Prolegomena 20 (1) 2021: 119-136
doi: 10.26362/20210106

Constitutional patriotism in the context of Habermas's political philosophy

PREDRAG ZENOVIĆ
University of Donja Gorica, Oktoih 1, 81000 Podgorica, Crna Gora
predrag.zenovic@udg.edu.me

ORIGINAL SCIENTIFIC ARTICLE – RECEIVED 28/01/2021 ACCEPTED 03/05/2021

ABSTRACT: Although the work of Jürgen Habermas is often associated with constitutional patriotism as a post-national and post-conventional political identification and allegiance to a set of fundamental norms and principles of a political community, Habermas himself did not elaborate it as a fully-fledged theory. Nevertheless, this paper shows that constitutional patriotism is rooted in some of the most significant elements of his epistemology and is integrally embedded in his social and political theory. The idea of the paper is to offer, through the lens of Habermas's philosophy, a compelling logical and normative argumentation in favor of constitutional patriotism as a desirable and coherent conception of social and political integration in plural democratic societies. The paper examines the relevance of Habermas's theory of post-metaphysical reason, discourse ethics, and dichotomies stemming from the tension between liberal and republican paradigms for the notion of constitutional patriotism. At the same time, it explains how these theoretical fragments endow constitutional patriotism with normative validity and legitimacy in instances of its practical application in contemporary complex societies. The idea of the paper is to show the normative advantages of this concept and reaffirm its salience for contemporary theoretical debates on citizenship, social integration, and democracy.

KEYWORDS: Habermas, constitutional patriotism, cooriginality thesis, law, democracy, human rights.

Introduction

In his essay "Popular Sovereignty as Procedure" (1988), Habermas quotes German historian Rudolf von Thadden, saying at the German-French meeting in Belfort that with high immigration percentage, "nations run the risk of changing their identity," and that "soon they will no longer be able to understand themselves as monocultural societies, if they do

not provide any points of integration beyond pure ethnic descent." "In these circumstances," the quote continues, it "becomes urgent that we return to the idea of the citizen as the *citoyen,* which is at once more open and less rigid than the traditional idea of ethnic belonging" (Habermas 1997: 38). With the first wave of immigration to Western democracies, the need to integrate plural societies became the pivotal question of contemporary political philosophy. Habermas's answer to this question was constitutional patriotism.

Constitutional patriotism is often associated with Habermas's political philosophy and only recently with his intellectual debates on the future of the European Union.[1] It is clear that Habermas's idea of constitutional patriotism resonates with the change depicted in the abovementioned quote, which relates to a new, contemporary understanding of citizenship as a fundamental notion of political life in plural societies. Constitutional patriotism reflects this change: in a new socio-historical context, active or participatory and passive or rights-based (constitutional) – as well as identitary or patriotic – components of citizenship seek new interpretations. Nevertheless, since Habermas did not offer a fully developed and well-argued theory of constitutional patriotism, what kind of normative argumentation it rests on remains unclear, just as it remains unclear to what extent this notion fits into his general theoretical framework.

> The situation is somewhat different with the constitutional patriotism that first arose after culture and politics had been differentiated from one another more strongly than they were in the nation states of the old stamp. In this process, identification with one's own form of life and tradition was overlaid with an abstract patriotism that no longer referred to the concrete whole of a nation but to abstract procedures and principles. What the latter have in view are the conditions of common life and communication among different, coexisting forms of life with equal rights – externally as well as internally. (Habermas 1988: 9-10)

[1] The notion of constitutional patriotism re-emerged in the context of historians' dispute (*Historikerstreit*) during the mid-1980s between conservative and leftist intellectuals over the evaluation of Nazi crimes and critical memory in general. Since the shared history was full of crimes committed in the name of ethnicity, the past, the nation, or the state itself could not be a legitimate reason for the national unity. There was a need for a different focus on common, democratic identity and patriotic allegiance, which was supposed to be found in universal norms of a polity, its legal order, rather than in ethnicity, *Nazion*, or other historic, pre-political ideals. Dolf Sternberger elaborated his idea of constitutional patriotism in *Frankfurter Allgemeine Zeitung* of 23 May 1979, on the 30th anniversary of German basic law (*Grundgesetz*). The normative distinction between Strernberger and Habermas is clear: "where Sternberger's patriotism had centered on democratic institutions worth defending, Habermas focused on the public sphere as providing a space for public reasoning among citizens" (Müller 2006: 278-296).

Habermas situates constitutional patriotism within a dichotomy of political culture and culture *en generale*. "A liberal political culture is only the common denominator for a *constitutional* patriotism (*Verfassungspatriotismus)* that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society" (Habermas 1996: 500). Whereas "culture" is related to thick ethical, aesthetic, and axiological values in general, "political culture" results from the exchange and communication between perspectives of different traditions. "The universalism of legal principles is reflected in a procedural consensus, which must be embedded in the context of a historically specific political culture through a kind of constitutional patriotism" (Habermas 1994a: 135).

