4.1 Introduction to the chapter

The first chapter of this paper, using the conclusions from Hegel’s philosophy, raised the question about the particular and universal in the history, the question that can be asked in the case of the Socialist Federal Republic of Yugoslavia. Why in this country there was no consensus over the particular national feelings that could have brought about shared levels of their social existing? Instead, these feelings became the foundation for the conflicts between national identities, based at the core of the political discourse, and institutionalized in the Constitution of the Socialist Federal Republic of Yugoslavia from 1974. These two claims, the claims about consensus and conflict, are the points where the political and legal theory of Habermas and Schmitt end their journeys. Therefore, after analyzing in the second and third chapter the path both German thinkers used in order to reach these ends, in this chapter I return to the historical moment of Yugoslavia with the goal of presenting the dialectics that led to its violent break up.

In what follows, I will join some conclusions about the fall of the socialist state of Yugoslavia which has led to the rise of the nationalist country. This shift can be observed from a multidisciplinary level of research that can include social, historical, political, legal, ethnic, economic, and other platforms of interest, given the complexity and consequences of that shift. Therefore, after theoretical examination of certain aspects of modernity in the field of law, politics, philosophy and history that I have examined above, at this point I will turn to the example of Yugoslavia and present it as the rupture of modernity within the modern legal and political theory. Why there was no consensus about the general “Yugoslav” values in the Constitution of 1974, and why nationalist conflicts did not shift to the dialectic of antagonisms that would carry the political process and avoid the war? In the first part of this chapter I will answer these questions using the historical, legal, and social characteristics of Yugoslavia. In doing so, the prevailing game between consensus and conflict, between intersubjectivity and nationalism, will be seen in the story of the disintegration of this country. Therefore, after reflecting upon the political situation
before the war and, more importantly, upon the constitutional debate, I will proceed with the synthesis of Habermas’s intersubjective mind. This part will firstly focus on the excluding and violent structures of his theory of discourse, moving to his writings about nationalism as the worst enemy of cosmopolitanism. It is at this point where his theory meets Schmitt’s political concept of law. This debate is not only about their views on democracy and law, but perhaps more importantly, it reveals the connection between law and politics. Therefore, following Schmitt’s concept of the political, I will employ its reading of Chantal Mouffe with the goal of showing how, in the case of Yugoslavia, nationalist antagonisms could have been transformed into agonistic pluralism that could have led this country to democracy, instead to nationalist autocracy.

If we take into account the modern definition of constitution, from 1835 until today, Serbia has changed 13 of its highest legal documents: three as a vassal state, four as an independent country, two as a monarchy – under the name of the Kingdom of Serbs, Croats and Slovenes and then the Kingdom of Yugoslavia; and four documents as a part of the Federal People’s Republic of Yugoslavia, the Socialist Federal Republic of Yugoslavia, the Federal Republic of Yugoslavia and the State Union of Serbia and Montenegro. Politically, we can talk about three Yugoslavias and two Serbias, which is a fact that entitles many Serbian citizens today to say that their country has changed its name five times. The first Yugoslavia (The Kingdom of Yugoslavia) was a monarchy established after the WWI. This was also the first time that a project for the integration of different people started. The fall of monarchies in Europe after the WWII will bring upon the second Yugoslavia (the Socialist Federal Republic of Yugoslavia – SFRY, hereinafter just Yugoslavia) which was a socialist country, where the previous project of integration through aristocratic logic was replaced with the communist concept of “brotherhood”. There were no citizens of Yugoslavia, there were no Sirs or Madams, only comrades united in the idea of a socialist revolution. The second Yugoslavia was a big project carried by the economic revival of the country and communist ideology. This stemmed from the defeat of the Nazis, and nationality was supposed to be in the background, since the whole world witnessed what can be done in the name of one nation. Even though the communist term of “brotherhood” should have brought certain shared values to the concept of a Yugoslavian citizen, such an outcome never occurred. The third Yugoslavia, the Federal Republic of Yugoslavia (called like this although it consisted of only two ex-Yugoslavian republics – Serbia and Montenegro)
lasted from 1992 until 2003 and was a consequence of the failure of its socialist precursor. Finally, after the fall of the third Yugoslavia, the State Union of Serbia and Montenegro was formed under the ideas of the Constitutional Charter of Serbia and Montenegro. This legal document formed a new country of Serbia and Montenegro, with a confederative character, for the purposes of continuing the idea of Yugoslavia. After the referendum on independence in 2006, Montenegro and Serbia became two separate republics.

In what follows, I will focus on showing that nationalism became a particular consequence of the Yugoslavian communism by giving, in my opinion, the main documents that are useful for this paper. Academic focus on the event of the violent disintegration of Yugoslavia is immense, extending from economic, political, sociological, cultural, historical analysis to the focus on the role of the Yugoslavian literature and the Orthodox Church in the events prior to the war. However, the aim of this paper is not to judge and critically analyse the existing research. That is why, this paper will be limited to the modern dialectic of Yugoslavia that was moving between its particular and universal destiny, and whose inner dialectics of the power of political elites led to the legal and political changes that were later interpreted and considered only in the name of nationalism. Therefore, I chose the work of Zoran Đinđić as the main source of Yugoslavian critique, which I complement with the work of other authors who can provide certain legal and political analysis for it.

