subsystems develop only a partial self-consciousness which is usually not reflective or conscious of the lifeworld's needs (PDM, 358; also, Gorz 1989). Monetarists continue to preach competitive and individualized self-reliance despite the growing numbers of people unemployed due to technological advances, decreasing real wages, and the shrinking tax contribution of the corporate sector (which swallow up the potential tax revenue base of bankrupted smaller businesses). The ability to provide some form of social stability and equality through social programs of the social state are now being eliminated, leading to a new round of social divisions.

This model reduces citizens to stakeholders, as if in a corporation, where money, not the hearts, or minds are important. Political elites are reduced to managers rather than as

reasonable leaders of a society. Citizens are dehumanized by this stakeholder status rather than as citizens who wish their governments to act with the *generalizable* interests of society in mind.¹⁴⁸

Yet the *attractiveness of neo-liberalism and monetarism* to the average citizen has been largely ignored by those opposed to its general effects and intent. It should nevertheless be understood. The main appeal of this model is that it allows for a protest against the (perceived and/or real) autonomy usurping power held by the state, government officials and experts, the increasing share of income by the non-affluent going to taxes, and the image of autonomy-usurping union power. While much of the above is coded by the mass, corporate-dominated media with its own agenda (Keane 1991), "there has been enough truth in the picture to make it stick" (Brown 1995). On the other hand, for much of the public the positive appeal of monetarism (translated *politically* into neo-liberal/conservatism, and *charismatically* via Western political leaders such as Thatcher and Reagan, to name just the two most paradigmatic figures) for much of the public has been to the values of individualism and autonomy, self-improvement, making one's own choices about how to spend one's money, and resisting the power of the state to decide for them, in other words, the issues of private autonomy.

In addition, Falk (1995, 48-9) has given compelling reasons why capitalism in the form

¹⁴⁸ And nor is the recent turning to referendums a sufficient form of "participatory democracy." Rather, we still require leaders who represent our best side, not simply leaders that abdicate this responsibility and role to citizens.

of neo-liberalism, or what we euphemistically now call "market economies" are in a particularly harsh phase (compared to the 1955-1975 period). These include the following reasons:

- capitalism has become essentially uncontested ideologically after the fall of the Berlin Wall;
- world economic restructuring through a new technological cycle has created economic stagnation, which has weakened the power of organized labor and the commitment of people and governments in the West to alleviate poverty elsewhere;
- the restructuring has sharpened intra capitalist rivalries, placing a premium on efficiency, growth, and "competitiveness," tendencies which discourage welfare and environmental approaches domestically and internationally;
- an increased tendency to rely on *capital* rather than *labour* for increases in productivity and profit, resulting in increased unemployment; the "opening up" of Eastern Europe is used as an opportunity by governments to expand their influence;
- the collapse of bipolarity has reduced the pragmatic rationale for foreign assistance;
- the globalization of financial markets, fiscal policies, and trade relations, and now international *investment* treaties, coupled with the influence of the IMF and its medium of Structural Adjustment Programs place strong restraints on governmental efforts to engage in social assistance programs.

"These factors," Falk suggests, "constitute the backdrop against which to develop a critique of the mode and manner by which the dynamics of the world political economy impact upon human lives" (1995, 49. Cf. Offe's comparison of the move from organized to disorganized capitalism in Pierson 1991, 62.)

Critical for the functioning of a well-informed and deliberating community of citizens is an understanding of how the shift in *funding for the institutions* of a democratic society are eroding. Crucial to this reduction in the funds available to regulatory agencies, education, good health, community, leisure and interaction services and facilities, is the fact that the *proportion*

of *taxation* has been moved from the corporate sector to the middle and working classes. The greater mobility of capital (or "globalization") as well as the greater capacity of stocks and currency speculators to monetarily punish countries that attempt to resist low-inflationary measures help to explain this shift in the tax burden. The failure of governments to discipline speculators has led to a reduction in real tax revenues since personal, and then newly conceived VAT taxes are insufficient to provide public funding for not only social programs, but also for the larger "tax expenditures" (i.e., tax write-offs) of corporations.

It has been the failure of certain levels and sectors of the market system to pay a *fair share* of the taxation burden --rather than a selfish tight-fistedness of non-affluent citizens and small- and medium-sized enterprises (SMEs) for example-- that has created the recent crisis in funds available for the sustained viability of the regulatory, public and private autonomy guaranteeing state.

It is important to reverse the misconception that the *nature* of much of the downloading in funding for social programs and institutions *begins with* governmental sources. The wrath, for instance, of many public sector employees and those citizens negatively affected by the reduction in public-sector programs in education, health, welfare, environmental protection, etc., is often directed *uniquely* towards either their national or subnational levels of government. This is a (serious) mistake. Instead, while certain constellations of those governments may indeed willingly follow a *laissez-faire* or, more accurately, a monetarist economic model in order to "improve the global competitiveness" of their national economies through low direct and indirect labour rates, etc., critical social theorists must highlight the

originary source of much contemporary downloading of responsibilities: mobile transnational corporations and non-taxed financial activity.

Ideologically supported both within and by some corporate and governmental sectors and actors, the flow of the current downloading process leading to a reduced share of funding for forums and policies that aid in social cohesion and democratic interchange can more accurately be depicted as *beginning with* the transnational corporate sector (and the personally affluent, according to Galbraith). This *then* creates a downloading free fall from national, to sub-national, to municipal governments, and finally onto communities and citizens. This is affecting citizens almost everywhere, from communities in the North, to those citizens in the South that have witnessed a considerable reduction in the contribution that the governments of countries in the North are willing or able to make to “foreign aid” programs.

5.1.2 Agendas to Internationalize De Jure Rights of Pure Economic Rationality

As if the *de facto* imbalance of influence and penetration of economic rationality into political and administrative decision-making processes which either directly or indirectly affect the rest of society are not enough, there is presently a concerted effort to *legally entrench* this imbalance. And this imbalance of influence is proposed to be institutionalized at the highest treaty levels, potentially overriding even the human rights protections thought to be entrenched in the UN Covenants. For example, the Multilateral Agreement on Investment (the MAI) is a new international economic treaty which has been negotiated behind closed doors at the Organization of Economic Development (OECD) since 1995. It is designed to ease the movement of capital across international borders by restricting laws that are viewed as

impediments to capital flows.¹⁴⁹

The MAI is based on the investment provisions of the North American Free Trade Agreement (NAFTA). However, the MAI seeks to amplify these provisions and, unlike NAFTA, which only applies to the US, Mexico and Canada, would apply them worldwide. Such an agreement was first attempted in Singapore in 1994 with *all* of the countries belonging to the World Trade Organization (WTO) as the Multilateral Investment Agreement (MIA). When there was too much opposition by smaller, more vulnerable, or more socially-progressive Third World governments to the strict economic criteria demanded of the proposed agreement the proponents of the agreement took a different route. The 29 mostly high-income countries that comprise the OECD would join first and then participation in the MAI would be offered to poorer nations. According to OECD officials, the MAI negotiators are considering rules that would "go well beyond the...provisions of other international agreements" and would "provide path-breaking disciplines on areas of major interest to foreign investors" (cited in Sforza-Roderick, Nova, and Weisbrot 1997, 7)

In order to accomplish this goal, the agreement would establish a set of rules limiting the ability of governments to restrict the "rights" of investors. These rules would result in the curtailment of a nation state to regulate both foreign and domestic corporations. A look at some of the key rules towards this end will give us an idea of *the general agenda* that some

¹⁴⁹ The analysis in the following subsection has benefited from the work of Barlow and Clarke 1997; Mandel 1996; Schneiderman 1997; and Sforza-Roderick, Nova and Weisbrot 1997.

would like to see legally entrenched at the international level and which will have reverberating effects at the national, subnational, and local levels of most countries.

One of the key rules on the agenda include *National Treatment*, which requires countries to treat foreign investors and investments no less favourably than domestic ones. Under national treatment, governments could not, for example, protect certain “industries” (such as cultural) from foreign ownership, or require that a corporation hire a certain percentage of workers with local knowledge and expertise. While governments would be prohibited from discriminating against foreign investors, there is no proposed provision to stop governments from treating foreign corporations more favourably than domestic ones by, for example, offering special tax expenditures to attract their investment.

The rule for *Most Favoured Nation* status requires governments to treat not simply all countries, but also all foreign *investors* the same with respect to regulatory laws. Laws prohibited by this rule would include economic sanctions that punish a country for human rights violations by preventing corporations from doing business there. Laws encouraging local economic development, because they may put foreign investors at a competitive disadvantage, are subject to challenge under such proposals. These include rules promoting the investment of public pension funds in local businesses and/or in socially responsible businesses; and targeted loan and grant programs, and special regulatory relief for small businesses.

Limitations on Performance Requirements are laws that require investors to meet certain conditions if they want to establish an enterprise in a particular locale (such as locally developed forms of environmental protection) or if they want to be eligible for tax incentives

or other government aid (for example, low-interest development loans). Performance requirements and being “discriminatory” towards potential investors has been a tool for governments to shape investment policy in order to promote more balance between social, economic and environmental goals. Laws that could be challenged include laws designed to protect jobs by requiring corporations that move jobs out of a country to pay tax penalties. Provisions proposed by the MAI would augment the force of the Most Favoured Nation rule insofar as they may also prohibit unilateral sanctions against human rights violators, including laws prohibiting firms from investing in countries with poor records on human rights, labour rights and the environment, and laws that block investment in a country by companies based in such countries. It is proposed that the ban on performance requirements apply equally to domestic and foreign firms.

A ban on the expropriation of assets would require governments, when they are judged to have deprived foreign investors of any portion of their property, to compensate the investors immediately and in full. Expropriation would be defined not just as the outright seizure of a property but would also include governmental actions “tantamount to expropriation.” Laws could be subject to challenge under these new treaty regimes that protect the environment and public health. They could be ruled to be discriminatory against foreign investors, to constitute expropriation of investor assets, or to be illegal performance requirements. Examples include bans on the production or sale of dangerous products; laws designed to conserve natural areas; requirements that recycled content be used, when possible, in the production process; and public contract preferences for environmentally responsible firms. A pending lawsuit filed

under NAFTA by the Ethyl Corporation could be a key test of this question.

Ethyl Corporation is a chemical company which filed a lawsuit against the Canadian government under the terms of NAFTA, the first multilateral agreement to allow *private* companies to directly sue governments, or agents of the *public*, for damages. The suit resulted from the government's ban on the gasoline additive which the company manufactured on the grounds that it is a dangerous toxin. Ethyl Corporation is seeking \$251 million in damages, arguing that the ban on the additive constitutes an *illegitimate expropriation* of Ethyl's assets. Ethyl had tried, unsuccessfully, to use the threat of a suit to dissuade the Canadian Parliament from passing the ban in the first place.

Under proposed agreements, transnational corporations in the OECD countries could follow Ethyl's example and use the power conferred by the agreement to challenge environmental and other safeguards in order to sue governments. Another fear is that the mere bringing to court by such private companies will provide a "chill effect" on any regulatory considerations by governments. The latter will fear that even in unforeseen ways that they may be brought to court for damages to potential profits by corporations if they attempt to regulate certain areas of activity.

Another proposed key rule is the institutionalization of a *direct investor-to-state dispute resolution* which would enable *private* investors and corporations to sue national *governments*. Through this institutionalized rule private investors and corporations would have the right to seek monetary compensation, if a national law, practice or policy is determined to violate investor rights as established in the agreement. International investors would have the

option to sue a country before an international tribunal rather than in the country's domestic courts. This investor-to-state dispute resolution mechanism is a significant departure from previous international economic agreements like GATT (General Agreement on Tariffs and Trade), which allow only governments to bring complaints against other governments. (NAFTA currently employs investor-to-state dispute resolution in limited cases).

Finally, *"roll-back" and "standstill" provisions* would require nations to eliminate laws currently in effect in a country that violate MAI rules (either immediately or over a set period of time) and to refrain from passing any such laws in the future. State and local, as well as federal laws, would probably be affected. Country-specific exemptions could be made for some existing laws as part of the negotiating process.

While some proponents claim that the accession of so-called Third World countries to the MAI will be purely voluntary, negotiators and MAI proponents in the business community have expressed their expectation that the current competition for investment capital will pressure developing countries to adopt the MAI in order to more successfully attract foreign investment. Opponents view the MAI as an attempt to create rights for transnational corporations and other investors and to defend these rights even when they are in conflict with the rights, needs or interests of individual nations and their citizens.

What is most brazen is that proposed agreements such as the MAI do not contain provisions outlining the responsibilities of private investors towards legislated or constitutional public and environmental protections, such as legislation concerning fair competition, labour or environmental standards. While the inclusion of an existing OECD code of corporate

responsibility in these new “charters of rights for corporations” is being contemplated, these provisions would not be binding.

It is particularly disturbing that agreements such as the MAI seek to *provide binding legal protections for the rights of investors, and impose no binding obligations on investors* with respect to labour rights, environmental standards or anti-competitive business practices. To opponents, this *imbalance* reflects a conscious effort by the drafters of such proposed international treaties to place investors' rights in a privileged position relative to environmental, labour and other concerns. In addition, the proposed treaty *does not include the exceptions* usually included in trade agreements that allow governments some leeway with respect to environmental and public health protections.

In the past twenty years with some notable exceptions (for example, Etzioni 1988; Devine 1988 & 1991; Esping-Andersen 1990; Pierson 1991; van Parijs *et. al.* 1993; Hirst 1994; Held 1995), critical social theorists have not provided sufficiently *comprehensive, coherent, positive, reconstructive economic* counterdiscourse to neo-liberalism and monetarism. Such a counterdiscourse to their arguments would need to be underpinned by a *reconstructed paradigm of cosmopolitan democratic public law* (or citizenship and administration) and *democracy* (theorizing the gap between the direct *and* representative model; see 3.2-3 for the legal theory basis.) Building on Habermas' and Held's works, I consider some tentative solutions to the looming neo-liberal agenda below.

5.2 The Requirement for Cosmopolitan Democratic Law

After a review of the legacy of neo-liberal monetarism and the attempt to make the dominance of this economic rationality the *international legal norm* over the past twenty years, *pace* Habermas' suggestion in *A Berlin Republic*, we can see that it is not simply complexity and abstraction which are dissolving the "social glue" (BR 168). Rather as he states elsewhere in the same volume, it is a very *concrete* and particular historical moment and "devastating neo-liberal vision" (BR 66) of social relations which is fuelling this social disintegration at a *global* level. Habermas in another recent article on "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight" continues that although one can speak of a "world society because communication systems and markets have created a global context; at the same time, it is also important to speak of a stratified world society, because the mechanism of the world market couples increasing productivity with increasing impoverishment, development with underdevelopment processes" (PP 131). It is this concrete ideological constellation, not merely mysterious and abstract forces that are leading to the roll back in social, educational and economic conditions necessary for the proper development of human cognition, self-confidence, self-esteem, and solidarity, in short, the "social glue" of the lifeworld.

As Galbraith suggests in *The Good Society*,

The conflict is between those who support the autonomous, self-motivated operation of the system and, in particular, the pecuniary interests of those so engaged, and those who see the evident need for intervention to arrest socially damaging or deeply self-destructive tendencies. In recent times [...] a massive ideological attack has been mounted on public regulation in and of the economy. This [...] is an escape from

thought. (1996, 76)

The complexity and abstraction issue is certainly *part of* the effect of a trend heralded by industrial, secular, urban and modern living from rural and premodern societies described by Durkheim sociologically. However, the difference today is that, whereas the welfare state was developed as an unhappy compromise between the state, the economy, and mobilized sectors of society in the *après guerre* period, the move from *accommodation* to *confrontation* politics by money and the neo-liberal states is leading to a more fearful, less secure world --at the individual, family, community, subnational, and national levels. None of this fear bodes well for developing the postconventional identity orientations and *capacities* that Habermas correctly perceives as *required* for his postnational "liberal public sphere." With the "Denationalization of the economy [... n]on-governmental actors such as multinational corporations and internationally influential banks render the formal sovereignty of nation states increasingly hollow. Even the governments of the economically most powerful countries today are keenly aware" of this dilemma (PP 122). Now, as we have seen, *international economic and treaty bases* are threatening to further affect the viability of a deliberative political and social system of rights.