A broad body of literature emerged as a reaction to the idea of constitutional patriotism – both critique and support of its added value for contemporary political thought.[2] "Habermas's call for constitutional patriotism – like most appeals to cosmopolitanism – tries to establish a political community on the basis of thin identities and normative universalism" (Calhoun 2002: 157). "One of the key concepts that informs Habermas's response to questions of cultural diversity is his notion of 'constitutional patriotism'" (Baumeister 2007: 483). One might deduce from these statements that the implications of constitutional patriotism for Habermas's political theory go way beyond his explicit theoretical argumentation on that issue. This paper aims to shed light on specific parts of Habermas's comprehensive and ambitious political theory, relevant for the issue of plural societies and understanding of constitutional patriotism, to show that this concept implicitly, but coherently, echoes within the overall system of ideas that Habermas's epistemology and social philosophy offer. For methodological reasons, "constitutional patriotism" is used to denote post-national and post-conventional universalist political *identification* and *allegiance* to the set of normative components of a constitution, broadly understood as the political and legal order of a particular polity (Markell 2000: 40; Michelman 2001: 269).

The paper has four sections. Habermas's theory of post-metaphysical reason (section 1) grounds his social and political philosophy in the realm of intersubjective recognition and discourse ethics. Facticity and validity of law (section 2), Habermas's contribution to legal theory, reflect important dimensions of the dichotomy between public sovereignty and

[2] E.g., Ingram 1996; Canovan 2000; Markell 2000; Fossum 2001; Laborde 2002; Hayward 2007; Müller 2007; Schwartz 2011.

human rights, a *leitmotif* of modern and contemporary political thought. This theoretical dilemma of causal and normative primacy between republican (sovereignty) and liberal (rights) paradigms, which Habermas tried to overcome in his cooriginality thesis (section 3), has salient implications for his conception of legitimacy (section 4). By elaborating the theoretical fragments in Habermas's social and political philosophy, I will point to their possible theoretical and normative relation to and relevance for the notion of constitutional patriotism.

1. A post-metaphysical theory of reason and discourse ethics

To put forward some of his social theory arguments and embed them within a broader philosophical and historical tradition, Habermas develops a "post-metaphysical" theory of reason. He introduces the idea of communicative reason through which he overcomes the shortcomings of both metaphysically rooted substantive, foundational reason, which has been consistently called into question by 20th-century philosophy, and postmodern relativization of reason as such, problematized by the argument of performative contradiction.[3] This theory aims to reconstruct the practical and normative conditions for legal and political intersubjective communication. In principle, its main idea is to overcome the epistemological and theoretical abyss between individual and social dichotomies that stem from it: morality and ethics, validity and facticity of the law, private and public autonomy. The change identified in post-metaphysical reason consequentially reflects the idea of *social and political*, which, in Habermas's interpretation, attains new normative meaning[4] based firmly on the notion of intersubjectivity. This epistemological turn has direct implications for his ethics.

Habermas's concept of reason reflects the overall linguistic turn as one of the main streams of Western philosophy in the 20th century.[5] According to Rehg (1996: xiii), "for Habermas a post-metaphysical vindication of reason is possible only insofar as philosophy […] can show how the use of language and social interaction in general necessarily rely on notions of validity, such as truth, normative rightness, sincerity, and

[3] Cf. Habermas 1990a; Habermas 1992; Matustik 1989.

[4] Cf. Habermas 1992.

[5] "These themes – postmetaphysical thinking, the linguistic turn, situating reason, and overcoming logocentrism – are among the most important motive forces of philosophizing in the twentieth century, in spite of the boundaries between schools" (Habermas 1992: 8).

authenticity." The notions of legitimacy and validity are thus linguistically construed, which implies that the circumstances of speech acts in the public sphere are crucial for determining these notions' overall value/impact. The change in the concept of reasoning had to find its corresponding change in the overall political and ethical – in a word, normative – self-understanding of modern subjects.[6] The difference between "moral" and "ethical" in Habermas's view moderately reminds one of the Kantian position on the same matter.

