
Habermas at 90: A personal and professional tribute

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For those laboring at the conjunction of moral, political, legal philosophy and constitutional theory within the past half century, Habermas together with Rawls have been by far the dominant and most influential figures. As a law student and graduate student in philosophy in the US during the 1970s, most of the relevant discussions centered on Rawls, but I became increasingly engaged with Habermas's formidable philosophical and sociological early writings as a critical theorist and heir of the Frankfurt School.¹ By the 1980s when I entered the legal academy, Habermas had taken a major turn toward the Kantian camp through his monumental and path-breaking work on communicative action that laid the foundation of his discourse theory of morals, ethics, and law.² From his Hegelian and Marxist origins with an emphasis on the priority of substance over procedure, Habermas turned to a Kantian conception of justice as independent from the good. Habermas also set out to perfect Rawls's proceduralism by overcoming its social contractarian limitations through promotion of dialogically based consensus.³ Viewing Habermas's entire intellectual trajectory from a bird's eye view, what is most impressive is his unbending commitment to the equal worth and dignity of all human beings as against all oppression and excesses stemming from the spread of exclusionary ideologies, contested conceptions of the good, or systemic encroachments. Throughout his long and most illustrious intellectual journey, Habermas has been guided by an ironclad determination not to forget the unspeakable evils of Nazism and to erect the most unforgiving comprehensive theoretical barrier against the recurrence of or return to any ideological bent that may open the way to any tendencies towards such evils. In essence, Habermas is an endlessly creative, resourceful, innovative, and unyielding defender of the ideals of the Enlightenment against all odds: disenchantment and instrumentalization of reason;

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¹ See, e.g., JÜRGEN HABERMAS, *THEORY AND PRACTICE* (John Viertel, trans., 1973).

² See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy, trans., 1984).

³ For an account of the evolution from Rawls's social contractarian position to Habermas's consensus-based theory, see Michel Rosenfeld, *A Pluralist Critique of Contractarian Proceduralism*, 11 *RATIO JURIS* 291 (1998).

globalization and its discontents; fundamentalist global terrorism; postmodernism and post-secularism; as well as illiberal populism.⁴

I met Jürgen Habermas in December 1990 when he graciously invited me to his apartment in Frankfurt to discuss a conference that I had proposed to organize at the Cardozo Law School in New York upon the publication of his book on law and democracy which he was then in the process of completing.⁵ That conference took place in September 1992 upon the publication of Habermas's groundbreaking book in German and it brought him together with thirty-two scholars from various disciplines and parts of the world for an intense three-day discussion. Remarkably, and true to his commitment to communicative ethics, Habermas carefully considered and thoroughly responded to every comment and critique detailed by his various interlocutors.⁶ Habermas's book, which combines a sociological theory of law and a philosophical theory of justice, is a monumental achievement. As I noted in my endeavor to introduce the book to a broader segment of the American legal academy, in its scope and comprehensive nature, Habermas's opus is reminiscent of Weber's sociology of law and Hegel's legal philosophy.⁷

Habermas's book provides a novel and powerful answer to the key question that has bedeviled legal philosophy in our times: namely, how can law in all its coercive force be proven as legitimate or just to all those subjected to it given the divisions over interests, values, and conceptions of the good that are typically present within contemporary constitutional democracies. Habermas's proposal is encapsulated in his "proceduralist paradigm of law," according to which laws are legitimate if they can at once be justified as self-imposed by those who must obey them and as satisfying universalizable normative criteria, such as those embodied in universal human rights.⁸ Habermas thus reframes a proposed synthesis between Kant and Rousseau and, through reliance on an ideal discourse ethics that requires an equal opportunity for the presentation and consideration of all the various normative perspectives spread among the citizenry,⁹ expresses confidence in the construction or reconstruction of legal regimes that may be interpreted as self-given and as bridging across all the diverse relevant normative perspectives variously embraced within the polity.

Justification of legal and moral precepts in pluralist societies requires proportionate calibration of poles of identity and poles of difference. Kant's categorical imperative is purely abstract as it purges all differences and interests to focus exclusively on all

⁴ See Jürgen Habermas, *Conceptions of Modernity: A Look Back at Two Traditions*, in JÜRGEN HABERMAS, *THE POST-NATIONAL CONSTELLATION: POLITICAL ESSAYS* 130, 138ff (Max Pensky, trans., 2001).

⁵ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg, trans., 1996).

⁶ Final versions of the various critiques and Habermas's lengthy and thorough reply to his critics were published in MICHEL ROSENFELD AND ANDREW ARATO, EDS., *HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES* (1998).

⁷ See Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights* (Book Review), 108 *HARV. L. REV.* 1163, 1164 (1995).

⁸ See HABERMAS, *supra* note 5, at 414–415, 459–460.