Habermas recognizes this trend away from accommodation to conflict and appears to be providing more emphasis on the need for a "free and combative political culture" which is nonetheless oriented towards institutionalizing the "muted legacy of humanism and the Enlightenment" in the principles of a society's constitution at the cosmopolitan level (BR 163). As Habermas puts it, the world market "clearly cannot be left at the discretion of the World

Bank and the International Monetary Fund” (BR 178).

Instead there are two urgent and attainable requirements in the agenda for this cosmopolitan democratic law. First, the reassertion of stricter procedures for the *proper constitutional separation* of economic decision-making processes from political and treaty decision-making processes. By proper separation we mean that although economic forces have a place in decision-making processes as other administrative and solidary forces, their influence in recent times has come to eclipse the proper balance of concerns over the other two forces in political and treaty decision-making processes. Therefore, this would bring about a *proper balance* between these three forces, and their socially diverse interests and values which would necessitate, for instance, more open deliberation and concentration on the integration of social, labour, and environmental rights in decision-making processes, especially those concerning international investment, trade, and capital rules. All of this would best occur within the framework of a binding and democratically determined *cosmopolitan legal order*.

Beginning first with bringing the rule of law to market relations and their effects and influence on society, Habermas (esp. BFN chaps. 7 and 8) emphasizes that the key issue that must be reckoned with is not merely problems stemming from increased *complexity* due to expanding supranational factors. Rather, it is the increasing social and particularly privileged economic *power*. As we saw in Chapter One, Habermas' *sociologically* informed theory of democracy and law as well as Held's recognition of sites of power attempt to first unmask these illegitimate access points and, secondly, to put controls on the capacity of these sources of power to non-democratically influence the circulation of administrative and decision-making

power. In his articulation of the proper *relation between law and politics* and of the *constitutional separation of these forms of power*, including "the factual strength of privileged interests to [illegitimately] assert themselves," Habermas reiterates the following point:

Politics cannot coincide as a whole with the practice of those who talk to one another in order to act in a politically autonomous manner. The exercise of political autonomy implies the discursive formation of a common will, not the implementation of the laws issuing therefrom. The concept of the political in its full sense *also* includes the use of administrative power within the political system, as well as the competition for access to that system. The constitution of a power code implies that an administrative system is steered through authorizations for rendering collectively binding decisions. This leads me to propose that we view law as the medium through which communicative power is translated into administrative power. For the transformation of communicative power into administrative [power] has the character of an *empowerment* within the framework of statutory authorization. We can then interpret the idea of the constitutional state [*Rechtsstaat*] in general as the requirement that the administrative system, which is steered [1] through the power code, be tied to the lawmaking communicative power and [2] kept free of illegitimate interventions of social power (i.e., of the factual strength of privileged interests to assert themselves). Administrative power should not reproduce itself on its own terms but should only be permitted to regenerate from the conversion of communicative power. In the final analysis, this transfer is what the constitutional state should regulate, though without disrupting the power code by interfering with the self-steering mechanism of the administrative system. In sociological terms, the idea of government by law illuminates only the political side of balancing three major forces of macrosocial integration: money, administrative power, and solidarity (BFN 150).

However, Habermas does not share Rawls' reliance on institutions for *determining* the just estimation of goods. Habermas views institutions only as the medium to translate communicative power into administrative power and to overcome, for instance, the *overrepresentation of illegitimate*, especially corporate forms of influence on the law and decision-making system (BFN 58).

At a minimum, institutional power must be used to bring "a new balance between the

forces of societal integration so that the social-integrative power of solidarity --the 'communicative force of production'-- can prevail over the powers of the other two control resources, i.e., money and administrative power, and therewith successfully assert the practically oriented demands of the lifeworld." It is true that the "goal is no longer to supersede [*Aufhebung*] an economic system having a capitalist life of its own but", he continues critically, "to erect a democratic dam against the colonializing *encroachment* of system imperatives on areas of the lifeworld." These are the aims of "radical-democratic change in the process of legitimation" (RPS 444).

The above is an essential point for one part of any project which argues for the increased "democratization" --in the form of a *balancing* of actors affected by decision-making processes, in this case, international economic, investment, and trade treaties-- of the economy, and particularly their increased accountability, preferably to local, national *and* supranational members of civil society and their representatives (for example, in the institutions of the EU). The primary point to which Habermas wishes to draw the attention of those committed to the citizenship issue is to show that individual autonomy is closely bound with public autonomy: if the public is held captive to strategic-purposive interests, such as those of transnational corporate interests, the autonomy of individuals will also be strongly infringed.

One of the prime means that this occurs is through the subjugation of public policy formation to the purposive-economic rationality and needs of the now transnational market. This kind of rationality orientation cannot properly take into account the ethico-political rationality of citizens. The purposive-economic rationality operates by a different logic which

externalizes and marginalizes *other* value orientations of a society. I say other value orientations because the purposive-economic orientation and, particularly, its transnational variant *also* promote a value-laden rationality. We can decide whether our policy orientations should be based largely on the logic of the *economic* system (or the *law of the market*), or on the logic of the communicating social (TCA2 326, 329), representative and two-track political subsystem, all based on the *rule of law* and, for instance, the rights and obligations which it confers upon its citizens through a deliberative democratic process (BFN and chapters above. See also *Concluding Remarks*.)

Secondly, we need to consider the need for more than a post-, supra- or international coordinating system or rule of law, we also require a *cosmopolitan* legal order. As Habermas notes, national governments are losing their control over the conditions of production and with it any leverage for maintaining its standard of living.

The classical image of power politics is being changed not only by additional normative features such as a politics of democratization or of human rights, but also through a peculiar diffusion of power itself. With the growing pressure for cooperation, more or less indirect influence is becoming more important than direct implementation of one's own goals through the exercise of administrative power Instead, power is now exerted indirectly in the structuring of perceived situations, in the creation of contacts, in the interruption of flows of communication, or in the definition of agendas and problems 'Soft power' forces 'hard power' aside and robs the subjects Kant had counted on in his association of free state of the very basis for their independence. (PP 123)

Habermas, in describing actual trends of the retreat of governments from their duties to protect *all* citizens is not actually making a claim that this is how it *should* be. For he is well aware that the "soft power" of "the creation of contacts" is currently *largely* being successfully managed

by one of the three societal forces, the economy, and pushing and pulling, as we have seen above, the “hard power” of administration out of areas (such as in regulatory and social policy) that interrupt its pursuit of profit maximization, and pulls it into creating binding and global normative agreements. Contrary to the idealized version that comes from an overly abstract conceptualization of the diminution of administrative “hard power,” the gains for soft power in the form of communication flows and a structuring of the situation are *not* being attained by civil society, but rather by economically powerful and strategically self-interested global, largely “non-governmental” actors.

But how would a reversal of the current trend cited above be conceptualized and enforced? Habermas explains that alongside the internal civil law of states (*Recht*) and in place of international law *among* states (*Völkerrecht*), Kant introduced a third variant to his understanding of public law: *cosmopolitan law* (*Weltbürgerrecht*). Whereas the binding force of international law is weak and applies merely to states, Kant suggested that in order to achieve the conditions for a global legal order capable of bringing forth peace, cosmopolitan law was required. This allows for a higher-level legal power to define the limits and responsibilities of authority beyond the mere individual state (the issue of judicial *Kompetenz-Kompetenz*, or the determination of which court has ultimate authority to pronounce on the limits to Community competencies (Weiler 1997, 266)).

Such cosmopolitan law gives actual legal status to individual subjects rather than simply states, and allows for their *unmediated* membership in common and equal association with other world citizens. This leads to the giving of rights to every person “qua human being.”

Since “everyone decides for everyone, and each decides for himself”, every individual comes to have access to equal rights under a cosmopolitan legal order (PP 113 & 128). As constitutional norms, *human* rights have a certain primacy. For even among constitutional norms as a whole, basic rights have “the form of general norms addressed to citizens in the properties as ‘human beings’ and not merely as members of a polity” (138). Even if these rights can be best realized in the nation state’s legal framework, these rights are nonetheless “justified in this sphere of validity as rights for all persons and not merely for citizens” (PP138).

Establishing a cosmopolitan order means that violations of human rights are no longer condemned and fought from the moral point of view in an unmediated way, but are rather prosecuted as criminal actions within the framework of a state-organized legal order according to institutionalized legal procedures. (PP 140)

We cannot, as Habermas criticizes what Kant came to do, handle the problem of the obligations of powerful actors through “a simple appeal to reason” (PP 118). We cannot rely on “the heartfelt sympathy” of legal persons on important issues that affect all other citizens for this lacks any systematic importance (PP 125). “The rights of the world citizen must be institutionalized in such a way that it actually binds individual governments. The community of peoples must at least be able to hold its members to legally appropriate behavior through the threat of sanctions” (PP127).

While the *unmediated* moralization of law and politics could very well lead to the penetration of spheres that legal citizens want to have secured, a moralization of social relations is not hindered simply “by keeping international law free of law and the law free of morality.” This is wishful thinking. For there is already a certain penetration of morals and

ethics into law, national or otherwise. Rather, under the premises of the constitutional state and democracy,

the idea of a constitutional state demands that the coercive violence of the state be channeled both externally and internally through legitimate law; and the democratic legitimation of law is supposed to guarantee that law remain in harmony with recognized moral principles. Cosmopolitan law is thus a consequence of the idea of [this nation state level conception of] the constitutional state. In it, symmetry is finally established between the juridification of social and political relations both inside and outside the state boundaries (PP 146)

This helps to lead us away from the current *surreptitious* moralization of power politics to the *democratization* of notions of morality into and, partially (in addition to the informal public sphere), through a positive system of law with proper legal procedures for their justification and implementation (PP 149). In addition, the granting of cosmopolitan legal status to individuals must be carefully understood as occurring with two understandings. First, that these are rights for *human* persons not, for instance, corporate persons. This eliminates them a priori from such rights. This is important precisely because, as we have seen above, recent normative agreements are attempting to give corporations the right to *unmediated* legal action *against* states. Thus the definition of cosmopolitan rights as human rights is crucial. With increased constitutional balance provided by a separation of powers enforced through the rule of law it would allow the powers of solidarity greater access to legally binding action for the protection of human rights from the other subsystem forces of administration and money.

Intermediate Summary of the Potential Implications of a Cosmopolitan Legal Order

Let us for a moment consider the implications of this cosmopolitan legal order. We will again use the European context to give a general appreciation of the current as opposed to the

potential nature and level of influences for norm-making.

Whereas European and, increasingly, national law formulation in the form of regulatory and coordinating public policy applied to the civil and economic spheres currently stems from the Treaty bases of the European Union, even such *EU-level* initiatives for postnational social and economic integration and regulation respectively will eventually prove to be insufficient in the face of changing *international* economic forces and treaties. EU-level democratic institutions will continue to experience legitimacy deficits as they are incapable of taming the policy decisions of nation-states steered by economic self-interest. As a result, members of European civil society will continue to experience increasing social and economic dislocations brought on by the socially and environmentally irrational decisions of European institutions.

Such ethically and rationally distorted decision-making is more likely to continue to occur if the formal institutional decision-making structure remains strongly biased in favour of the relatively weaker nation-state Council as the principal decision-making body over that of the more postnational, European-level EP institution. I mean relatively weaker in the sense of its capacity as a vehicle for converting lifeworld impulses towards a more socially interdependent constitutional and policy orientation and thus mobilizing both the economic, social, and political will of European countries and EU-level resources. This will occur, both at the national and EU-level as governments continue to experience a slide in their legal and political legitimacy and authority.

The new supranational social, economic, and political model in Europe is emerging due to the crises in *economic* management desires and halting attempts to correct the resultant

social "pathologies". New "rationality structures" are being demanded by citizens who have become accustomed to and retain memory of universal preconditions for citizenship at the national level. Changes are *required* in order to help alleviate a crisis in *legitimacy* of the political, legal, moral, and economic subsystems in the lifeworld (Honneth 1995; Smith chap. 9).

In addition to the trend towards higher unemployment and loss of meaning and time for interactions, *decreasing revenues* from traditional sources of taxation are a *major* issue for critical social and political theorists interested in the capacity and role of the state to encourage social policy forums (for instance, committees of inquiry). Nonetheless, most citizens view and accept the payment of their fair share of taxation as a civic duty. They understand the importance of paying their fair share in the maintenance of the infrastructures of solidarity, administration as well as in the economic functioning through the proper maintenance and improvement of, for instance, educational, judicial, and transport systems and services. However, there is little or at least there is a decreasing reciprocity of this sense of civic *duty* by corporate power. Civic republicans would use their discourse of civic duty and obligation to more effect, and relevancy to average citizens --who are already fulfilling at least one important element of their civic duty, yet are finding themselves obliged to pay *more* than their fair share of taxation due to the proportionately reduced share of taxes paid by the corporate sector-- by arguing that the corporate sector must not only receive the protections and advantages of a legal "personality," but that they must also fulfill the pecuniary *obligations* which stem from such state and legal advantages.

Taking us back to the attempt to bring balance to the rights of citizens and the functioning of the economy, world citizenship can only be credibly conceived by two means. While the first means entails making the new sources of international power subject to the same rule of law that citizens are subject to, the second means entails making them *equally* (not necessarily more) responsible for the *revenues* needed for the increased *expenditures* required for supranational coordination, civic and social cohesion. The detailed consideration of this responsibility is *a basic task* for critical theorists in order to retrieve the conditions for truly deliberative and just societies.

Towards this end, Habermas has suggested the need for "*Volkswirtschaften*" (BR 179) and even a "*Solidarzuschlag*" (BR 170) in order to help correct the effects of globalizing markets on national economies. What could these two forms of "people's economies" and tax-based resource generation look like, especially in view of the emergent supranational economic landscape?

In light of the overlapping internationalizing of power and, particularly, the impact of unregulated international money and bond trading (look at the impact on a NAFTA member, Mexico, in 1993, and Asia in 1997-8), David Held suggested that *a new coordinating economic agency* be created at regional and global levels. Held has also stressed the need to make *international and transnational economic agencies accountable to parliaments* and assemblies at regional and global levels following an *international constitutional convention* (279; see also Falk 1995). The international constitutional convention could begin the groundwork, as they have begun to do in Europe, for the basis of a Social Charter, providing

rights to a Basic Income (BI).

The importance of Held's refocus on an *international* (or, better yet, a cosmopolitan) constitutional convention appears critical for any discussions of constitutional possibilities occurring at regional or national levels. For example, recent attempts to (1) bring in a *national social charter* in the Canadian Constitution or even to (2) interpret the existing Canadian Charter of Rights to protect existing social programs are overshadowed by *economic* considerations. Given the vulnerable position of provincial and national economies created by the reduced accountability of global actors to societies and also their reduced contribution to the tax burden (necessary for maintaining the social minimums for an active and self-respecting citizenry), nation-states are left with less funds to properly fund social and democratic policies (Ross 1992; Jenson 1992).

Therefore, there is a clear need for *a new, coordinated economic policy* applied to the requirements of a democratic public. This is necessary first at the supra- and even *international*-level of coordination. In order to *fund* citizenship rights in *democratic institutions and forms of informal communication flows* such as the *supranational* EP and ensure that the local concerns of autonomous publics are effectively heard in such properly funded bodies as the Committee of Regions (*Comité des Sages* 1995), *the new wealth* created in the "global economy" must be equitably accessed. These mechanisms for social cohesion -- from social programs to social dialogue-- require funding which must come from internationally coordinated sources. Alternatively put, to relieve the democratic deficit and for the conditions for citizenship rights to become sociologically viable new sources of taxation

(from the new forms of wealth) and their regional and *international coordination* will become increasingly necessary. This will also help to maintain the *legitimacy* of the emerging economic, social and political action systems and provide the basis for solidarity/integration in the postnational lifeworld (Honneth 1995).