> The distinction between autonomous and heteronomous actions has in fact revolutionized our normative consciousness. At the same time, there has been a growing need for justification, which, under the conditions of postmetaphysical thinking, can be met only by *moral discourses.* The latter aim at the impartial evaluation of action conflicts. In contrast to ethical deliberations, which are oriented to the *telos* of my/our own good (or not misspent) life, moral deliberations require a perspective freed of all egocentrism or ethnocentrism. Under the moral viewpoint of equal respect for each person and equal consideration for the interests of all, the henceforth sharply focused normative claims of legitimately regulated interpersonal relationships are sucked into a whirlpool of problematization. (Habermas 1994b: 4-5)

In Habermas, unlike in Kant's theory, both morality and rationality lie in private individual ethical and practical reasoning and result from interpersonal interactions. Since the discursive democracy and discursive ethics are focused on the communication process itself rather than its presumed aim, it is necessary to determine conditions that need to be satisfied by a form of communication free from distortions that impede the argumentative search for truth or rightness. Habermas formulates these conditions through three principles: universalization, participation, and free acceptance (Habermas 1990b: 65-66, 93). Already at this point, one might identify principles that constitute a core normative essence of constitutional patriotism. As the bases of constitutional patriotism as a concept, constitutions are necessarily acts of universalizing will that results from equal and free participation of those who consent on (accept) constitutional principles and rules. Like modern constitutionalism, Habermas's discourse ethics has its roots in the Enlightenment projects of democracy and continuous political emancipation.

[6] "The postmetaphysical legitimation of positive law must instead draw on peculiarly modern ideas – such as autonomy and self-realization which grew out of the very same process that destroyed the pool of premodern legitimations" (Habermas 1994b: 2) The issue of conceptual and empirical primacy between the two, one that stems from the liberal (autonomy) paradigm and the other from the republican (self-realization) paradigm, is resolved in Habermas's cooriginality thesis, which I address in section 3.

There are rules that should enable an ideal speech situation, the context in which discourse principles may be fulfilled. In "Discourse Ethics", these rules are listed as follows: 1) every subject with the competence to speak and act is allowed to take part in a discourse; 2a) everyone is allowed to question any assertion whatever; 2b) everyone is allowed to introduce any assertion whatever into the discourse; 2c) everyone is allowed to express his attitudes, desires, and needs; 3) no speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in 1) and 2) (Habermas 1990b: 86). This aspect of discourse ethics has clear implications for constitutional patriotism. Despite the pluralism of different comprehensive doctrines and worldviews in modern society, individuals and groups can still come up with a broad set of social values that result from intersubjective interaction.[7] The relevance of the results of such deliberation depends, as explained, on conditions in which debate takes place. For a constitution to be an object of allegiance and to enjoy full legitimacy, the context in which it is deliberated must be in accordance with the rules of dialogical requirements of discourse principle. Constitutional patriotism has motivational and normative strength only when constitutions result from such discourses. Not only is the ideal position of equality – which Habermas's discourse ethics implies – achieved by constitutional universalism based on equality of citizens regardless of their cultural and other particularities, but the constitution itself is an expression of communicative intersubjectivity that emerges in the practice of political life.

In relation to other pre-political values, in which reasons, principles, and values can be drawn from particular and hermetic worldviews, constitutional patriotism imposes the need to anchor them in the already accepted normative fields of consensus. The theory of communicative action, discourse theory, and the post-metaphysical reason on which they are based is the theoretical foundation for Habermas's dealing with the problem of ethical pluralism, conflicting comprehensive doctrines, and

[7] Referring to other authors who contest comprehensive doctrines as a source of ethical reasoning in contemporary societies, Habermas points to John Rawls's "political not metaphysical" theory of justice and Ronald Dworkin's theory of "law as integrity". Elaborating these two complex theoretical frameworks goes beyond the scope of this paper. However, one feature they have in common with Habermas's theory is evident. Namely, both Rawls's transition from justice as fairness towards political justice and Dworkin's law as integrity (which presumes that rights should be understood as constructively interpreted by judges and stemming from the community's conception of justice and fairness) imagine a sort of shared, procedurally obtained *consensus* over a coherent set of principles (cf. Dworkin 1986; Rawls 1993).

justice[8] in contemporary plural societies. "The transitory unity that is generated in the porous and refracted intersubjectivity of a linguistically mediated consensus," Habermas explains, "not only supports but furthers and accelerates the pluralization of forms of life and the individualization of lifestyles. More discourse means more contradiction and difference. The more abstract the agreements become, the more diverse the disagreements with which we can nonviolently live" (Habermas 1992: 129). In other words, the post-metaphysical intersubjective reason is not just a normative assumption but also a facticity that enhances the proliferation of social plurality. In this way, Habermas provided the epistemological and ethical basis for his conception of deliberative democracy, indirectly creating convincing normative arguments for a concept of constitutional patriotism. At the same time, this basis – the empirical intersubjectivity it entails – provides constitutional patriotism with a contextual dimension and idiosyncrasy, freeing it from abstract, elusive universalism.