⁹ See HABERMAS, *supra* note 2, vol. 1, 273–337 (Thomas McCarthy, trans., 1984).

human beings as ends-in-themselves. Habermas's communicative ethics, in contrast, allows for consideration of all the diverse interests spread among the citizenry in the quest for consensus on common universalizable norms.¹⁰ Notwithstanding Habermas's improvement on Kant, I have questioned whether discourse theory could yield pure procedural justice on three principal counts: first, Habermas only allowed post-metaphysical perspectives into the dialogue; second, his communicative ideal arguably disfavored certain perspectives, such as certain conceptions of feminism; and third, depending on the actual interests and ideological commitments in conflict, reaching normative consensus appeared ultimately contingent.¹¹ My disagreement with Habermas was over whether substance or procedure should be accorded priority, and whether justice could rise above the good. Habermas rejected my criticism and suggested that my own position owed more to procedure than I was willing to acknowledge.¹² As I revisit this disagreement nearly a quarter century later, and in view of the current worrisome turns toward tribalism and illiberal intolerance, I better understand the importance of Habermas's insistence on proceduralism. I am still not convinced that it can be pure or stand alone, but it is more than ever indispensable even if imperfect. At the same time, Habermas has expanded the horizons of his discourse ethics by becoming more open toward religious views without thereby abandoning his fundamental commitment to Enlightenment values.¹³

I have been fortunate to have had many exchanges with Habermas on both sides of the Atlantic. A particularly memorable occasion from the standpoint of the present Journal was a luncheon meeting that Norman Dorsen and I had with Habermas near NYU in the early 2000s when we were planning the launching of I•CON. Habermas was not only very supportive of the enterprise, but he most kindly committed an article which eventually became the first one published in the Journal.¹⁴ This article became a perfect vehicle to convey the Journal's commitment to exploring the theoretical as well as the transnational side of constitutionalism. Indeed, drawing on Western intellectual history, Habermas highlighted the distinction between mere tolerance of those the powerful cast as inferiors and equal tolerance based on mutual recognition and mutual acceptance of various religious and secular worldviews that are essential within the confines of contemporary constitutional democracy.

Habermas's greatest direct contribution to constitutional theory relates to his promotion of transnational constitutionalism, particularly in the context of the European

¹⁰ For an account of the contrast between Kant's monological approach and Habermas's dialogical one, see JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 195, 204 (Christian Lenhardt & Sherry W. Nicholsen, trans., 1990).

¹¹ See Michel Rosenfeld, *Can Rights, Democracy and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, in ROSENFELD AND ARATO, *supra* note 6, at 82.

¹² See Jürgen Habermas, *Reply to Symposium Participants, Benjamin N. Cardozo School of Law*, in *id.*, at 381, 404–412.

¹³ See JÜRGEN HABERMAS AND JOSEPH RAIZINGER, *THE DIALECTICS OF SECULARIZATION: ON REASON AND RELIGION*, at 45 (Brian McNeil, trans., 2006) (pointing to analogy between religious belief of "man in the image of God" and secular belief in equal dignity of all humans).

¹⁴ See Jürgen Habermas, *Intolerance and Discrimination*, 1(1) INT'L J. CONST. L. 2 (2003).

Union (EU), through the spread of “constitutional patriotism.”¹⁵ Building on a concept generated in West Germany,¹⁶ Habermas has promoted the thesis that the traditional link between constitutional ordering and the nation-state can be transcended through patriotic embrace of the ideal of constitutionalism. And that this as he sees it, in turn, provides the foundations for a constitutional regime assuring democracy and protection of fundamental rights that is susceptible to successful implementation beyond the confines of particular nations. Habermas’s understanding of constitutional patriotism has been controversial and much discussed among constitutional scholars, including in a symposium published in this Journal.¹⁷ Ironically, constitutional patriotism seemed well suited to one particular nation-state, namely West Germany, due to its unique historical situation. On the one hand, West Germany was bent on negation of its Nazi nationalist past, whereas on the other, it had to differentiate itself from its East German communist counterpart.¹⁸ I have been among those who expressed skepticism that constitutional patriotism in the absence of other significant sources of common identity could provide the necessary glue for transnational constitutionalism.¹⁹ In retrospect, however, the debate over constitutional patriotism in the context of the EU and its governing capacities seems to have been much more a matter of theoretical than of existential or institutional import. After all, every EU member state used to adhere to liberal constitutionalism and therefore EU governance could be legitimated whether it amounted to a constitutional arrangement, an international law based *sui generis* pact of integration, or an administratively coordinated regime backed by each of the member state’s national constitution. Most recently, in contrast, with the sharp turn toward illiberal populism through what many regard as constitutional subversion in certain EU member states, such as Hungary and Poland, Habermas’s promotion of constitutional patriotism acquires a whole new urgency as both an ideal and a reference point of critical analysis. And that holds true whether one focuses on constitutionalism within or beyond the nation-state.

As I reflect on Habermas’s contributions to the fields in which I have labored, I am certain that his theories will endure well beyond our own times. In this respect, the analogy between Habermas and Kant strikes me as particularly apt. Kant’s categorical imperative is exemplary though impossible. In a world in which none of us are self-sufficient, we cannot but rely on others as means. And precisely because of that, we should be mindful of the moral ideal according to which every one of us is an end in him/herself. Similarly, in the case of Habermas, pure procedural justification, consensus, and universalization will always remain beyond our horizon, but we should incessantly strive toward them in order to coexist fairly and peacefully in our increasingly pluralistic settings. Finally, constitutional patriotism may never stand alone, but its essence should always remain within our compass.

¹⁵ See Habermas, *supra* note 5, at 465–466, 499–500.

¹⁶ See DOLF STERNBERGER, VERFASSUNGSPATRIOTISMUS (1979).

¹⁷ See *Symposium on Constitutional Patriotism*, 6(1) INT’L J. CONST. L. 67 (2008).

¹⁸ For an elaboration of this point, see MICHEL ROSENFELD, THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE AND COMMUNITY 259–260 (2010).

¹⁹ *Id.*, at 260–261.