In sum, central to a *supranational* and even cosmopolitan Habermasian conception of the role of administrative and coordinating action systems is the understanding that such systems must play and, in fact, *are the only mechanisms with enough power to coordinate the funding* for the social cohesion of postnational societies. Although Habermas may be right that a one-sided productivist paradigm is analytically and normatively insufficient, it is morally and practically unacceptable to overlook the fact that a lack of work, economic justice, and income is the surest restraint on rational, democratic participation. Therefore, it is crucial for the viability of the very notion of a deliberative and participatory model of society that critical social and democratic theorists integrate in their analysis a critical and reconstructive supranational political economy.¹⁵⁰

¹⁵⁰ The need for a supranational political economy within the project for a more deliberative model of society may prompt one to ask: why not advocate a straightforward return to a Marxist class analysis? It should be clear that Habermas' critique of the Marxist tradition stems not from its criticism of the distorting effects of unregulated economic power and social relations of production leading to inequalities and alienated forms of life. In other words, he acknowledges that the class-specific nature of certain inequalities is an ongoing subject for critical theory (TCA2 348 & 340). However, his argument is with Marxists' viewing labour relations as both the main source of an alienated lifeworld, the target for fulfilling one's life chances, and the agency for an emancipated life.

Instead, Habermas suggests that equitable class and material conditions for living are just one, although a major, *precondition* or criterion for a discourse theory (rather than a labour-value theory) of morality and democracy. I.e., freeing the worker from material need

This analysis is not stuck in the "old way of thinking" that the state is responsible for the welfare of citizens. Rather, Hayekian economics are taking us back to a world where the power of the state is used to only protect the privileged, an Hobbesian state, where what we share and build for each other is reduced to the absolute minimum (Honneth 1997).

Citizens helped empower and invest authority in the state, their state, to look after the interests of all, to help protect them against the awesome, and unfortunately too often environmentally, economically, and socially irrational decisions of powerful economic actors (putting thousands out of work for short-term gain, for instance). These decisions are violating the moral norms which societies have slowly, painfully, and still fragily attempted to build.

As Habermas has recently admonished,

If there is to be at least some substantive maintaining of the welfare state and some avoiding the further segmentation of an underclass, then institutions capable of acting supranationally must be formed. Only regionally comprehensive regimes like the European Community can still affect the global system in line with a coordinated world

(the "realm of necessity") or providing better social relations of production are *necessary, but not sufficient* requirements for a more just, moral society. Rather, those are part of the conditions that need to be fulfilled in order that individuals can interact freely and openly in their lifeworld and in moral and legal discourses. As long as these material conditions are not fulfilled, the preconditions for an ethical, moral, or legal discourses are not fulfilled. On the other hand, simply because these conditions for material freedom may be fulfilled (as they were in state communist countries), *political and individual rights* must also be fulfilled if an ethics, a political ethics based on the *fundamental notion that rational and unsubverted dialogue*, is the basis for generating the validity claims of moral and political life.

See also Klaus Eder's (1993) useful attempt to reintroduce class into social movement and critical theory analysis. However, I have concentrated not so much on the fact that "class matters" (Honneth 1996). Rather, following Habermas and perhaps pushing beyond him, I have focused on the enormous *power of money as a resource*, and its internal logic to transform and often distort life forms after its own image, according to its economic as opposed to communicative rationality at the social and individual level (NR 9).

domestic policy. (RG 261)

The conceptualization of these regional supporting democratic systems and interchange relations is part of what Held (1997) refers to as the need for a system of *global governance* as opposed to a simple and monolithic *global government*. Whereas the latter represents the world state that Kant feared would lead to “soulless despotism” due to its incontestable central power, a system of global governance would include differentiated national and regional systems of governance that would help act as sluices to cosmopolitan-level legal orders. The best current and emerging model of such a regional level and democratically responsible system of governance is that offered by the EU. While we have considered the mechanisms for interchange and the system of rights that would underpin that model in some detail in the previous chapters we need to step back here and consider it from a more external viewpoint.

5.3 A Democratic and Social Europe as Model and Wedge

While Habermas’ recent reflections on the necessary upward consideration for democratic theory has jumped to the cosmopolitan level, he has also indicated the importance of conceptualizing a *substratum* of “supporting structures,” regional institutions and public spheres for the democratic interplay between more formal and more informal publics in a cosmopolitan space (PP 125). The formation of regional regimes are “for the first time provid[ing] the world organization [of the UN] with an effective substructure” which help orient political leaders with a compulsion to globally coordinate actions to threats against the environment, asymmetries of standards of living and economic power, the power of technologies, *et cetera* (PP133).

Conventional proposals to reconstruct supranational forms of democracy, above all at the cosmopolitan level and through the UN, tend to concentrate on three venues: establishing a suitable parliament, strengthening the court system, and reorganizing the political executive of the Council. In the UN, the General Assembly still is a mere assembly rather than a Parliament; the World Court cannot make binding decisions and is thus “limited to the function of an umpire. Its jurisdiction is now restricted to the relations among states; it does not extend to conflicts between individual persons or between individual citizens and their governments [and corporate citizens]” (PP 135). On the Security Council, it has been proposed that “along with world powers (such as the United States), regional regimes (such as the European Union) should also be given a privileged vote” (PP 135). While Habermas suggests that such reflections as the above are “conventional,” what is not conventional but rather critical (and perhaps even crucial) is the consideration of the European integration process *in particular* as a *model* to decrease the one-sided national and neo-liberal agenda that is currently still having much success in increasing its presence in all spheres and levels of opinion- and norm-formation.

Yet, most discussions concerning Europe tend towards either an *internal* analysis of, for instance, the institutional democratic deficit, or the possibility to develop “European citizenship” with its own *sui generis* constitution. On the other hand, in face of the trends towards suprastate systems of governance and norms a broader perspective-taking of the potential usefulness of the European democratic and social model as a normative order is often sidelined. Göran Therborn (1997) has recently made an important contribution to this

normative perspective-taking in a collection of essays on *The Question of Europe*. While the majority of the articles in this work (including a contribution by Habermas) precisely took the internal viewpoint, Therborn's contribution at the end of the volume indicated the outward-looking promise of the European model for the rest of the world in the twenty-first century. This project in general has attempted to add to this perspective-taking.

The point is not, as radical free market advocates (cynically) suggest, that due to the empirically verifiable economic globalization we must merely orient our national and regional policies to make investment climates more attractive on the global level. The following of this logic, that flows from a literally technical, even computerizable form of knowledge which externalizes all social, environmental, and democratic normative considerations, can only lead to a race to the lowest social, political, and bodily requirements.

Such logic can only produce "a race of devils" to the bottom if one considers that what is seen at an individual, municipal, provincial, national, and regional level: increased unemployment, poverty, and impoverishment of educational, health, equity, and environmental policies and program capacities as national decision-makers attempt to fit their economies into the logic of a rigid, monetarist economic rationality. This race towards a *particular* form of economic "rationalization" is now reproducing itself at the regional level, due, by the necessity of the logic of competitiveness, to the international character of economic production, trade and investment.

The very autonomy of practical (never mind ethico-existential) discourses are affected by power and, one could argue, especially technocratic, fiscal, monetary power. Technological

innovations, and, above all, *unregulated* international monetary and bond traders that consciously (or simply due to their own autopoietic-like code rules, radically augmented by computerized code and information exchange technological systems) create a presence which undermines the international principle of not so much state sovereignty, but, more importantly, world citizens rights (BR 152). These are the rights to determine social, cultural, economic (including fiscal), and environmental policies for the common weal grounded in the principle of the *democratic* rule of law.

The point is then that *even the European democratic and citizenship model is endangered* unless problems are democratically determined and coordinated not simply, as Habermas suggests, at the regional level (BFN 506), but rather, as he states, at the international level of regulation (for instance, in currency speculation) and revenue generation.

Therefore, whereas Therborn conceptualizes Europe only as a *model* of the social dimension, I suggest that it has the potential to play a role as a *wedge* to more actively prevent the entrenchment of one-sidedly economic treaties at the international level. And the more active image represented by the wedge is no accident. For while "the idea of Europe" (Delors 1988) may indeed act best as a model to citizen movements in other regions and countries going through the pressure to have increasingly strict limitations on investment prerequisites, Europe can also act in a more active manner. An "idea" or model is rather passive. However, *pace* Therborn, North American and Third World networks need a Europe that can also act as a bloc, or, more precisely, as a *wedge* to prevent the reduction of national level *acquis communautaires*. It can act as a wedge by not simply concentrating on creating a political

space for "European" concerns. Rather, critical movements could help to orient the European experiment to wedge a space in other regional and international treaties and at tables for environmental, citizen and social rights and concerns. Hitherto such spaces have been rarely made available. Increasingly and, brazenly as we have seen in the recent MAI example, such negotiations have largely been reserved for only political/administrative elites and the interests that they represent have most often been those of the new and old economic classes.

Yet, even at a relatively prosperous regional level such as Western Europe, its viability to demand a more social and democratic cosmopolitan legal order is highly questionable. In particular, the flight-of-capital problem which struck Mitterrand's France in the early 1980s during that government's attempt to provide generous social programs could easily be reproduced at the level of the European Union (Ross 1995).

Thus, in order to act as an effective wedge, the model of a more social and democratic regional or cosmopolitan legal order would require the cooperation of not only movements in Europe, but also in North America and the Third World. It is in the interests of European critical theorists to be involved in such a European "wedge-movement" into *international* treaty-making, despite the (only) apparent protections that their own regional level treaties provide them because those protections would be more apparent than real if, or rather when, international-level economic and legal agreements come to subsume them, first de facto and then de jure.

It is also in the interests of the North American and Third World networks to encourage the European wedge-movement because it would embody many of the same *value*

and democratic orientations that autonomous groups and progressive parties at the European level share, especially as they have been democratically reconstructed in the chapters above. Such values and democratic orientations include the movement away from hyper consumerism to conservation, from the basis of international negotiations away from national interests to debates over shared and divergent values and needs, and the intersubjective means to determine their particular design and implementation.

An example of how a more *social* Europe, politically (not merely economically, although that is an important source of negotiating power as well) unified could act as a wedge towards the improvement of international agreements is provided through the agreements negotiated at the WTO. While one can bring more balance between the social forces of solidarity, money, and administration through multilateral agreements by making the former two forces accountable to *nation states* without *necessarily* having *supranational* “wedges” such as a social Europe in place, the presence of a socially and democratically oriented supranational Europe would provide a more politically and economically powerful negotiating presence at such negotiations. For instance, as an immediate and attainable (as opposed to a longer-term and more ideal) goal, if there was the political will and pressure, the EU could push for the inclusion of a social clause into all WTO agreements. The inclusion of such a clause would require enormous political pressure and will --from parliamentary, leadership, governmental, national autonomous and international publics.

Why integrate a special clause in the WTO? Why even look at the WTO? Because it is the “most advanced” set of rules capable of being *enforced* (*supra*, BFN 456). This is

different than saying that it is the most progressive body globally. Far from it. But because the nations who sign on to the WTO actually take its rules seriously due to the actual economic chill (through "investment strikes") which could afflict their economies, they take the rules from this body much more seriously than the normatively preferential institution of the UN which has a *much* more diffuse mandate. The strategy would be part of a more general approach to make a reformed UN the legitimate and resource-capable decision-making supranational institution as Habermas and Held have suggested. It should also make the other, particularly economic, investment, and trade treaties, institutions and bodies that are emerging at the international level, *accountable* to democratic, environmental and social rights.

At this point, the latter rights are losing ground to economic rationality through an even *purser* form. This economic rationality is being introduced into the trade and investment international agreements as we have seen. Such investment agreements entail, for instance, the inclusion of the proposed MAI and its key provisions into the WTO, which would have the potential to effectively nullify the even marginal environmental and cultural protections allowed in the NAFTA agreement and, of course, could seriously damage the entire EU social charter framework. The MAI has run into trouble especially with neo-liberal think tanks because some countries such as France are calling for minor exemption clauses regarding, for instance, culture. In other words, neo-liberal advisors are cool to this proposed international agreement in its present form not because it is too radically economically oriented, but because the operational rationale is in danger of being *somewhat* diluted.

Even those organizations such as the UN with its relatively weak autonomous resource

base are losing ground. Namely, the UN has recently committed itself to establishing a framework for co-decision-making, not with members of a global civil society, but with the transnational corporate sector (Barlow & Clarke 1997, 28). Nonetheless, the fact that the WTO has not been considered as an institution for the spread of a more social and humane model of governance and international integration through the medium of the rule of law has given a free hand to those with a pure economic rationality to include a new treaty agreement (the MAI, MIA, etc.) that would virtually eliminate all social, environmental, and cultural considerations *entirely* and legally.

Habermas (BR) ends his article "1989 in the Shadow of 1945" with a statement which, although referring more specifically to Germany within the European integration process, ties in many of the issues that have been touched upon in this project:

Today we must try to carry further the legacy of the nation-state on a European level. A Berlin republic without the fatal aftertaste of the wrong continuities would in fact operate less autonomously, and yet with greater initiative than the old Federal Republic. It would not, looking eastward, project itself as a sovereign supreme power, but would act in a focussed manner. It would make its influence felt within the institutional framework of a democratically developed European Union and work to ensure that, together Europeans live up to their responsibility outside as well as within Europe. As part of a greater whole that must be characterized by solidarity this republic would no longer arouse its neighbors' suspicion about the super-mark and great-power aspirations. Instead of issuing sabre-rattling decisions from Berlin, it would have to win majorities in Strasbourg and Brussels. Disencumbered in this way, it would not need to shy away from taking the long view. It could work on operationalizing long-range objectives that could provide motivational impulses once they are no longer suspected of being utopian. Europeans bear responsibility, not only for making the organization of the community of peoples [*Völkergemeinschaft*] finally fit to undertake a cooperative solution of global problems that are becoming increasingly insoluble, but also for halting within their own societies the decline of existing social standards, as well as the division that results from the chauvinism of affluence (BR 181).

In 1990 Habermas suggested that "Europe must make the utmost effort to quickly improve conditions in the poorer regions of central and eastern Europe or it will be flooded by asylum seekers" (BFN, 508). By 1997 his concern for the deteriorating social situation had escalated to such an extent that he stated that we need to stop the decline of *existing* social standards and the chauvinism of affluence (BR 181, 13, 62) and that the "new poverty" has *increased*, not decreased (BR 142-3, 156). And all this is occurring, not within the confines of former East Block countries, but within the formerly, economically secure Western countries themselves. "Everything is changed but nothing is working" (BR 63) Habermas notes, and the more particular reason for the rise of "the new poverty" is the ascendancy of the neo-liberal vision that is "devastating" citizens and social solidarity (BR 66).

Although the attempt to provide more infrastructure for the economic enhancement of poorer regions is occurring at the EU level through structural funds (2.1), Habermas is now perhaps making the point that human rights protections are required at the cosmopolitan level. This would certainly help reduce the number of *economic* asylum seekers in general. Although the issue of *political* asylum seekers would remain a relatively small problem, a social charter would more-or-less make the debate and dilemma faced by some Western European countries such as Germany concerning the majority of asylum seekers, who are economic refugees, less relevant. If instituted at the EU level, a social charter would provide a mechanism for the more even distribution of the burden of pan-European economic integration and thus prevent countries that have more established and attractive social programs from becoming the logical economic "paradise" from poverty and economic dislocation.