2. Dichotomies of Habermas's conception of law

For Habermas, law signifies an overarching communication matrix that enables the exchange between system and lifeworld, between the network of our determined and expected relations and background contexts and discourses, between the public domain and private dispositions. As he clarifies, "the language of law, unlike the moral communication restricted to the lifeworld, can function as a transformer in the society-wide communication circulating between system and lifeworld" (Habermas 1996: 81).[9] The language of law that Habermas describes has specific rules and grammar, different from the rules and grammar of moral communication. In other words, law emerges in a particular discourse context and is led by its own prevailing reasons. However, the legal system and law itself should not be understood merely in a functional way. In a complex

[8] The post-metaphysical and intersubjective nature of reason will have normative implications for other aspects of Habermas's political philosophy. Referring to Habermas's concept of a proceduralist conception of justice, Rosenfeld (1996: 811) claims that "all perspectives that could be broadly characterized as metaphysical perspectives – including those framed by religious dogma and ideology – would effectively be excluded or, more precisely, would effectively exclude themselves from any dialogical process designed to resolve issues of justice."

[9] The system and the lifeworld follow normatively and functionally different patterns of rationality. "The system (bureaucracy and capitalism) is basically founded on instrumental rationality, which highlights efficiency and results, whereas the lifeworld is the site of communicative rationality, which highlights the interpersonally based requirement to provide compelling reasons for one's actions" (Fossum 2001: 190).

societal system, diversified social subjects and entities communicate *via* law. The integration of the society occurs in the process of mutual interpersonal and intergroup recognition of validity claims (i.e., arguments in favor of imposed obligations and rights). Acceptability of validity claims gives additional legitimation to facticity, to the law as a given, imposed medium of intersubjective communication:

> But law must do more than simply meet the functional requirements of a complex society; it must also satisfy the precarious conditions of a social integration that ultimately takes place through the achievements of mutual understanding on the part of communicatively acting subjects, that is, through the acceptability of validity claims (Habermas 1996: 83).

In this interpretation, the system of law encompasses two intertwined and interconnected but principally different phenomena: the positivity of law (sociological facticity) and the legitimacy claimed by it (normative validity). This Janus-faced nature of contemporary law can be conceptualized in two ways: as *facticity* or identified societal network of imposed laws, and as *validity* or internal legitimation of the laws by the citizens of a polity (cf. Habermas 1996).[10] Ideally, as a concept primarily concerned with public autonomy and external acceptance of the rules (particularly in theories of procedural democracy), democracy as a system of self-imposed rules should correspond to our internal justification of these rules – our private autonomy (substantive notions of democracy).[11] It is essential to notice that Habermas also deploys a dichotomy between "private" and "public" autonomy. In his understanding, the constitution can be seen as "an interpretation and elaboration of a system of rights in which private and public autonomy are internally related" (Habermas 1996: 280). These spheres of individual autonomy are endowed with corresponding rights (i.e., negative and positive freedom). Private autonomy is a precondition for the free political participation of the citizens, while public autonomy is an expression of political will and a safeguard of private autonomy. Essentially, Habermas's ambition is to reconcile liberal and republican standpoints regarding the primacy

[10] Habermas's reconstruction of the social contract, as well as his vision of deliberative democracy, is deeply rooted in this dichotomy, as I elaborate in section 2.

[11] These two dimensions of public and private autonomy represent the liberty of an individual to act and create: one is confined to his private domain and the other to the principles of common intersubjective political life. However, they relate to common norms of a political community (constitutional, legal order) in different ways. Just like negative and positive freedom, one is based on the limitation of intrusion of the others (protecting the liberty of private life), while the other is a matter of publicly achieved endeavors (active participation in political life).

between concepts of sovereignty and human rights, which I will elaborate on below, in section 3. The dialectics of internal and external legitimation of laws functions – and our public and private autonomy remains in equilibrium – only in the case of correspondence of the two faces of law.

The tension between facticity and validity within democratic polity can be resolved only if the laws can be fully legitimized by those on whom they are imposed, which, in other words, requires that subjects of law can identify themselves, at any point, as creators of the law. This ideal of deliberative democracy has a powerful normative impact on the theory of constitutional patriotism. The political and social substance that appeals to our respect and allegiance as citizens is found only in the basic set of principles and rules, because these are supposed to be unquestionably legitimized and, as such, crucial for the overall functioning of the polity. Feeling attachment and showing patriotic allegiance to any other sort of political phenomenon (practice or narrative) would not be normatively desirable because it does not provide common internal acceptance by all members of a (plural) polity.[12]

As a form of patriotic loyalty and citizenship allegiance, constitutional patriotism also entails that the only acceptable and normatively relevant domain of political unity can be found within basic and consensually determined constitutional norms and principles. As citizens of a polity, we are unified by principles that determine our common life and inter-subjective relations and that impose limits on our liberty, which we legitimize for the sake of peaceful coexistence in an ordered society, requesting the protection of our rights in return. No symbolic or normative concept should be an object of our patriotic loyalty unless it corresponds to these legitimately determined basic principles and rules.[13] These principles and rules should allow us to live freely and pursue our life goals without the domination of the state or any other party.