While Habermas correctly seeks to raise the social standard for Germans and Europeans alike not only domestically, but also internationally, this project has suggested that socially-oriented Europeans have already done much to raise, if not implement that social and democratic standard in regional normative agreements and, as is Habermas' wish, in international agreements. However, this responsibility neither should, nor can be left to Europeans alone. North American critical theorists must also take up this issue and provide their own insights. However, the *example* of Europe and of the European model of supranational integration is one which above all is attempting to introduce substantial social, economic, cultural, welfare, and environmental rights into binding treaty agreements at the supranational level. This could be used as a *concrete* though certainly improvable model *alongside* economic models in general and against the current monopoly of commercial rights of property that are driving the logic of most regional and now international trade agreements.

This is a *crucial* dimension for the viability of not only the EU's capacity to expand its own social charter proposal to the poorer regions of Europe but also for the notion of a "spillover effect" (although we must reject the functionalist evolutionism of this concept) of the EU's example to the Americas. For as Jean-Pierre Lehmann (1996, 120) explains, the US and the Asian countries consider their relationship "the most important, bar none" which has, since the end of the Second World War, resulted in the marginalization of Europe from economic trading considerations. While one may suggest that social democratic European states, in particular, and Europe, in general are better off without these trading "partners" due to their side-lining of democratic, social and environmental issues, the nature of global trading will eventually begin to undermine the capacity of "Fortress Europe" to generate sufficient

finances for its own policies as more production and investment moves to the American-Japanese regional "ménage à deux" not to mention the Chinese mainland (Kennedy 1988).

Brutally put, just as a local, subnational, or national state is captive to the vagaries of the (increasingly technologically-determined) logic of international currency, stocks and bonds markets, the EU, even as a supranational region, will also come under increasing pressure.¹⁵¹ The European model, despite some of the democratic and social deficits that we have seen, is *considerably* further ahead in implementing remedies to these deficits than countries influenced and coerced by other regional and international investment and trade treaties, and, more theoretically, by monetarist fiscal, political and "social" models of society. As well, the EU model is also certainly ahead of many countries dominated by the highly elitist corporate-political relationship. Even the "paternal corporatist" model of Japan, for instance, is being coerced by other emerging Asian "economies" (not "nations") where basic human rights abuses are still a thinly veiled reality.

Conclusion

This chapter has argued that, given the *de facto* globalization of corporate power and the empirical upward movement of decision-making concerning economic and investments due to the intention of the constitutional strategy and more specifically of entrenching a social charter at the regional and cosmopolitan levels is not designed to "legalize politics" for citizens

¹⁵¹ For instance, the Asian region under the *APEC* (Asia Pacific Economic Cooperation) agreement signed in 1996 as well as the third regional economic pillar, the Americas, are increasingly consolidating their regional economic positions and economic models with an eye to improving their investment and trading competitiveness on a *global* level.

in society in general. Instead, this *social and democratic oriented* constitutional strategy is designed principally to bring the rule of law to globalizing economic actors and their actions. And bringing the rule of law, entrenched, binding, and capable of being enforced, can only be effective for borderless corporations at the *suprastate* level. The use of a supranational level charter is to not only problematize negative rights, but also help positively raise the level of social rights in those countries and regions that are without such guarantees. Initially, or at least for some countries and regions, it can be conceived as a negative strategy. In other words, many countries in the West already have excellent social, welfare, and environmental protections. However, the problem is that the new treaties that are being contemplated at the international level, particularly through the WTO, are encouraging a "radical libertarian" (Hutchinson & Monahan 1996, 314) and neo-liberal constitutional order. The preoccupation of such a constitutional order is not, as we have seen, with democratic or social concerns, but with the unfettered freedom of the market. The project for a social and democratic legal order at both regional and cosmopolitan levels represents a rejection, therefore, of those who admonish resignation to the acceptance of a legal structure which already dominates the current agenda: a legal structure that shields internationalizing market forces from political decision making regarding social and environmental obligations (such as Attali 1997).

**Concluding Remarks:
The European Integration Process,
Supranationalism and Reworking Habermas' *Verfassungspatriotismus***

At the end of this project, we can draw some conclusions of short- and medium-term relevance to the European integration process, and more general conclusions regarding Habermas' contributions to North American critical theory. Beginning with reflections regarding the integration process in Europe, at least two conclusions strike us.

On The European Integration Process

First, in terms of *democratic processes*, one can conclude from this project that given their tremendously increased regional capacity to improve as well as *undermine* human and non-human environments supranational decision-making bodies and, especially, executive bodies (such as the European Council) must be made more *accountable* (Weiler 1997). And this can be done by making the European Council's decision-making procedures more transparent and its reasoning more accessible to autonomous public and, at a minimum, EP scrutiny. Also, if the EP was given more equal legislative powers with Council, it would be able to act as a legitimating democratic balance to the more member state and elite orientation of the Council.

Second, the fact that supranational "identity" (i.e., the social integration and acceptance of the obligations of EU-level laws) depends not simply on economic and political "freedoms", but rather also on *positive rights* must be recognized. These rights can help act as a basis to empirically stabilize the normative expectations of citizens set in motion by globalizing and economically destabilizing economic systems.

The EU example exposes the undue access and influence that economic actors and

reasoning are allowed to play in the substantive and long-term decision-making process due to largely *non-transparent* and *informal* mechanisms for influencing that process, especially at the national level, but which ultimately affect EU-level decisions. There is no mistaking the extraordinary influence of the power of money and economic reason --exemplified in the current focus on attempting to address the convergence criteria of economic and monetary union (EMU) rather than addressing with *equal* vigour citizens' simultaneous concerns for social, environmental and economic justice.

Nonetheless, the power of autonomous publics, --both interest-oriented associations and values-debating citizens-- continues to be a latent and perhaps *potentially* influential social and political "sensor" over those political elites who may yet be forced to accede to the demands of civic, and not simply economic society. More particularly, it draws our attention to the possible justification of Habermas' theoretic focus on the notion that political and economic subsystems have not merely a normative, but also an empirical or sociological "*latent dependency*" on "*those in the gallery*" (BFN 382). In turn, however, *this "dependency" relies on the improved communicative capacities of citizens* if the latter are to maintain their motivation to consent to the rule of positive law and especially (highly rationalized and abstract) supranational law: it is upon the rule of law and consent to this emerging form of law on which increasingly complex political and economic systems rely for efficient, if not thoroughly *effective*, coordination and reproduction. The example of the EU highlights both the dilemmas of attempting to coordinate complex political and socio-economic systems and integrate the identification of citizens into a more abstract, postnational identity.

Of more politico-theoretical importance, we should nonetheless emphasize that *the*

extension of social and democratic forms of rights to citizens did not evolve simply out of the good intentions of the EU's domestic elites (with the possible exception of such extraordinary recent figures such as Jean Monnet and Jacques Delors (see Ross 1995)). Rather, some of these forms of rights are being slowly and, in some cases, very reluctantly extended to "Eurocitizens" in the wake of the backlash against what was perceived (more at an intuitive level and communicated in smaller, autonomous spheres rather than in the mass media) as the narrowly economic interests of the principal players and the non-democratic manner in which this momentous union was occurring.

In effect, there was a backlash against the potential erosion of their *acquis communautaires*, that is, the rights and goods that citizen movements --workers, women, anti-racist, peace, poverty, environmental, etc.-- had acquired through collective, historical debates, negotiations, and direct actions at the national and community levels. In other words, these rights were *acquis, not given* to citizens. This history of the struggle for these social, welfare, and bodily goods *and* democratic and civic *procedural norms* remains a powerful source of civic motivation as well as a force that European neo-liberal economic and political elites have had to reluctantly acknowledge in their decision-making processes. This *presence* of a citizenry accustomed to the preconditions for the good life *and* debate is an exemplary --but constantly endangered-- historical value and force.

The often suddenly (and very publicly) stated desire by certain political elites to increase the "input" of citizens into the European decision-making process came about as a result of the disaffection of citizens with the increasingly one-sidedly *economic and monetary* unification rationality. In the end, in order for the EMU to continue, and in order, for instance,

to efficiently manage and direct such a regional economic network, the executive of the EU found that they were obliged to provide more mechanisms and resources allowing for citizens' enhanced *capacity for democratic* input.

Two broad means have been used to increase citizens' presence. Firstly, as we saw in the previous chapter, two levels of *democratic institutions* and mechanisms have been improved: the "sluices" to various EU-level bodies as well as improved powers over the decision-making process by their elected representatives in the EP. Secondly, *constitutional social provisions* for European citizens' social, employment and environmental well-being and autonomy have been strengthened. This latter improvement is viewed as increasingly necessary if the political and economic subsystems are to continue to enjoy the support of citizens and, more specifically, if EU-level executive authority is to be seen as legitimately issuing its directives and hence carry the motivating power of that supranational executive office.

Positively, while the "spillover" effect onto social, civic, welfare, and environmental policy indicates that although *the level* of this model of social organization and justice is fraught with complexity and even danger, it offers a useful example of "*actually existing*" *alternatives* to neoliberal, radical free market dominated conception of citizenship and highlight the potential for justice via a vigilantly critical reconstruction of procedures and demands for the internationalization of the rule of law.

George Ross (1997) has suggested that one can see two clear periods in the recent movement towards European integration: the *après guerre* and the period since approximately 1980. He suggests that the postwar period saw a heightened interest in integration, an integration which encouraged the development of Marshallian rights at the national level due

to the neo-functionalist, pyramiding or "Monnet effect". Since approximately 1980, fervour for the expansion of such rights has declined. This decline exemplifies the weakness in any reliance on the neo-functionalist assumption that the spillover from an *economic* to a monetary, then *political*, and finally *social* union is "inevitable" (BFN 110).

However, Ross' periodization tends to downplay a certain historical and institutional political economy. Notably, it downplays the *tremendous drag effect* that the presence of a central European player, the UK, with the tenure of an ultra *laissez-faire*, neo-conservative political economy has had on attempts at the European level to further the constitutional entrenchment at a supranational level of Marshallian-like convergence of civic, political, and social citizenship rights. The drag-effect of this institutional neo-conservative agenda on the *entire* European integration and constitutional project cannot be underestimated. The capacity for this drag effect to again slow down the extension and entrenchment of citizenship rights highlights the tremendous dual nature and ambiguous liberatory potential of the institutional, representative and legal mechanisms towards augmenting, or, *in this case*, distorting the preconditions for furthering more radical democratic, social and environmental justice.

Regarding Habermas' Contributions to North American Critical Theory: Supranationalism and Verfassungspatriotismus

David Held (1997, 236) has mentioned that there are new opportunities and dangers that have emerged with the enormous changes in the post-cold war international context. One question that the new context poses is whether the supranationalization trend leads to a necessary *shrinking* of political spaces and constitutional rights? I have in a sense suggested that the "elongating" or stretching of the democratic terrain which the EU represents --from

a more compressed, less complex and therefore less in need of differentiation of relations between state, economy, and society, to a more complex supranational European court-council-commission-parliament/state-parliament-civic society imaginary-- increases critical theorists' capacity to *conceptualize* new *democratic* and *constitutional* opportunities. This elongating of the democratic terrain has the potential to create more holes and, thus, more demand for "transparency" in the workings of the *normative procedures* of the political sphere. For as with any substance which is slowly stretched the *holes* in the structure, its form, become more clearly visible.

In addition, the short- to medium-term need is to reverse at the supranational level the neo-liberal international treaty agenda. These reversals can occur only through *complementary* regional, and eventually, international agreements and cosmopolitan law. Pressure would also need to be brought to bear on decision makers by complementary action from those with an emancipatory interest in civil society, those in positions of administrative power, and those even in positions of economic power who agree to the need for a socially and environmentally responsible legal system.

With the *de facto* blurring of borders and the globalization of civil society, politics, and legal and economic systems there is currently a *conceptual and identity gap* which is emerging. This project has alluded to the prospect that there are at least two dominant approaches by which the filling of this gap can be accomplished.

One option, which is currently being fast-pedalled, is to turn the political, legal, cultural norms at all levels towards purely commercial concerns as the basis for decision-making supported by rational-choice theories. For instance, in addition to the *legal* efforts that we

considered before, the word "economies" rather than "nation-states" is increasingly used to justify the separation of economic from social, environmental and human rights reasoning. This trend has gone so far as to have *already* been instituted into the most far-reaching free trade initiative in the world, APEC (Barlow & Clarke 1997, 24). This empirical point highlights the theoretic gap in (some largely North American) liberal-communitarian debates which do not factor in the devastating effect that attempts to position pure economic rationality in an even more dominant conceptual and cultural position is having on the capacity to develop a deeper and broader reconstruction of a historically effective morality and identity in civil society.

The second option in the search for an *alternative* historically effective morality is one suggested by Habermas which seeks the development of an orientation towards a postnational *Verfassungspatriotismus* (constitutional patriotism). This emphasis on the importance of considering the normative and practical potential of constitutionalism for an emancipatory politics is a major contribution of Habermas to North American critical theorists. The recognition of the importance of constitution-building has always been well understood by those in a position of hegemonic power. It has perhaps not been as well considered by critical theorists as an important site of *positive and creative* contestation towards securing public and private autonomy. No matter which revolution occurs, it is always the constitution of a country which is the first to receive the attention of the new elite in order to codify the framework for their legitimacy. While these constitutional bases often become the mechanism to control further change in a society, there is an increasing attempt by critical theorists such as Habermas, Preuß, Held, Benhabib (not to mention more specifically constitutional experts such as Dworkin, Ackerman and Sunstein; see Benhabib's (1996) comment concerning the

“fascinating yet separate efforts” of these set of experts and that of recent critical theory) to increase the public’s understanding of the content of a constitution as a site for *continuous* contestation, debate, and change.

In *Between Facts and Norms* as elsewhere, Habermas stresses that constitutional moments, *when* they occur, have the potential to represent the equivalent of a *nonviolent* French Revolution. At these moments, the appropriateness of critical legal theorists’ ambivalence concerning rights discourse needs historical contextualization. At these moments, all of the energy and insight of critical legal and social theorists could do worse than to turn towards this moment for *re-constituting* the basis for a society’s self-understanding of, for instance, *its* state, and the rights which that state should protect, and the obligations it and other members of the system should have towards their fellow citizens. The *critics’* social insights could be turned at these moments less toward a rejection of the entire process and intent *tout court*, but rather towards drawing attention to the lack of breadth and depth, perhaps, of certain categories of rights. Even more important at this historical moment, is to *put forward creatively reconstructed categories of rights as part of the precondition for a new societal “patriotism”*, not simply critiques of the rights tabled, or the process in general.

In effect, Habermas and others who are attempting to draw attention to *the preparation for* contestation for the constitutional decision-making moment, note that if there is a moment to move beyond a *one-sidedly* critical positioning to an opportunity to reconstitute the basis for a more just society, a moment when the normal forces of influence and power are forced to expose themselves, their interests and (techno-economic-consumerist) values and rationales to the same light of argument as others, it is to be convened at this

moment.

It is a time when a relativized basis for the moral point of view, which has been struggled for in innumerable other moments, actions of constestation, has been *compelled to happen*. It is a moment when *general critiques* of the injustice of the system, of the micromechanisms of power in the cultural, political, economic and social spheres need to be focused on *actually constituting* the possible basis, and procedures and rights for the continuing construction of a more just society.

Habermas would say "possible basis" knowing that even the best constitutions provide no real "guarantees" of justice and, secondly, that power and influence will continue to dominate, and that laws that are acquired now may become irrational later, necessitating the reworking of the constitution, even if massive, nonviolent direct action campaigns are necessary to make that reworking necessary.