Constitutional patriotism, thus, unites our private autonomy as holders of rights and obligations and our public autonomy as creators of binding legal norms. The consensus in a constitutional democracy,

[12] If only norms that enjoy internal validity of a polity's subjects can be imposed *via* constitutional and legal acts, then majoritarian cultural (national, religious) norms that promote particular ethics do not satisfy this criterion.

[13] Continuous contestation of these rules would be one of the clear signs of the illegitimate nature of these rules. Nevertheless, following the argumentation of constitutional patriotism, contestation has to be sound and reasonable and in harmony with minimal rules of the rule of law and democracy. *Ergo*, radicalism, terrorism, and fundamentalism cannot be considered reasonable contestations of the order.

embodied in the constitution, is at the same time a sociological fact and a source of validity of the entire political and legal life. In the kaleidoscope of public and private autonomy, facticity, and validity of law, constitutional patriotism is an ideal that should reconcile our divided legal and political identity, but also the Janus-faced nature of modern law. As both subject (creator) and object of law, the citizen is more certain to achieve the unity of her two identities (including her contradictory relation towards a legal norm) through constitutional norms, which have a higher degree of generality and validity and are not subject to continuous contestation and deliberation. The more that basic constitutional (legal and political) norms result from intersubjective recognition and deliberation of individuals and groups, the lesser the facticity-validity gap in citizens' attitudes toward them will be. The validity of law – as legitimacy claimed by law – is one of the strongest normative arguments in favor of constitutional patriotism over competing theories and strategies of social integration, and it will be separately elaborated in section 4 of this paper. This is how Habermas's "facticity vs. validity" opposition becomes relevant for constitutional patriotism, which, as a theoretical concept, entails both sides of the above-explained binary oppositions. In the following section, I will address one of the basic ideas of Habermas's political philosophy, closely entwined with the theories and arguments elaborated so far: the "cooriginality" thesis.

3. Cooriginality thesis

As Habermas explains, the universalist core of the constitutional state, as a result of the American and French revolutions, is contained in two paradigms of Western political philosophy: democracy and human rights. "This universalism still has its explosive power and vitality, not only in Third World countries and the Soviet bloc but also in European nations, where constitutional patriotism acquires new significance in the course of an identity transformation" (Habermas 1997: 37). The tension between these notions lies at the heart of modern and contemporary debates in political theory and the relations between democratic and liberal principles in the constitution of modern nation-states. Moreover, the notions of democracy and human rights – their epistemological elaboration and underpinning normative arguments – are essential for understanding Habermas's political philosophy and the history of political thought.

Habermas uses the concept of cooriginality to resolve some of the fundamental dichotomies of modern political theory, such as republi-

canism vs. liberalism, security vs. liberty, public vs. private autonomy, democracy vs. human rights, positive vs. natural law, and coercion vs. legitimacy.[14] That is to say, even though all these binary oppositions entail conflicting notions and project rather different values and normative conceptions, in Habermas's view, they are closely tied to the same conceptual and hypothetical moment: the emergence of the modern state. At the same time, great traditions of liberalism and republicanism cross their spears in the primacy dilemma between human rights and sovereignty. As Habermas notes, "liberal" traditions conceive human rights as the expression of moral self-determination, whereas "civic republicanism" tends to interpret popular sovereignty as the expression of ethical self-realization (Habermas 1996: 99). Neither of these two responses, liberal and republican, "satisfies our normative intuition that human rights and popular sovereignty are not only interwoven, but of equal importance and even of the same origin: The two are, on a conceptual level, co-original" (Habermas 1994b: 2).

> The principle of democracy is what then confers legitimating force on the legislative process. The key idea is that the principle of democracy derives from the interpenetration of the discourse principle and the legal form. I understand this interpenetration as a *logical genesis of rights,* which one can reconstruct in a stepwise fashion. One begins by applying the discourse principle to the general right to liberties – a right constitutive for the legal form as such – and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape. Hence the principle of democracy can only appear as the heart of a *system* of rights. The logical genesis of these rights comprises a circular process in which the legal code, or legal form, and the mechanism for producing legitimate law – hence the democratic principle – are *co-originally* constituted. (Habermas 1996: 121)

Hence, democracy and rights, as the legitimizing and legislative power, constitute each other through private autonomy, which retroactively (reversely) takes legal shape and transforms legal forms into legal norms (i.e., rights). This is, concisely, Habermas's dialectics of rights genesis.