The argument for *constitutional* jurisgenerative politics then is certainly not to simply celebrate constitutions as they are found, for they themselves may become reified objects of worship and bases for injustice. Rather, these constitution making moments, when and if they can be compelled to recur, may be used as a mechanism to do more than expose the deficiencies in classical liberal charters (Schneiderman & Sutherland 1997, xii) and put forward proposals for constitutions underpinned with an understanding of rights that respect the *twin* requirements of public and private autonomy as found in Habermas' framework and concretized with a deepened set of Marshallian rights.¹⁵²

¹⁵² See Michelman's (1996) review article which tends to downplay the contribution of Habermas' conception of the initial source and *impulse* for laws as stemming from the

It is a moment to reconstitute from the best reasons of a people, and from their own self-understanding, in a deliberative and collective process, the *institutional, norm-regulated, and enforceable* basis for their living, considering the dual demands of diversity/complexity and effectiveness. It is a moment to determine whether citizenship rights are to be viewed as “divine, moral, or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as prerequisites for happiness; whether they are to be understood as irrevocable or partially revocable; whether they are to be broad or limited in number and content” (Weston, cited in Steiner & Alston 1996, 169-170).

Without first the understanding of the importance of these moments-of-possible-being, the attention of alternative publics will continue to scatter over historical time, leveling the distinction between heated moments, and more-or-less everyday cultural lifeworld struggles. Habermas’ renewed focus on the institution and medium of constitutional law as a site of political struggle, rather than only extra-parliamentary, or philosophical, or ethical, or even parliamentary democratic discursive sites, is not simply part of the movement to use the courts for constitutional challenges, particularly in countries where a Charter allows for a more *activist* interpretation of laws and rights.¹⁵³ Whereas all of these are means by various groups

democratic public sphere where values are publicly debated, rather than imposed as notions of the good.

¹⁵³ For example, see the former Canadian Supreme Court Justice Bertha Wilson on abortion (Morton and Knopf. 1992). Or the case of Nisga’a has involved not only social identity, or cultural and political recognition, but *also* material gains (cf. Fraser 1997) and resource gains providing a long-term material basis for sustaining their autonomous culture based in a particular, indigenous economy of the land. The Nisga’a carried their land claims to the Supreme Court, prompting federal negotiation of it. The precedent-setting agreement allocates \$200 million, commercial fishing rights, nearly 5,000 square kilometres of Crown land and municipal-style self-government to the 5,500 Nisga’a (Globe & Mail, March 23,

to seek recourse for their violated integrity, Habermas' project is more than *substantive and piecemeal*, i.e., more than simply encouraging groups to pursue these institutional paths to achieve recognition and compensation within the confining parameters of *liberal* charters of rights. Rather, Habermas' concern is for the *ongoing preparation for* the procedures for rulings on constitutional questions where an important legal principle is at stake --and not *simply* in Ackerman's more liberal representative understanding of "moments of constitutional excitement" where "the People step forward" (BFN 277).

His is the attempt to radicalize the very basis for the foundation and validity of all projects through *radicalizing the procedural mechanisms* to help distinguish and "linguistify" issues for public scrutiny (BFN ch. 6, esp. 6.3). For instance the individualist morality which underlies the current legal paradigm and its system of rights and its legitimizing function for economic social relations and attitudes towards the physical environment. In other words, the fusion of morality and law is often a force for maintaining stability and certainty for the subsystems in spite of their distorting and even devastating effects, rather than a positive force for change in the judicial system. Even more he wishes to radicalize the democratic nature of the legal system to allow more *ethical*, context-sensitive identity and social issues, challenges and put the power of the state to work to complement these attempts, rather than maintaining the status quo which allows for largely hidden, informal, discretionary procedures and mechanisms for influence of the state systems by, for instance, the resources of money in the economy.

In other words, Habermas' argument focuses on abstract legal and moral theory dealing with non-substantive (although tied with the two-track, context sensitive) strategies in an attempt to slowly filter out the ability for elites, whether judicial, political, or economic, to introduce, formulate, interpret, and adjudicate on issues and laws of public concern behind closed doors, or use their own moral or ethical preferences and "discretionary powers" in designing and interpreting the *meaning* of laws, rules, values and norms.

When the auratic traces of the sacred have been lost and the products of a synthetic, world-picturing power of imagination have vanished, the form of understanding, now fully differentiated in its validity basis, becomes so transparent that the communicative practice of everyday life no longer affords any niches for the structural violence of ideologies. The imperatives of autonomous subsystems then have to exert their influence on socially integrated domains of action from the outside, and *in a discernible fashion*. They can no longer hide behind the rationality differential between sacred and profane realms of action [for instance] and reach inconspicuously through action orientations so as to draw the lifeworld into intuitively inaccessible, functional interconnections. (TCA2 354)

Habermas' attempt to understand the potential base of the normative orientation of social criticism and creativity in a postnational, democratic and constitutional rule of law began with his description of the types of constitutional systems. He began with the concluding section of his *Strukturwandel* on the "transformation of the liberal constitutional state into a social-welfare state." This analysis was followed by an historical review of the different traditions of law in *Theory and Practice*, especially the chapters on the classical doctrine of politics and "Natural Law and Revolution". In volume two of TCA he provides a chronology of the *expansion of law* (i.e., the legal regulation of new social matters that were previously informally regulated) and the increasing *density of law* or the specialized breakdown of global statements of "the legally relevant facts" into more detailed statements. Habermas presents this

chronology as part of his argument to show the tendencies toward *juridification* or the tendency toward an increase in formal (or positive, written) law in modern societies. The latter term was originally introduced during the Weimar Republic to describe the perceived institutionalization of class conflict through collective bargaining and labour law and more generally, the "juristic containment of social conflicts and political struggles" (TCA2 357).

The rough outline of the four epochal juridification and constitutionalism processes is described by Habermas as the following: the first wave led to *the bourgeois state*, which, in western Europe, developed during the period of Absolutism in the form of the European state system. This legal order was interested in guaranteeing the liberty and property of the private person, and the security of the law [*Rechtssicherheit*]. The second wave led to the *constitutional state* [*Rechtsstaat*] which found an exemplary form in the monarchy of nineteenth-century Germany. This sought the constitutionalization of the state [*Verrechtsstaatlichung*] in order that the administrative form can be interpreted through the rules of law. The third wave led to the *democratic constitutional state* [*demokratischer Rechtsstaat*] spread in Europe and in North America in the wake of the French Revolution and preoccupies political theories even today. The last state (to date) led finally to the *democratic welfare state* [*soziale und demokratische Rechtsstaat*], which was achieved through the struggles of the European workers' movement in the course of the twentieth century (and codified, for example, in Article 21 of the German *Grundgesetz* (TCA2 357-362)).

However, in a history of constitutional systems in the Western world, there is a fertile tension, not only between the American and French constitutions, but also that of the more recent German constitutional chronicle. Habermas and Arendt have already described that

which is fruitful in the former two, with Arendt favouring perhaps what she perceives as the American participatory republican tradition, and Habermas the French emphasis on private *and* public autonomy through its three principles of liberty, equality, and solidarity (TP).¹⁵⁴

¹⁵⁴ Exponents of civic republicanism and participatory democracy share, as Phillips points out, a deep critique of the liberal tradition. However, they approach the critique so differently that it reflects

an almost continental divide. For much of Europe, the tradition of radical democracy developed in close association with socialist theory and practice. It derived its strength from the socialist critique of inequality, arguing that it was not enough to create 'political' equalities and rights. In the United States, however, radical democracy has been more typically influenced by a tradition of small town democracy, and its radicalism is less economically defined. What has most troubled writers in Europe is the contrast between political equality and economic subordination. What has most troubled writers in the USA ... is the declining significance people attach to public affairs. In both contexts there is a debate between liberalism and its critics, but there is a three-way, not a two-way, divide. (Phillips 1991, 17)

As Ehrmann (1982) notes, the French have an interestingly ambivalent attitude towards the state. On the one hand, they are highly individualistic and embody a sense of *vivero libero*. On the other, they have a strain of *républicanisme* that is situated *alongside* notions of the appropriateness of *dirigisme* and *étatisme*, where individual and democratic rights live alongside collective and social notions of responsibility. These two principles stem perhaps from a strong sense of ownership of the socially productive and normatively oriented nature of the gains struggled for and always potentially stemming from the state after the 1789 Revolution.

They see no contradiction between having a highly autonomous individualism as well as a strong state, regulating market forces, public services and provisions, encouraging egalitarianism in education, and being steered politically from a central government. However, their individualism is perhaps more of a Voltairian variety, *méfiant* and not afraid to say so and at the same time highly reflective of the importance, *nevertheless*, of the state which the ideas and actions of their *compatriotes* brought forth in the 18th century.

On the other hand, the rugged individualism celebrated in the US *dominant* political culture is more "action" oriented. To return to Habermas, unlike the American Revolution, the French Revolution created the norms from their own history *first* and *then* carried forth the Revolution (BFN 465-6).

However, the articulation of this divide in national, or continental terms is ultimately not of interest to critical theory. For the *content* and the *intent* of identity and principles is not time or space bound. For instance, the "American tradition" is just as replete with Tom Paine's and M.L. King, Jr.'s. They were of different times but from the same national and continental "boundary." However, they shared what is essential to a critical constitutional

Habermas' writings have latently brought to light how the German Constitution represents an important socio-political example of the instantiation and continuing struggle over *some* of the (supposed) lessons learned from the above two "great" constitutional traditions, particularly in the wake of the *ill-fated Weimar* Constitution.

Few other countries have experienced the implications of the Weimar period even though one could argue that some Western countries are experiencing similar constitutional and social crises today. The social and dislocating economic conditions are such today that they are seen by many, including Habermas, as again providing fertile grounds for applepie- and especially right-wing authoritarianism to surface. And a partial lesson of the German experience, in addition to the much discussed "national" character of the problem, is that social and political instability surfaces as a result of a constitution which does not *encourage* the conditions for stability and justice, not only in its political and civil conditions and culture, but also in helping to *secure* the *socio-economic conditions* of a nation's people.

Even though Germany was the first complex society to have a welfare state system under Bismark, the *capacity to sustain this welfare system* was undermined by their imperialist adventurism and military expenditures during WWI. After WWII, the German constitution changed two elements in its institutional structures dramatically in order to avoid the *institutional* conditions for authoritarianism to rise again. First, in their electoral and executive systems, they moved away from a *straight* (and more unstable) proportional representation

theory, North American or European, which is in Habermas' articulation a concern for the public and private autonomy of *all* (world) citizens through the mobilization of individual and collective resources and capacities.

(PR) to a *mixed* PR system. This mixed PR system was not only more stable than the straight PR system (*voir* the post-war Italian parliament and the Israeli systems), but it was much more representative than the traditional majoritarian system.¹⁵⁵ This also gave sufficient powers to

¹⁵⁵ This is, for instance, a problem that besets parliaments which only have a straight proportional representation (PR) system. Although the *representative function* of PR is superior to the two-party system and majority-vote system, its codification of difference in party politics makes consensus building on progressive policies sometimes impossible, and governments often incapable of lasting long enough to formulate and implement progressive programs (Cairns 1993). Therefore, either a *mixed* PR system as in Germany (with a five percent threshold) or the EP method provides an important mechanism at the institutional *party politics* level for a balance between diversity and a relatively stable platform for implementing changes.

The *majoritarian two-party* electoral system --unlike the mixed and threshold multi-party PR, and/or mixed executive systems found in most other European countries--*institutionalizes* the potential for irrational, polarizing, non-consensual, discontinuous political swings (Cairns 1993). It is precisely for these reasons that Germany, with its experience with right-wing institutional extremism (Kaes, Jay, & Dimendberg 1996), institutionalized mechanisms and procedures and principles of accommodation politics through the multi-party system that would avoid such polarizing, anti-statist and anti-democratic swings.

The even more consensus-oriented multi-party, *non-threshold* PR political systems of the Nordic countries, such as Finland and Sweden, are certainly impressive (Hague 1993). However, they are much smaller and more homogeneous socio-political cultures. On the other hand, the significance of the German example is that it has constitutionally institutionalized a system of democratic, social, civil, and, most recently, environmental rights in *a large, and increasingly culturally, politically and economically complex and heterogeneous* nation-state. As a world economic power, its accommodation or "corporatist" politics between labour and business, strongly suggests that progressive social and environmental protections are *more* viable than the polarizing, anti-labour, environment, and minority rights politics of neo-conservatism and the latter's blinkered monetarist economic policies.

The point is that the tremendous benefits of a more *representative* electoral system in the form of mixed PR, as well as *interventionary* state, must not be lost in highly abstract discussions concerning the potential distorting effects of a more juridified state and (especially Anglo-American, as opposed to Continental) discussions of "the political". Therefore, suggestions as to the practicality and efficiency of institutionalizing the Marshallian triadic, and even approaching the broader Heldian categories of rights in other complex, modern, international economic and legal environments could be replied to with reference to this enduring --although *by no means* perfect-- Continental orientation to protecting and *extending* constitutional rights.

the executive in the form of the *Bundeskanzler* to act as guardian of the *Grundgesetz*, providing for a more stable set of checks and balances, as predominantly found in the American representative system. Simultaneously, on the other hand, *the constitution provided sufficient safeguards for the social security* of its citizens (Finer, Bogdanar & Rudden 1995).

This *constitutionalizing* of the political and social conditions towards securing more *democratic representativeness*, on the one hand, and *social and economic justice*, on the other, represents the (albeit imperfect) instantiation of the French constitutional commitment to the principles of *Gleichheit* and *Solidarität*, in addition to the rights to secure political *Freiheit*.

In Germany, while the democratic and social dimensions of the constitution of the state are clearly articulated, they are still articulated under what Habermas considers the philosophy of the subject viewpoint which leads not only to their analytic, but also their *practised* separation. For instance, there is no continuing two-track and intersubjective dimension to the designing and implementation of social rights. Nonetheless, the articulation of these *two* dimensions at a *constitutional* level is a significant step.

The lack of a clear constitutional vision which stems out of the socially-economically oriented tradition between the state and civil society has been a weakness in *recent* critical theory. Their concern has largely centred on issues of the problem of citizenship participation in their democratic will-and opinion-formation due to the intrusion of state steering mechanisms and commodification into the realm of the lifeworld. However, while this is a problem with state mechanisms, this should not obfuscate the strengths of a system that secures the preconditions for economic justice (section 3.2, *supra.*).

This has been the *relative weakness* of the German constitutional tradition: the effects of an analytic, and therefore practised separation between the state's helping to secure the conditions for the democratic and social, public and private autonomy of its citizens. This brief historical and materialist contextualization of the character of the German political and welfare system helps explain Habermas' interest in improving the *communicative interaction* in social systems generally, and deliberative participation (while respecting constitutional boundary competencies) of citizens, in other words, the civic (and not economic) republican tradition, often one-sidedly lauded by American constitutionalists.

Habermas has always lamented the "undervaluing and the impoverishment of the political and cultural reserves that a democratic legal state must stay rooted in" if it is to produce a deep identification with a way of ordering ourselves socially (PF 48). And this lamentation, even fear for this impoverishment of the liberal culture of the lifeworld partially explains his commonly fierce attacks on postmodernist "gamings". He fears the past recurring in the future unless there are proper protections institutionalized and inveterately acquired by citizens.

Habermas partially lived through the aftermath of the Weimar Republic, witnessing how the not-so-civil society in the form of the far-right was able to take over the political subsystem due to insufficient protections, *boundaries*, and vigilance towards the Constitutional protection of all individuals and collective identities (Kaes, Jay & Dimendberg 1994; see also PDM, and Rasmussen 1990, 97, regarding the legacy of Heidegger and contextualist versus moral universalists).

With the rise of populist right-wing parties and movements throughout the East and

Western "democracies," Habermas' intention in creating strong procedural protections for constitutional democracies is targeted more against his fear of infiltrations by the neo-authoritarians in so-called civil society than in keeping out the agendas of progressive voices who seek to reassert the importance of social rights.

His sobering experience with right-wing populism rising up through the cracks in the constitutional and political system is not one that many of the other Continental, or North American critical democrats experienced. This can partially explain the comparatively weak attention (for example, in the Fifth Republic's skewed Presidential system) towards ensuring radically procedural protections in their normative political theories.