Habermas introduces three categories of rights *in abstracto* that define the private and public autonomy of persons who consider each other free and equal: a) basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties* and two corollaries, b) basic rights that result from

[14] Some of these dichotomies and related theoretical issues were already discussed in sections 1 and 2.

the politically autonomous elaboration of the *status of a member in* a voluntary association of consociates under law, and c) basic rights that result immediately from the *actionability* of rights and the politically autonomous elaboration of individual *legal protection.* As Habermas explains, these three categories of rights result from the application of the discourse principle to the medium of law (i.e., "to the conditions for the legal form of a horizontal association of free and equal persons"). These rights should not be confused with *Abwehrrechte* – liberal rights against the state (negative personal rights) – because "they only regulate the relationships among freely associated citizens *prior to* any legally organized state authority from whose encroachments citizens would have to protect themselves" (Habermas 1996: 122).

The underpinning presuppositions of the cooriginality thesis are reflected in modern constitutions' juxtaposition between the principle of popular sovereignty and the principle of individual (and collective) rights. The bearers of sovereignty are citizens of a polity, politically self-understood as a nation or a collective constituted of individuals understood as one entity – in other words, a body that exercises internal and external sovereignty. Since sovereignty is constantly transformed by the (power of the) state apparatus, the latter is in continuous need of legitimation. Fundamental human and citizenship rights pose an additional safeguard against and check on this state power. On the symbolic level, but also in the sense of its legal origin and authority, the constitution embodies the cooriginality of human rights and popular sovereignty (i.e., private and public autonomy, negative and positive freedom, passive and active citizenship). That is where the normative robustness of constitutional patriotism stems from, as it binds exactly those political *aporias* that lie at the heart of contemporary citizenship. In my view, this is the most evident connection between Habermas's legal, political, and social theory and the idea of constitutional patriotism. The cooriginality thesis explains why our patriotic allegiance, especially in the context of plural societies, should be with constitutions, as constitutions are *loci* of both one's private autonomy and her rights and public autonomy of the political community she belongs to. Simply put, constitutions are sources of our legal and political identity, essential for overcoming the normative abyss between individual and community perspectives in contemporary liberal democratic polities.

4. Legitimacy: moral vs. legal norms

Legality and morality are often interpreted as incongruent notions. One could portray various theoretical discrepancies between the two in Western moral philosophy.[15] The relation between two sources of ethical reasoning[16] has been one of the dominant topics in contemporary political and legal theory triggered by the facticity of ethically plural societies. This question has penetrated contemporary citizenship theories in a post-Rawlsian era and became one of their fundamental issues. The importance of recognition of different moral worldviews and their various forms is evident within both Habermas's theory of law and his social theory, and, in my view, it relates firmly to the concept of constitutional patriotism. To address the issue of moral pluralism in his theoretical system of law, Habermas distinguishes morality and legality. He differentiates *moral norms* – norms regulating interpersonal relationships and conflicts between natural persons who are supposed to recognize one another as both members of a concrete community and irreplaceable individuals – from *legal norms* – norms regulating interpersonal relationships and conflicts between actors who recognize one another as consociates in an abstract community first produced by legal norms themselves (Habermas 1996: 112).

Habermas's argument in favor of reconciling these two axiological structures is simple. The contemporary states are territorially defined groups of individuals and communities organized through legitimately binding legal norms. To be legitimate, these norms should stem from discursive democratic practice and the law-making procedure, not from particular ethics. It is common knowledge that for most modern states (except for colonial states, occupied territories, and semi-sovereign territories), the principal source of legitimacy is a constitution. Hence, if we follow his argumentation, the legality and legitimacy of basic constitutional norms are those that ultimately matter, although morality often plays an unquestionable role in their formation.

[15] See, for example, Hart (1962). One could also interpret this antinomy as the clash between "the good" and "a right". Abraham Edel clarifies that these two concepts "conceptualize basic phenomena in human life", the good interpreting humans as "goal-seeking beings who have desires and aspirations", while rights determine them as beings who live "in groups that require some modes of organization and regulation involving practices, rules, and institutions" (Wiener 1974).

[16] In Hegel's (1991) philosophy, for example, ethical life (*Sittlichkeit*) is a synthesis of abstract right and morality as self-determination (*Moralität*). Habermas himself, as explained in section 1, makes a clear distinction between ethical and moral.

Habermas defines the democratic principle of legitimacy in a way that "only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted" (Habermas 1996: 110). Therefore, there must be a vantage point from which the norms can be impartially justified, a principle that reflects those symmetrical relations of recognition built into communicatively structured *forms of life* in general. The introduction of such a discourse principle presupposes that practical questions have already been arbitrated impartially and decided upon reasonably.

> Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses. […] The predicate "valid" (*gültig)* pertains to action norms and all the general normative propositions that express the meaning of such norms; it expresses normative validity in a nonspecific sense that is still indifferent to the distinction between morality and legitimacy! I understand "action norms" as temporally, socially, and substantively generalized behavioural expectations. I include among "those affected" (or involved) anyone whose interests are touched by the foreseeable consequences of a general practice regulated by the norms at issue. Finally, "rational discourse" should include *any* attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations. (Habermas 1996: 107)

How does the validity of norms relate to constitutional patriotism? How does it narrow the scope of valid norms in a culturally, socially, and politically diversified society? The Janus-faced nature of a norm (validity and actionability) implies two distinct normative meanings. What is a prudent way to overcome opposite (conflicting) moral norms in contemporary plural societies and transform them into valid legal norms? Habermas's answer is to refer to norms that have unquestionable democratic legitimacy (i.e., those derived from popular sovereignty). However, rights and liberties indispensable for exercising this sovereignty must not be jeopardized, and the transformation of ethical into political is not a straightforward process. Constitutional patriotism presumes that only a certain minimum of political principles and norms, shared by all political subjects, should establish the constitutional core of a polity. At the same time, it protects minorities from the domination of majoritarian moral norms by guaranteeing a minimal basic principle of mutual recognition.

For some authors, constitutional patriotism is "a consciously shared sentiment arising from an ethical assessment of their country by the country's people, according to which the country credibly pursues a

certain regulative political ideal for which the constitution stands" (Michelman 2001: 253). However, only norms to which all possibly affected persons could agree upon in a rational discourse can be considered legitimate. Given the high ethical diversity of modern plural societies, one can reasonably argue for a minimalist rather than a maximalist prospect *vis-à-vis* the normative content of that constitution. In other words, legitimacy remains the primary domain of polity that constitutional patriotism tries to address. Constitutional patriotism as a normative concept in the works of Sternberger and Habermas arises as a solution for the crisis of legitimacy: in Sternberger's case in post-war Germany and in Habermas's case in contemporary plural societies. As Laborde (2002: 591) puts it, "constitutional patriotism is an influential attempt to reconcile the conflicting imperatives of political legitimacy and cultural inclusiveness."

Instead of a consensus on values, Habermas believed that complex modern societies must look for "a consensus on the procedure for the legitimate enactment of laws and the legitimate exercise of power" (Habermas 1994a: 135). Instead of looking for a common good (*substance*), they should instead decide how norms become rights (procedure). In this way, proceduralism and, indirectly, constitutionalism shape the normative core of Habermas's legal theory, creating a normative dimension in which constitutional patriotism can be embedded. Legitimacy can be attributed only to those norms that stem from the social pact: a constitution and the legal order it creates. Therefore, particular ethics shared by members of groups that possess social and political power (majoritarian groups) could be adopted universally (constitutionally) only if they pass the above-mentioned legitimacy test. As Ingram (1996: 2) explains, "[a] post-national identity has to accommodate difference and plurality… Unity and legitimacy come from the constitution and the formal tie that holds people together is their continuing voluntary recognition of the constitution, their constitutional patriotism." Legitimacy is the main argument in favor of the normative power of constitutional patriotism and its practical applicability in contemporary plural democracies.

Conclusion

The primary purpose of this paper was to show that, although Habermas did not fully elaborate it as a freestanding theory, constitutional patriotism is logically and normatively embedded in his social, political, and legal philosophy. For Habermas, post-metaphysical reason caused

the change in the foundations of normative reasoning, consequently entrenching certain domains of morality in the realm of intersubjective relations. In addition, positive law faces a duality expressed in what Habermas denotes as "facts" and "norms": the sociological understanding of law as rules imposed by the state (facticity) and normative understanding or internal legitimation of legal norms (validity). Therefore, to be legitimate, norms cannot simply be imposed on citizens but need to be reasonable and likely to be internally legitimized by them. These binding legal norms should stem from discursive democratic practice, the law-making procedure, not from any particular conception of the good life. Intersubjective creation of moral norms depends on the social and political structures in which these norms are (re)produced. Particularly in plural societies, where diverse ethical outlooks often collide, social mechanisms must exist that enable free deliberation and the creation of legal norms. That is why constitutional patriotism, as a form of allegiance and social integration, gives priority to the most universal, general, and thus non-biased norms, which are fundamental for every legal system. Constitutions as social pacts of modern states that result from political deliberation and form the ground for political and legal functioning of the community define and contain these norms.