However, the principal point here is that, while for historical and contextual reasons Habermas' work became *focussed on* the important project of working out the constitutional separation of spheres (judicial, legislative, civil, and later, economic), justifying and improving the conditions for democratic opinion formation, too many (even critical) theorists have one-sidedly *isolated* this aspect of his project to improve the democratic nature of the system-lifeworld interaction. This overlooks the other aspect of the 20th century German context, which drew from the French constitutional and philosophical tradition, and which has become instantiated, codified, institutionalized in the German *Grundgesetz* after the pragmatic-political lessons of Weimar: that is the need for positive rights which help secure the conditions for a more secure (if not robust) civil society. As we have seen, the entwining of democratic *and* social constitutional protections, brought about through tragic and torturous histories, have not been overlooked by many of the more historically-mindful Europeans in the making of the

EU political and constitutional framework.¹⁵⁶

Therefore, the *deficiencies* with Habermas' conception of a merely "postnational" *Verfassung* undermines its capacity to motivate, excite the imagination and desire for citizens to turn towards this new source of identity. For the preoccupation with the use of the notion of nation, even negatively stated in terms of postnationality, has a proclivity to set up a red herring argument. In addition, therefore, and in keeping with the dominant motivating force in most citizens' lives (as attested by an 1996 OECD survey), a properly conceived *Verfassungspatriotismus* must be able to marry *at a minimum* the intersubjective and *deliberative* paradigm of rights with rights for *economic security*. Since we have already discussed this point in the previous chapters, I will not belabour it here.¹⁵⁷ Instead I will simply

¹⁵⁶ Cf. Rasmussen on Rorty's remark that "Americans are better than Germans." The basis for such an argument is *ad hominem* writ large. By way of contrast, see Preuß and Offe's (1991) useful comparison between the American versus the French constitutional traditions. It is interesting that these authors are perhaps too shy to introduce the German constitutional hybrid. For this, see Preuß elsewhere (1995).

¹⁵⁷ By economic security I mean freedom from the fear of economic or material *need*, not want (Leiss 1978).

However, strategies that have attempted to appeal to *economic nationalism* as a source of motivating citizen involvement in the protection of democratic, social, environmental, and human rights from the liberalizing effects of economic globalization have perhaps misunderstood the deeper interests and understandings of citizens. On the one hand, citizens understand that these rights are essential, with freedom from economic devastation being a core need (although not the core source of meaning, for instance). On the other hand, they understand, as did Kant, that because of the determinate size of the world, that we are bound to run into difficulties, and that normative arguments *based on nation* cannot provide a sufficient grounding for judgment, even economic security arguments, due to their particularist and limited empirical understanding in a increasingly cosmopolitan world. Therefore, the citizen would be forced to acknowledge those arguments based on economic nationalism, although superficially attractive and possessing some motivating force, are of limited validity. Hence the capacity of "globalist" arguments to convince the public's mind that economic nationalists/protectionists are incorrect. As Habermas has mentioned, nationalism's artificial features "makes it naturally susceptible to manipulative misuse by political elites"

reiterate that in view of his own newly acquired appreciation for the principle of appropriateness (*Sinn der Angemessenheit* from Günther. JA 14, 37, 87, 130, 171), Habermas has perhaps not taken *sufficient* account of the fact that standing in the way of the postnational identity ideal is the requirement to take seriously the material concerns of citizens who are faced with the other side of the ideal movement towards "postnationalism:" the *effects* of economic globalization.¹⁵⁸ As we have suggested here, Europeans are threatened with more than losses to their sense of nation and are anxious about how and whether they can adjust to such changes. They are also concerned with the effects of such "postnationalism," namely in the form of a loss of national regulatory oversight on, for example, the environment. It is these concerns that are perhaps a missing link that is preventing Europeans, for one, to become more motivated to embrace the political and even economic "*Völkergemeinschaft*" and especially *Verfassungspatriotismus* which Habermas seeks.

(BFN 494). Therefore, it remains a treacherous basis for normative political theory, whether it is conceived as procedural, cultural, or economic nationalism.

However, what the citizen would certainly be more open to is the notion that, *while* "globalization" is an unavoidable trend, *the loss of forms of environmental, political and economic protections are not* an unavoidable part of that globalization. Instead of the old strategy of arguing for full-time employment, on the one hand, and national protectionism, on the other, a more effective discourse would perhaps be not one which embraces the move to freeing labour from mundane and repetitive tasks by technology and cosmopolitan integration, and which asks who is having such a strong influence in the decision-making as to how those historical benefits are being distributed. And the language which can perhaps best frame the notion of entitlement in the determination of the legitimate influence over such decisions is that of rights, especially democratic rights.

¹⁵⁸ Whereas Habermas tends to emphasize the latter "postnational" ideal, Doern (1993, 39) has suggested that the drive for a social Europe is driven by three forces. First, it is in reaction to the excessive zeal of the promarket orientation in 1992 which stung many citizens. It is also fuelled by the relatively greater political strength of labour unions and social democratic traditions in many European countries. And only finally it is also a search for a more encompassing sense of overall community.

Final Considerations

The libertarian underpinnings of the Magna Carta in 1215, the American Constitutional orientation in 1776, and the division of the International Covenant of Human Rights in this century between political and civic, and social and economic rights have all laid the historical and precedent basis for treaties and constitutions which "act solely in accordance with commercial considerations" (to cite Article 1502:3 (b) of the NAFTA agreement). There has been a concerted attempt (again) in the past twenty years to increasingly confine constitutions and treaties to such considerations.

The extraordinary element introduced by neo-liberal "political" thought, represented now in treaty and constitution-making, is the advocacy of the reliance on market mechanisms, one of the three resources in a society, to determine the policy direction of a social system. This marginalizes even the classical liberal one-sided fixation with individual rights and political freedom. This increases even more the distance from political theories, constitutional values and traditions which understood the importance of the role of *social* and economic independence of the citizen, even if it had to be imperfectly secured through the intervention of the state in the distribution of wealth.

However, rather than simply bemoaning such a trend, and suggesting that such a trend is "evolutionary" (which it clearly is not, given the different types of constitutional states cited earlier that were struggled for), there should be a more comparative and historical appreciation and frank understanding that such a libertarian constitutional basis is a product of profound social and political conflicts on the nature of social organization. If one accepts such a notion of political conflict over the proper organization of a society and the allocation of scarce

goods, both as an empirical and even normative reality, then one should be less surprised by such defeats for those who are interested in struggles for recognition and redistribution. Instead, one should be surprised that critical theorists are allowing themselves to remain in the position of critics of the *current* trend in constitutional affairs rather than also being a part of the *historical, back-and-forth, dialectic struggle* for conditions of universal self-realization and self-determination.

We require historical memory of struggles that were fought, some that were won, many lost, and some which embodied aspects of both. Such an embodiment of both aspects, of the gains and losses --the gains of a sense of social and economic equality within the French Constitutional Revolution on the one hand while the immediate *political* outcome of the event led to awful purges.

We also require a *comparative* analysis for a full appreciation of the accomplishment, however, ambiguous, of one Revolution through, for instance, a comparison with its other "grand event," the American Constitutional Revolution which importantly entrenched the liberal concern (against the protests of many who thought it invited "too much democracy"). Yet, its failing was for social protections. The consequence of *that* failing, compared, for instance, to the tragic but immediate outcome of the French Revolution, takes on enormous contours when one contemplates, for a moment, the horrific internal ghettoization of American society and the millions of marginalized and wasted lives as a result of social neglect.

But again, the loss of this *social* dimension of constitutional legal protections should not be overdone, at least in an academic reference. For the political rights of the individual were impressive. And what is more, one can understand that its shortcomings were at least not

overlooked in the constitutional basis of the other major liberal and Western revolution. In the end, one could, not only for the purposes of research with more emancipatory interests, but simply for the sake of historical accuracy of the *human* condition, with more of comparative historical method, comprehend these constitutional revolutions and their different accomplishments as grand cousins that embody the poles of human potential.

When viewed over the last two thousand years, then the last two hundred years, such historical moments of nonviolent revolution have occurred with increasing rapidity since the fall of the Berlin Wall, at least in the West from Canada to West and formerly East European countries. The recognition of the need for a new agreement for the bases of identity and coordination is recognized by reluctant political and economic elites not only due to these political and cultural shifts, but also due to the economic and legal changes signalled by Habermas and Held.

Unfortunately however, too many of these moments for political mobilization and awareness of the bases of citizenship have been lost. As Held's typology helps illustrate, struggles over civic and cultural autonomy are essential struggles. But to complement these struggles, and remain relevant to the reality of the majority of citizens, critical social theorists must also recognize the needs of economic, social, health, and environmental rights. And these are not only necessary at the national level any more, but also at the regional, international and cosmopolitan level. Without an analysis which avoids one-sided conceptualizations of "the good" and a recognition of the historic and continued power and impact which constitutional moments represent for the majority of citizens, critical and even reconstructive efforts will not be as effective, and relevant as they are needed to be for those who generally suffer from a lack

of conditions to exercise their right to private and public autonomy.

But the point that has been made throughout this work is that it is not utopian, or merely morally responsible, but rather *practically possible to generalize citizens' political, civic, culture, welfare, economic and health rights through reconstructed supranational forms of democratic law, accountability and coordination*. Despite its considerable challenges (Preuß 1996), the emerging EU social model for instance, provides a model for how we could achieve a "real utopia" at the regional level. It is a model to which critical North American social and political theorists should perhaps orient more of their creative democratic, legal, and social research. As Habermas has said, although we need the supranational level, we also need imagination to handle the new challenges presented by the changing international conditions. The supranationalizing EU model can help excite that imagination (BR 168).

It is, above all, unnecessary to give in to or even simply *react* to suggestions that citizenship rights for public and private autonomy are utopian or unproven. Similarly, it is self-defeating to say that such attempts have only led to Jacobin terror; that they are economically unfeasible; that democratic participation is incompatible in complex, increasingly supranational politics, *et cetera*. The European countries, spurred on by long civic, cultural, income and labour struggles, represent one of the seasoned *modernist* attempts at fulfilling the preconditions of private and public autonomy. The EU model constitutes a potential "second chance" not only for Europe itself, but for modernity to fulfil the negative and positive rights of citizens announced in the French Revolution's *liberté, égalité, fraternité*. We are presently in an exceptional historical period when a revolution over the communicative preconditions of political and social well-being has been fought for, and is, in some respects, ready for the

articulating: a revolution armed with constitutional proposals and complemented with the urgency and commitment of civil society in the streets. The obstacles and forces which loom large in our imagination against such a reconstructed basis for societies are not a mere chimera, but they must not be one-sidedly stated: *ce n'est pas qu'ils sont grands, c'est que nous sommes à genoux*.¹⁵⁹

The gaze of critical theorists has been too low. One's gaze must raise wills, not lower them. And as Fraser (1997, 2) notes, political criticism must not fall for the current pressure to curtail their ambitions to remain purely *oppositional*. The fact that the possibility for a supranational and justiciable system of justice for all is emerging *at all* is thanks to a long history of struggle by civic, class, environmental, women's, and cultural groups for *creative* alternatives. It has been these movements that have created a particular constellation that currently provides a basis for improving beyond their borders social and economic rights that are already widely accessible for their citizens.¹⁶⁰

Nonetheless, critical theorists must continue to believe in a better local, national, and *international* community, in the reflective knowledge that the barriers and dangers are considerable. But such barriers and dangers should not discourage and be dwelled on. Rather they should but act as impulses for the human spirit to reflexively and democratically conceive of alternatives. This does not require self-interested privatism or wallowing cynicism, but

¹⁵⁹ An old Chinese proverb imparted to the author in an interview with Ralph Miliband.

¹⁶⁰ In other words, this possibility has nothing to do with a certain neo-functionalist assumption of an eventual integration and spillover of policies from relatively noncontroversial to more sensitive political areas of policy (Baum 1996, 6).

rather uplifting reflective action in which *all* --particularly the most marginalized of our postnational citizens and those in the nonhuman environment-- can pursue impassioned lives thanks to contextualized, reflective, inspired individual, collective and institutionalized efforts.

Appendix:
Some Conceptual Background to Habermas' Theories of Democracy and Rights

This Appendix provides an overview of four elements that can help the reader to conceptually situate this study in Habermas' work. It provides: (i) a brief *annotated bibliography* of Habermas' principle works; (ii) a brief overview of an important thesis of Habermas' *discourse theory of society*; (iii) a longer consideration of the framework for his *discourse theory of morality*; (iv) and finally a *critique* of certain tendencies in Habermas' recent work which offers me an occasion to briefly reveal some of my own biases.

(i) With over 3,000 secondary sources as of 1990 (Rasmussen 1990), not only does the literature on Habermas deserve its own bibliographic book, Habermas' very theories, related to the various disciplines, also deserve detailed attention. However, the primary purpose of this project is not to (re)describe Habermas' analytic architectonic social theory found most systematically in TCA1 & 2. The "overriding concern" is to get a "bearing" on the implications of his *normative* theories of *democracy* and *rights* for contemporary practical and emancipatory projects. This focus on elements of his democratic and legal theory does not rely on extensive familiarity with Habermas' more sociological and analytic work. In any case, elements of that theory that are incorporated in the description of his theories of democracy and law above. While an extensive review of Habermas' more sociologically conceived theory of communicative action is of great interest, it would inevitably take this project down the more familiar path of another largely one-sided commentary and theoretic volume on Habermas. (For some of the best representative examples see McCarthy 1978; Ingram 1987; White 1987; Rasmussen 1990. For a broader review to situate Habermas among other members of the Frankfurt School and its own intellectual history see Held 1980; Benhabib 1986; Honneth 1991; and Wiggerhaus 1994.) For this reason, this work circumscribes long descriptions of Habermas' previous *sociologically* articulated analytic architectonic by limiting itself to its influence on his discourse theories of democracy and law. Clearly, a project with a theoretic and empirical dimension that, in addition, is attempting to remain relatively accessible to non-Habermasian and non-European specialists alike must self-consciously not even make pretensions towards attempting to provide, in one volume, complete "comprehensiveness" in either its analytic or empirical framework.

Instead, and more positively, I will concentrate on Habermas' normative work, especially his theories of democracy and rights and other comparative normative theories. However, since an appreciation of his more sociological analytic basis is, nonetheless, useful reading, I will direct the reader to either secondary, but more usually Habermas' own works which I consider useful for further reference on the specific topic or issue as it is broached. I begin this process below with a brief annotated bibliography of Habermas' principal works concerning this project. Then I highlight the background theory which *most directly* informs the democratic and rights work in the current project. (Please see "Limitations" section above for further stylistic and methodological considerations.)

In regards to Habermas' largely *sociological* and critical analyses of the structural dynamics, crisis tendencies, and social forces which inhibit and promote changes to the social,

at a structural and individual level, his two-volume *Theory of Communicative Action* (and the single volume *Legitimation Crisis*) is foundational. Through a deep and wide history of authors and approaches, from Durkheim, Marx, Weber, Mead, and Gadamer (the latter in *On the Logic of the Social Sciences, inter alia.*) to Lukács and the early Frankfurt School, Habermas lays out the basis of his own reconstruction of a *critical theory of society* based on his theory of communicative action. In his analysis, he considers everything from the positivist, systems, structural functionalist, and Marxist approaches, to the phenomenological, linguistic and hermeneutic approaches to help determine the bases for the change of Western societies from their traditional to modern forms of social integration and meaning formation.

With regards to his more *philosophical* reinterpretation of the dual character of rationality, and his own reconstruction of a philosophically defensible moral point of view as the basis for a new theory of justice, there are several relevant sources. In addition to the above two-volume *Theory of Communicative Action*, the *Philosophical Discourse of Modernity* (1987) provides the most sustained defence and immanent critiques of the aporia and, as Habermas views them, outright deliberate mystifications of some of the heirs of left and right Hegelian, and post-Nietzschean positions. In Habermas' view, the aporia concern the potential of the counter discourse of modernity to develop from itself the normative bases for social criticism, and hence the prospect of reconstituting an emancipatory program at least as a *normative and philosophical possibility*. *Moral Consciousness and Communicative Action* (1990) and the follow-up volume *Justification and Application* (1993) are the properly philosophical elaborations on the preconditions for his *discourse theory of morality*. This discourse theory of morality is an elaboration on the universal pragmatics for a communicative rationality oriented towards the consensual agreement of norms (first elaborated in *Communication and the Evolution of Society* (1979)). His work in *Postmetaphysical Thinking* (1992) represents a further detailing of the pragmatic basis (from Pierce and Austin) of his attempt to philosophically justify the unavoidable embeddedness of "speech act immanent obligations" to the normal moral and cognitive development (from Mead and Kohlberg) of a critical, postconventional form of identity formation.