The quintessence of Habermas's political theory lies in an attempt to overcome the abyss in modern political thought between republicanism and liberalism and the implications of this dichotomy for modern societies. He reconciled these opposing worldviews in his cooriginality thesis. This thesis resolves the normative tension between democracy and human rights, explaining that rights as entitlements, and sovereignty as a capacity to guarantee these rights and express political will, arise in the same hypothetical moment. In other words, they cooriginate and presuppose one another. As ultimate aims of allegiance for constitutional patriots, modern constitutions reunite sovereignty and rights, regardless of their dissimilar normative appeal. This paper aimed to establish the connection between constitutional patriotism and Habermas's epistemology and social theory. Although Habermas did not offer a fully-fledged theory of constitutional patriotism, his theoretical universe offers convincing logical and normative argumentation in favor of this concept. All the above-mentioned theoretical fragments are coherent and compelling in normative framing of constitutional patriotism as a post-national and post-conventional political identification and allegiance to a polity's legal and political fundamentals, and subsequently as a model of patriotic loyalty and social integration in plural liberal democratic societies.

References

Baumeister, A. 2007. "Diversity and unity: The problem with 'constitutional patriotism'", *European Journal of Political Theory* 6(4), 483-503.

Calhoun, C. J. 2002. "Imagining solidarity: Cosmopolitanism, constitutional patriotism, and the public sphere", *Public Culture* 14(1), 147-171.

Canovan, M. 2000. "Patriotism is not enough", *British Journal of Political Science* 30(3), 413-432.

Dworkin, R. M. 1986. *Law's Empire* (London: Fontana Press).

Fossum, J. E. 2001. "Deep diversity versus constitutional patriotism: Taylor, Habermas and the Canadian constitutional crisis", *Ethnicities* 1(2), 179-206.

Habermas, J. 1988. "Historical consciousness and post-traditional identity: Remarks on the Federal Republic's orientation to the West", *Acta Sociologica* 31(1), 3-13.

Habermas, J. 1990a. *The Philosophical Discourse of Modernity*, translated by F. Lawrence (Cambridge: Polity Press).

Habermas, J. 1990b. "Discourse ethics: Notes on philosophical justification", in: J. Habermas, *Moral Consciousness and Communicative Action* (Cambridge: Polity Press), 43-115.

Habermas, J. 1992. *Postmetaphysical Thinking: Philosophical Essays*, translated by W. Hohengarten (Cambridge, Mass.: MIT Press).

Habermas, J. 1994a. "Struggles for recognition in the democratic constitutional state", in: A. Gutmann (ed.), *Multiculturalism* (Princeton, NJ: Princeton University Press), 107-148.

Habermas, J. 1994b, "Human rights and popular sovereignty: The liberal and republican versions", *Ratio Juris* 7(1), 1-13.

Habermas, J. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press).

Habermas, J. 1997. "Popular sovereignty as procedure", in: J. Bohman and W. Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: MIT Press), 35-66.

Habermas, J. 2008. *Between Naturalism and Religion*, translated by C. Cronin (Cambridge: Polity).

Hart, H. L. A. 1962. *Law, Liberty and Morality* (Stanford University Press).

Hayward, C. R. 2007. "Democracy's identity problem: Is 'constitutional patriotism' the answer?" *Constellations* 14(2), 182-196.

Hegel, G. W. F. 1991. *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press).

Ingram, A. 1996. "Constitutional patriotism", *Philosophy and Social Criticism* 22(6), 1-18.

Laborde, C. 2002. "From constitutional to civic patriotism", *British Journal of Political Science* 32(4), 591-612.

Markell, P. 2000. "Making affect safe for democracy? On constitutional patriotism", *Political Theory* 28(1), 38-63.

Matustik, M. J. 1989. "Habermas on communicative reason and performative contradiction", *New German Critique* 47, 143-72.

Michelman, F. I. 2001. "Morality, identity and 'constitutional patriotism'", *Ratio Juris* 14(3), 253-271.

Müller, J. W. 2006. "On the origins of constitutional patriotism", *Contemporary Political Theory* 5(3), 278-296.

Müller, J. W. 2007. *Constitutional Patriotism* (Princeton: Princeton University Press).

Rawls, J. 1993. *Political Liberalism* (New York: Columbia University Press).

Rehg, W. 1996. "Translator's introduction", in: J. Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press.), ix-xxxvii.

Rosenfeld, M. 1996. "Can rights, democracy, and justice be reconciled through discourse theory? Reflections on Habermas's proceduralist paradigm of paw", *Cardozo Law Review* 17, 791-824.

Schwartz, A. 2011. "Patriotism or integrity? Constitutional community in divided societies", *Oxford Journal of Legal Studies* 31(3), 503-526.

Wiener, P. P. ed. 1974. *Dictionary of the History of Ideas* (New York: Scribner) [electronic edition], http://xtf.lib.virginia.edu/xtf/view?docId=DicHist/uvaGenText/tei/DicHist4.xml;chunk.id=dv4-24;toc.depth=1;toc.id=dv4-24;brand=default [accessed April 6th 2021]