(ii) Let us turn now to the principal *sociological* thesis that provides the background to this work. Although Habermas' "early work" took a rather one-sided view of the "fall" of the public sphere (in *Strukturwandel* ([1962] 1991), *Towards a Rational Society* (1971), and *Legitimation Crisis* (1973)), he has noted in the new introduction to STPS that "my diagnosis of a unilinear development from a politically active public to one withdrawn into a bad privacy, from a 'culture-debating to a culture-consuming public,' is too simplistic. At the time, I was too pessimistic about the resisting power and above all the critical potential of a pluralistic, internally much differentiated mass public ..." (RPS 438).

However, already present in Habermas' crisis analyses were the germs for what would become his normative theory which began to focus on the more suggestive *logic and dynamics of the rationalization of the lifeworld*. This is a *sociological* attempt to analyse why the promise of modernity to achieve a more just society has fallen short of its potential. (See PDM concerning the "fork in the road signalled but not taken" in the post-Hegelian *philosophic* critical tradition.) The argument hinges on two distinctions in the TCA: first between the

rationalization of the lifeworld and the rationalization of the system; and second between the *logic* and *dynamics* of social development.

Regarding the former, a "lifeworld can be regarded as rationalized to the extent that it permits interactions that are not guided by normatively ascribed agreement but directly or indirectly --by communicatively achieved understanding" (TCA2 326, 329, 340). This, Habermas regards as "wholly positive" and should be distinguished from the contrasting tendency toward the rationalization of the system. Here, the *regulation* of action through money and bureaucratic power increasingly encroaches upon (or "colonizes") the capacities for critical argument, which leads to a "cultural impoverishment" of the lifeworld, and the appearance of increasingly visible pathologies (TCA xi).

Secondly, Habermas distinguishes between the *logic* of potential but unrealized communicative possibilities and the *dynamics* of actual historical development (a distinction he believes Weber and later Arendt overlooked in their rather one-sided *Verfallsgeschichte* (history of decline) of modernity). The logic of development derives from the structural differentiation of the lifeworld into three cultural value spheres (science, norms and art). If allowed to proceed uninterrupted, these would progress towards post-conventional identities and the erosion of domination. However, this process *is* interrupted and empirical development takes the distorted forms of a lifeworld restricted by the global capitalist economy and the bureaucratic-military state.

In addition, *social change* from one *form* of society to another takes place when the following four *conditions* are met: new cognitive potentials and productive techniques are transposed from worldviews in which they had been latent into social institutions (for example, prior to capitalist development new cognitive capabilities had accumulated in medieval universities and organization techniques in the monasteries); this transposition occurs when systemic problems of the old order overload its steering capacity and throw it into crisis (for example, the disintegration of medieval feudalism); new rationality structures (both cognitive and technological) are stabilized in institutions (for example, the market and modern bureaucracies); new capacities for resource-mobilization can be deployed (for example, the application of techniques of labour-saving to the production process).

However, the stabilization of problem-solutions itself brings to the fore new systemic problems (such as class conflict or economic crisis tendencies (LC)). According to Habermas, *modern societies are precisely in the throes of a complex and problematic transition*, in which the binding force of conventional and traditional authority has been broken, but in which post-conventional norms cannot yet be stabilized (Ray 1993).

TCA focuses on the normative and structural conditions for emancipatory action. A unifying theme in Habermas 's work is the search for communicative rationality which will serve as the basis for both the critique of sociology and the location of new emancipatory potentials. To this end, Habermas goes to considerable lengths to develop an elaborate concept of communicative action which serves two purposes. First, through the theory of speech acts and social action it aims at demonstrating that the possibility of emancipation is located in the very constitution of the act of socialization. Secondly, Habermas looks for an historical embodiment of communicative action in social development --located in the lifeworld, a concept initially derived from [a] phenomenology but given a novel twist by linking it up with

an analysis of [b] identity formation and [c] the public sphere (Ray 1993, 24).

(iii) Perhaps more closely related to his discourse theories of rights is the third element we will cover here: the principal framework he developed for his *discourse theory of morality*. The general compulsion to develop such a theory developed after the "sacred canopy" of religion and the Hegelian notion of a universal history –with a guiding thought that is capable of surveying the whole of history as a pre-given totality– were deemed insufficient for providing the most general categories for the critique of history and knowledge. As a result, critical theorists have been forced to grapple with the problem for determining *what concept of truth* a critical theory can appeal to in legitimating its own standpoint of justice. Habermas seeks this neither in a divine will, or a mortal consciousness bound to worldviews based on mere fact or norm. Rather he seeks the basis for social criticism in a linguistic reformulation of historical materialism where language is seen as a "universal medium" through which the social and emancipatory life of humans could unfold. Through this medium, the socio-cultural form of life is bound to systems of symbolically mediated interaction, rather than consciousness. A universal pragmatics of language would provide the normative basis of communication, *plus* it would simultaneously explain the nature of systematically distorted lifeforms (McCarthy in LC xi, xii).

The "transcendental-pragmatic" dimension of Habermas' strategy for justice and the basis for normative judgements in social conflicts are based on the claim that argumentation necessarily involves pragmatic presuppositions from whose normative content a basic moral principle can be derived (JA 83-86).¹⁶¹ Unlike the categorical imperative of Kantian moral theory which relies, to some extent, on a principle of private moral deliberation, Habermas' normative basis for social criticism requires a bridging principle of publicity which insists that all affected by a decision must be able to accept the consequences of its general observance. Such general observance would in turn rely not on forms of transcendental consciousness (Kant), or on ethically-generated notions of the good (Taylor), or restricting political conceptions of justice to issues which can generate an "overlapping consensus" (Rawls), but on radicalized forms of and forums for communicative interaction. This turns Kant's enlightenment project of submitting all claims and counterclaims to authority to the free examination of public reason and ultimately to "establishing institutions and procedures to give them social effect" (McCarthy 1997, 214 & 204). While a discourse theory of morality is

¹⁶¹ While making the distinction between strategic and communicative rationality and action, Habermas' earlier work suggests that one must also make the distinction between the *intentions* of the actors. For instance, one should distinguish between instrumental or strategic action oriented towards private, selfish, technical and individual gain and interest, and instrumental action oriented towards an *emancipatory interest*, or strategic action and rationality taken in the interests of all. However, later Habermas abandons this "epistemological" basis for justifying action orientations. He seeks instead to base the determination of the relative "morality" of actions on different intentions of actors using practical (as opposed to purely theoretical) reason.

generally used to raise validity claims and with it a common "global" language and (procedural) conditions to bring just outcomes to generalizable interests, he no longer talks of it in terms of an "ideal speech situation." The latter formulation has led too many critics (such as MacIntyre and Wellmer) to fall victim to the "fallacy of misplaced concreteness" or the "hypostatizing of the ideal" (BR 146-9; JA 163-165). All these have also led to an exaggeration of the importance of *moral philosophy* (compared for instance to political economy and legal theories. See Cronin 1993, xx).

The general importance of a moral or ethical theory is that it is supposed to help one decide how to make a judgement on how to act. However, according to Habermas, this conflation of "moral" with "ethical" (and political) theories is the basis for deep-seated problems in contemporary political philosophy. The dominant image of Habermas' theory of justice has been of a German philosopher attempting to establish one-sidedly universalist (i.e., hermetically sealed) presuppositions for an ideal speech situation (a reworking of Apel's *Ideale Kommunikationsgemeinschaft* proposal) through which *all* discussion and judgement could and *should* pass to validate claims. This characterization has been partially due to his own confusion in calling some of his earlier work the search for an *ideal* speech situation, and his later work a discourse ethics. Instead, he has clarified his work as a more differentiated (and less ambitious) discourse theory of morality. (The confusion was naturally also aided by those who have been too suspicious of *any* attempts to retrieve an emancipatory potential from the public use of reason.) Nonetheless, criticisms that his theory of justice does not allow for a diversity of voices, or, in his conceptualization, "action orientations" have helped him recently clarify this issue.

As noted above, Habermas' first step towards clarifying his view of diversity in political action orientations is to acknowledge that the term "discourse ethics" is too broad a term under which to attempt to understand and provide a normative political theory to help orient the diversity of discourse and action orientations in Western societies (JA, Preface, 2). Instead, he clarifies that what he had been preoccupied with providing before were the preconditions for a *discourse theory of morality*. This refers to the necessary preconditions in a given situation to achieve some *generally binding consensus* of what norms are best for *all* those concerned in a given society.

Compared to this a discourse theory of democracy would have different, less stringent criteria (BFN 565, n.3). It would not attempt to seek what moral norms are equally good for all in society, but rather, set up conditions which would mediate and allow all those *who are affected by a particular issue* to attempt to come to some necessarily imperfect and temporally binding agreement from all of their varying strong preferences. Rather than viewing Habermas' project as conceiving of a uniform approach to decision-making or only oriented towards consensus formation around some sense of hypermorality, Habermas recognizes the misunderstanding that his use of the notion of discourse ethics had on those concerned with such issues as context, power, identity, etc. in the formation of new political will (he has made brief mentions of this misunderstanding before. See for instance, AS).

His conceptual categorization of the different uses of reason (and the validity of even ignoring reason altogether in the appropriate context) is useful in understanding how a citizen may decide to act under different constraints and possibilities. It helps clarify the different

assumptions that underlie Kantian, Aristotelian and utilitarian approaches to morality. These three philosophic approaches have *generally* been oriented towards moral, ethical, and pragmatic bases for judgement respectively.

In *Justification and Application* (1993) Habermas refines his distinction between morally, ethico-existentially, and politico-pragmatically oriented uses of reason. According to Habermas, *ethical* questions contain imperatives which can be understood as an "ought" that is a strong subjective preference and, yet, which is not absolute. "What you 'should' or 'must' do has here the sense that it is 'good' for you to act in this way in the long run, all things considered."

However, according to Habermas, the meaning of the question 'What should I do?' undergoes a further transformation as soon as my actions affect the interests of others and lead to conflicts that need to be determined through a process that would allow some form of consensus to emerge that would be at least temporarily acceptable to all, that is the use of reason from the *moral* point of view.... [E]thical questions point in a different direction from moral questions: the regulation of interpersonal conflicts of action resulting from opposed interests is not yet an issue. Whether I would like to be someone who in a case of acute need would be willing to defraud an anonymous insurance company just this one time is not a moral question, for it concerns my self-respect and possibly the respect that others show me, but not equal respect for all, and hence not the symmetrical that everyone should accord the integrity of all other persons (JA 5).

Finally, Habermas makes a third distinction beyond ethical and moral points of view to that of the pragmatic.

Pragmatic tasks are informed by the perspective of an agent who takes his preferences and goals as his point of departure. Moral problems cannot even be conceived from this point of view because other persons are accorded merely the status of means or limiting conditions for the realization of one's own individual plan of action. In strategic action, the participants assume that each decides egocentrically in accordance with his own interests... (JA 5-6)

Habermas' reference to understanding the appropriate *level* of discourse in order to approach a problem on the right level –for instance, as a philosophic and moral problem open to speculative reasoning versus a more ethical problem subject to individual and group values, or a pragmatic problem requiring strategic considerations– is analogous to Held's notion of approaching problems and their solutions from either a position of what is ideal, what is attainable, and what is urgent (1995 206-216). For instance, much of Habermas' recent work on the discourse theory of morality has dealt with the ideal conditions for consensus formation around problems. This level of discourse is not always appropriately applied in conditions where there are choices to be made in a partisan political context between, for instance, a neo-liberal and a social democratic candidate. Although one may attempt to use a philosophic point of view to encourage or convince either candidate that they take a more moral position of providing universally accessible childcare, for instance, this level of discourse may not produce the ideal result. However, after this attempt has been exhausted, and the only alternative left to citizens is then the strategic contest between either of these candidates working from their

own ethically and pragmatically informed platforms, one must take action in the form of a vote that is a form of pragmatic and ethical discourse, or at the level of what goals are attainable or urgent, rather than what may be ideal. In the example of the universally accessible childcare, if that is one's ideal, the ideal that would stem from one's moral and philosophical arguments, then one would prefer to pick the social democrat's platform which may *approximate* that ideal goal rather than the neo-liberals' whose goal would be oriented towards a more *pay-per-service* orientation.

In the contemporary intellectual *milieu*, Habermas' discourse theory of morality is often compared to communitarian (such as Charles Taylor's) politics of the good. Taylor's politics of recognition and authenticity is a useful means to retrieve a sense of what he calls the "moral agent" (1992) which resides in all citizens, and which, when contacted, can be a source of "knowing" how and where to act on what is intuited as right or wrong in society. The means of recovering this Herderian sense of authenticity towards political and civic guidance for the individual is for Taylor best expressed by Rousseau:

Le sentiment de l'existence dépouillé de toute autre affection est par lui-même un sentiment précieux de contentement et de paix qui suffiroit seul pour rendre cette existence chère et douce à qui sauroit écarter de soi toutes les impressions sensuelles et terrestres qui viennent sans cesse nous en distraire et en troubler ici bas la douceur. Mais la plupart des hommes agités de passions continuelles connoissent peu cet état et ne l'ayant goûté qu'imparfaitement durant peu d'instans n'en conservent qu'une idée obscure et confuse qui ne leur en fait pas sentir le charme. (Quoted in Taylor 1994, 29.)

For Habermas, there are considerable and undeniable arguments in favour of the existential-ethical, community- and friendship-based models of the political. They are the voices and inward means of communication and understanding with our "moral expectations" (MCCA). However, while Taylor's theory is a useful mode of *inner* communication in order to either retrieve the moral agent at an individual, or, more radically, at a social level, such a mode of communication may *also be inappropriate for a particular kind* of "discourse," especially if considered on its own (SR). Its inappropriateness in more formal means of decision-making and in complex and *power-laden* contexts becomes particularly apparent when these models lack critical criteria for determining the rightness of validity upon which *diverse* individuals, groups, or nations, *et cetera*, can agree as being *relatively* free of power or of strong or "integrative" preferences. For the danger of models that *rely* solely, or *undifferentiatedly* on a pre-given and integrating ethical horizon or intuitive basis is that if others cannot freely see their general will embodied in the virtues of such an horizon, at its most extreme, as Rousseau says, "on les forcera d'être libre."

It is essential therefore, if one is to provide a useful critique of Habermas' work (such as BFN), to engage its arguments at their appropriate level. While BFN is a largely theoretic piece which seeks "coherence at a metalevel" (Preface), it necessarily exposes itself to attacks by both "realists" and "visionaries" due to the precise fact that it at least attempts to *bridge*,

again, without collapsing, the gap between these two levels of discourse and analysis.¹⁶²

Such an attempt at bridging-without-collapsing the discourses of "theory and practice," moral, ethical, and political theory and its implications is still crucial to Habermas. While viewed as problematic by those who may maintain a one-sided theoretical interest in emancipatory work, for instance, Habermas suggests that the practical *engagement* is really a necessary *dimension* of even theoretic work in order to avoid cognitive, moral and existential quagmires. This is the means by which and the point where Habermas' moral theory strengthens itself with the infinite other "background" sources of ethical and moral vision. "Moral issues" Habermas states in *MCCA*,

are never raised for their own sake; people raise them seeking a guide for action. For this reason the *demotivated solutions that postconventional morality finds for decontextualized issues must be reinserted into practical life*. If it is to become effective in practice, morality [and a discourse theory of morality, for instance] has to make up for the loss of concrete ethical life that it incurred when it pursued a cognitive advantage. Demotivated solutions to decontextualized issues can achieve practical efficacy only if two resulting problems are solved: the abstraction from contexts of action and the separation of rationally motivated insights from empirical attitudes must both be undone. Every cognitivist morality will confront the actor with questions both from the situation-specific application and of the motivational anchoring of moral

¹⁶² For example, Habermas notes that BFN has been interpreted by some as utopian and by others as conservative (BR 88). Those more familiar with the reality of power politics would make the former point, and those who argue from the more comfortable position of philosophical analyses and ideals will identify his efforts as conservative.

Less centrally, but worth noting is that there also tends to be an in-built methodological bias in the debate between the radical proceduralists and communitarians. This bias can be exemplified by the argumentative fallacy which often stymied theorists during Cold War debates. In such debates, those arguing for "capitalism" would usually refer to the *ideal* of capitalism, with its values of individualism, prosperity, and freedom while attacking not the *ideals* of socialism, but rather the "actually existing" state communist countries. Of course, these are two entirely different levels of discourse with entirely distinct burdens of proof to support the validity of their arguments. Instead, for a mutually constructive debate to occur, philosophical points should be responded to with reference to philosophical arguments, and practical-political arguments should be advanced with practical-political points. Whereas the individual arguing for a philosophical ideal will always have an easier time to defend her position than the individual who must defend or promote a position that is thrust into the quagmire of actual (socio-economic-geo-) political struggle.

While the content of the communitarians versus the radical proceduralists' arguments is different from that of the "capitalism vs. socialism" argument, communitarians often engage in similarly slippery forms of debate, which makes deeper understanding of the actual *philosophical versus political* differences and similarities, strengths and weaknesses between the recognition and radically proceduralists' approaches difficult to achieve.

insights. And these two problems can be solved only when moral judgment is supplemented by something else: hermeneutic effort and the internalization of authority" (MCCA 179; see also JS for an elaboration on the internal relationship between "justice and solidarity" in "Stage 6".)

The "abstraction from contexts of action and the separation of rationally motivated insights from empirical attitudes must both be undone" by *continually reinserting* oneself back into the source of one's conception of ethical life. The source of this conceptualization of ethical life is varied, stemming from "the moral grammar" that we find in our materialist, bodily, historical, ethical, everyday and solidarity circles. Although more politically, ethically or morally oriented theories and philosophical approaches –*including* that of Taylor's-- can help ethically and politically reorient ourselves, the works of authors as diverse as Fraser, Marsh, Benhabib and Honneth have sought to develop their own more politically, embodied, and vibrant ethical approaches which nonetheless do so with an appreciation of the overall framework of work such as Habermas'. As I understand him, it is Habermas' contention that these theories and philosophies that help the individual develop an embodied and inveterate sense of the good and the right are the most important means by which one develops the *sense of appropriateness* (*Sinn der Angemessenheit*) which is the bridging mechanism by which individuals help develop an understanding of *which* level of discourse is appropriate to engage in (JA chap. 5). A deontological and abstract theory of morality cannot adequately fulfil this role.

(iv) This dissertation, while accepting much of the general framework of Habermas' project, is also somewhat critical of certain tendencies in Habermas' project. These tendencies include, for instance, the overly formal and moral character which Habermas' later work took on; his perhaps excessive critique of the redemptive power of a democratic state and its administrative infrastructure, while elevating, on the other hand, an undifferentiated civil society; but, more importantly, and yet connected to the latter point is his marginalization of the distorting effects of corporate power and class generally. While these critiques emerge within the chapters of this dissertation, I will encapsulate them briefly below.

First, even while respecting the need for the *analytic* differentiation of levels and forms of discourse as noted in the above section, this work nudges, and even pushes, Habermas along where his more *formal* approach and move to a more *moral* theory often seem to prevent him from going. For instance, whereas the move from a mere philosophy of consciousness to a philosophy of intersubjectivity and communication is radical and emancipatory, an adherence to a deontological and formal approach can, as many have argued, lead to the virtual entrapment of the author in the sometimes artificially set bounds of his theory (cf. Rasmussen 1990; McCarthy 1991; Honneth 1991; Benhabib 1992 for friendly critiques.)

I am also critical of Habermas' lack of a clearer account of the resurgent importance of the power of money and class relations. I take this position nonetheless with a sympathetic eye towards the historical and political context in which he has written much of his work (see, for instance, the *Concluding Remarks*). This lack of clarity regarding the still *strongly* structuring character of class relations allows itself to fall, for instance, into the excessive use of such works as Cohen and Arato's effort on civil society. Therein, for instance, they tend to

highlight *what* the spheres of civil society consist of, such as privacy, publicity, legality, and plurality. However, less explicitly elaborated is *who the subjects* are who make up this intersubjective plurality of "civil" society (BFN 370).

One is tempted to think, though, that the old attempted sleight-of-hand of liberal theory exposed by Marx regarding *bourgeois-homme-citoyen* (STPS 111-129) continues only slightly modified as *bourgeois-société civile-citoyen*, whereby "civil societism" (rather than the more blatantly and one-sided liberal-individualist "*homme*") and the concomitant talk of critical but insufficient-on-their-own political and civil rights are the new clothing to continue to seduce critical publics into a cozy slumber. For instance, Cohen and Arato's (1992) highlighting of the issue of human or civil rights were critical in consideration of the historic epoch and presence of the catastrophic abuses of those rights in the former state communist countries of the East Block. However, as I argue in this project, critical attention, at least in the Western liberal democracies, while keeping those rights *firmly* in sight (Sunstein 1994), must move on from a *one-sided* consideration of those rights which the dominant liberal political culture already safeguards fairly well (at least for certain classes of "civil society").

This attention to differentiate what we are attempting to limit or conversely aid in the access to legislative power in the vague concept of "civil society" is conceptually and politically essential. While it is certainly portentous to differentiate the economy from the political system to highlight its illegitimate influence on the latter, the *who* that needs limiting and the *subjects* within civil society that need greater access to the communicative power of the citizens' primary public forum for legislative power are sometimes left unclear.

Similarly, while we are clearer about Habermas' general *principal* intention --to point to ideal preconditions for fairness in order to expose extant illegitimate conditions of access to power (Benhabib 1992)--, he is not always clear on *who* he sees as problematically accessing the power of the state. On the one hand, Habermas does not elaborate much on the *economic elites'* desire to rollback or block, for instance, environmental protection policies; or national, regional, provincial, or municipal levels of *parties or incumbent governments* that wish to rollback social programs in the populist name of "localism" (Alinsky 1971) or by appeal to the self-correcting market mechanism as a more efficient functional system than national, constitutionally determined standards for the protection of the environment, women, or the poor. Or, finally, they are members of "civil society" itself, such as bigoted or racially motivated associations, that wish to have certain gains *by other members* of "civil" society repealed.

Therefore, membership and arguments of these three analytically distinct subsystems --the economy, administration, and civil society-- need *to be distinguished*: for instance, in the sphere of the economy (small- and medium-sized enterprises from transnational and unregulated international money and bond traders); in the subsystem of power (parties and governments, bureaucrats, officials and judges who and which are open rather than *pre-judicially* closed to new social and economic protections); and, finally, the differentiated members of civil society mentioned above.

Habermas laments that too many "critical" models are too one-sidedly crisis-oriented rather than reconstructive-oriented (BR 138-139, 141). Nonetheless, his own crisis analysis and initial lop-sided critiques of administrative power, which he is haltingly attempting to

distance himself from (BR 135), are now coming to haunt his *other* interest embodied in the EU, that is to develop postnational identity bases. However, his self-confessed one-sided critical analyses of administrative power were so influential that they continue to inform one-sided criticisms of the EU as being too bureaucratic, rather than equally pointing out other even more serious sources of democratic illegitimacy (BR 158).

The relatively excessive lambasting of *state* "paternalistic bureaucracies" *tout court* by Habermas, "oriented as they are by economic rationality" (BFN 503), is still a problem in much of his work. Admittedly, Habermas has recently attempted to distance himself from this critical *focus*, especially in light of what he calls the "devastating" distorting effects of external economic power formations (not merely economically-oriented administrators, for instance) on the conditions for citizens' opinion- and will-formation (BR 180).

Finally, we must remember that the neo-conservative "revolution" occurred in part due to the fact that critical social scientists in welfare states were largely caught writing and reading, again and again, largely one-sidedly critical works on welfare and political rights systems and their institutions rather than building on positive *reconstructions* of those albeit ambivalent, dual-sided rights and institutions struggled for by previous generations (Fraser 1997; Rorty 1998).

As Honneth has pointed out, Habermas' own theory has possibly led to the encouragement of this middle-class self-interest. By proposing that political struggle has moved from "cruder" ideological and class issues to issues concerning the more nuanced, postmaterial fragmentation of the lifeworld, Honneth suggests that Habermas anointed those with greater intellectual and analytic capacities to recognize the dissonance between distorted and undistorted communicative forms as the emergent vanguard of social change. The consequence of this class anointment and the orientation away from class to postmaterialist issues was that it legitimized, ironically for Habermas' more universalist project, a narrowing of the research interests of intellectuals away from the multifaceted manner in which the power of money distorted social and political life and institutions towards analysing and describing the variety of distortions *within* the social itself.¹⁶³ Rather than retracing it to the economic

¹⁶³ Along with other authors interested in revitalizing civil society, Habermas holds a deep regard for the *cultural* activism and agonal spirit released by the French Revolution. However, in a spirit that resonates with the critique by Horkheimer and Adorno of the massification of culture, he notes the "ambiguous physiognomy" of the expression and implications of a one-sided cultural politics. "One is not quite sure," he suggests, "whether this 'culture society' reflects only the commercially and strategically 'exploited power of the beautiful' --a semantically desiccated, privatistic mass culture-- or whether it might provide receptive ground for a revitalized public sphere" (PSP 471; cf. Rorty 1997).

One has reason to wonder whether the culturalist orientation, particularly if it does not continue to theorize *other*, often more monarchial and not merely "discursive" or cultural forms of power, can seduce one to be a "nonconformist" in issues that do not matter for marginalized groups, individuals, or one's own integrity, and a conformist on issues and in moments that do (Fraser 1997).

realm, the middle-class theorist has tended to trace it back to another realm of research, which Habermas legitimized, the administrative realm. The tracing back of distorting effects to this sphere, rather than *also* to that of economic relations within which the middle-and upper-middle class intellectuals were themselves implicated, has provided a "complementary" voice to more right-wing anti-state theories.

It must be recalled that while Habermas' own theoretic perspective has encompassed the understanding and research interest in the effects of all three --social, political, economic-- forces on each other, other critical theorists have sometimes fallen for the current social trend to consider only parts of his analytic and research framework. This has helped to legitimize a culturally, socially and, as Honneth notes, more professionally rewarded orientation within capitalist society. As he notes, "the cultural milieu of the dominant class awards premiums of social recognition to the most complex and abstract presentation of normative convictions without examining the power of these ethical self-portraits to provide action orientation." Meanwhile, the social underclass does not have a "comparable potential to stimulate the elaboration of its own value conviction; rather, its members are excluded from the possibility of ethical examination or verbal stylization of their norms of action by the processes of cultural reproduction ..." which some critical theorists have themselves helped to reproduce (Honneth 1995, 211). This can also serve as at least one criticism among many for which some of this present work and its author are accountable.

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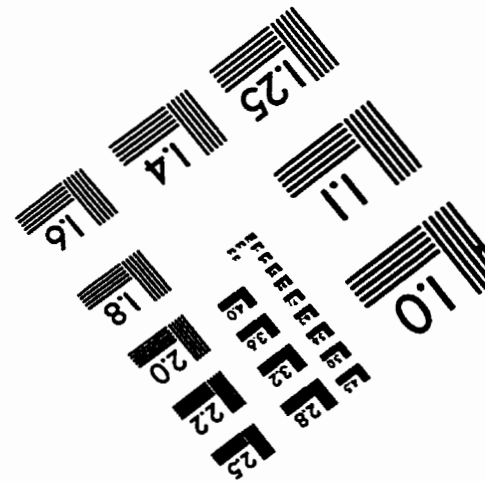
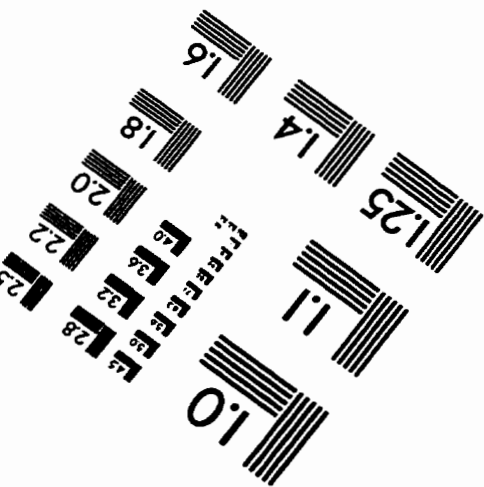
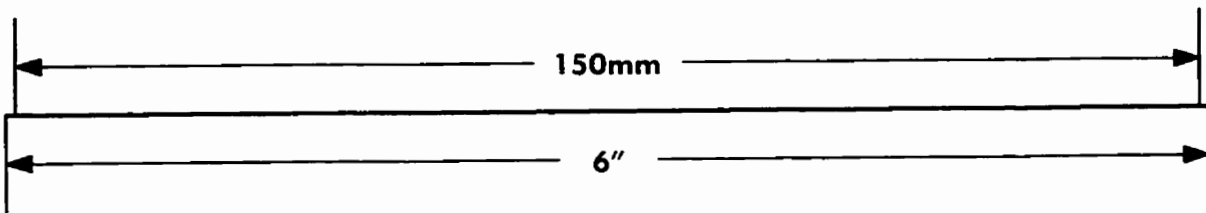
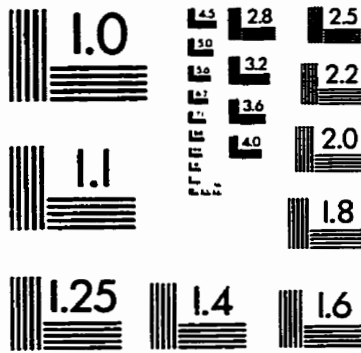
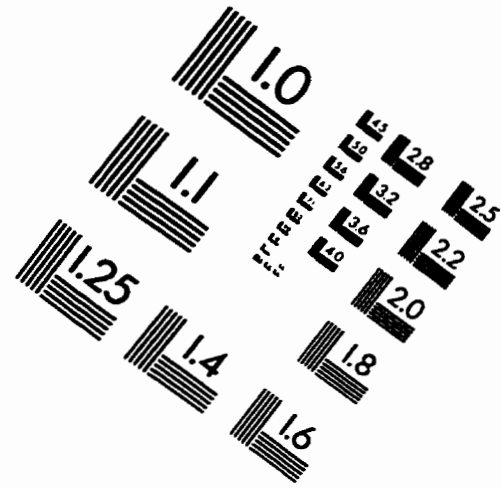
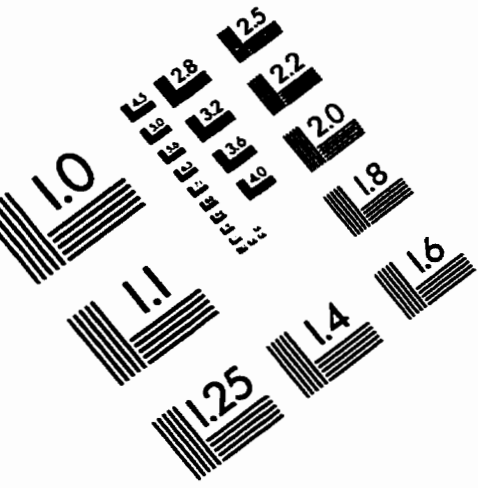
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