4.2 Yugoslavian unfinished statehood

Zoran Đinđić makes three important claims about the Socialist Federal Republic of Yugoslavia which in turn bring the thesis of the Yugoslavian unfinished statehood: that it was never a state, it was never a federation in its full meaning, and it was never a legal state. The first claim is based on the thesis that in Yugoslavia there was an ongoing separation between the state and sovereignty. This provoked a situation in which sovereignty became infinite, free-floating and detached from the state character. The new definition of sovereignty was grounded in the Communist party and the class. Regarding this Đinđić writes:
[i]t is not about that the state obtained the excess of sovereignty, but on the contrary, it is about that in socialism a state is not at all the sovereign. It is only the means in the hands of the true sovereign that doesn’t have a public and legal, but metaphysical-political status. 391

In a decade before the war, the legal and political question of who is the sovereign in Yugoslavia brought devastating answers. Responsibility for the dissolution was left to be found in the metaphysical space of mythological concepts of historical and nationalist politics. This way, the discussion about the future of the country couldn’t enter into the public sphere where it could have been thought socially.

In other words, in the last years of Yugoslavia, there was no true state anymore, because the intersubjective nature of the changed reality was not recognised by the state apparatus. The bases for communication about the values and presumptions of a common life were left to be found in the notion of communist, and the apparent lack of the latter was used for ‘its own life prerequisite’. 392 Therefore, the system that had the idea of total emancipation and transparency ended up offering a non-reflexive political system, moving towards the traditional level of rationalization. Following Weber’s classification of four types of social actions, 393 Đinđić is of the opinion that the type of action and its level of rationalization in the original socialist idea correspond to the value-oriented (wertrational) social action.

However, in the practical discourse of dying Yugoslavia, the silence had destroyed the deliberation about values (communism, emancipation) and goals (the power of the working class), leaving the system capable of

393 Max Weber defined four orientations to social action:
‘(1) instrumentally rational (zweckrational), that is, determined by expectations as to the behavior of objects in the environment and of other human beings; these expectations are used as “conditions” or “means” for the attainment of the actor’s own rationally pursued and calculated ends;
(2) value-rational (wertrational), that is, determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious or other form of behavior, independently of its prospects of success;
(3) affectual (especially emotional), that is, determined by the actor’s specific affects and feeling states;
(4) traditional, that is, determined by ingrained habituation’.
opening itself only to discussions about communist means, in other words, about the revolution. This silence is exactly what Đinđić feared most, because it had allowed the existence of a country that is resisting articulating its final definitions until its very last days. As a consequence, this silence was creating a dark hole that would swallow its own latent existence, and become strong enough to continue to exist in the Balkans to this day.

The second claim considers the (un)federal character of Yugoslavia. The definition of the Yugoslavian federation, in its most general aspect, involved the union of six political units (socialist republics) into one state. Đinđić saw this union as the union of non-states that were forming a non-federation, where they ultimately placed the birth of their own political existence. He calls this process the “reverse federalization”. Instead of forming a federal state, as the next level of political identity of units wishing to join their territories and political destinies, in the case of Yugoslavia, the federal state was a condition for the development of their political character. For this reason, federalism existed ‘only as the emotional symbol without the influence on the political power and the ways of using that power’. And that is why the same numbed federalism never offered an answer to a growing conflict. In return, when territorial units, through the processess of federalization, managed to reach the level of political and legal definitions of their statehoods, they started to look for their peculiarities that would differentiate them from other units. This is a very important argument that can explain the rise of nationalism as a product of the “silent” Yugoslavian communism and that can serve as the grounding point for further political and legal reading of the events in Yugoslavia before its breakup. Instead of generating strong Yugoslavian emotions and values around which states could distinguish their different definitions, the new federal state became a mirror in which its federal units were looking for the reflection of their differences and special destinies. Like this, Yugoslavia was a surrogate for the newborn nationalism of its territorial units based on ethnic originality and the invention of the past, which in return led to nationalism that was later used to defend the fight over power. Đinđić observed this consequence as a specific type of “free fall” into the state of nature, as ‘the situation in which already stabilized a non-political

394 Đinđić, Jugoslavija kao nedovršena država, p. 34.
character of the relation between the “subjects of the federation” could evolve into the Hobbesian conflict’.  

Finally, Yugoslavia was not a Rechtsstaat because its legal framework did not state clearly who had the power to decide, who had the sovereignty, and thus, it was hindered to dissolve the ongoing conflicts. At this point, we arrive to a very important, and according to many the crucial, factor that ruled the destiny of Yugoslavia years before people were aware of that verdict – the Constitution of the Socialist Federal Republic of Yugoslavia (Constitution of 1974), adopted in February 1974. In the text of this constitution, nationalities were given the power to form an effective successor to the socialist Yugoslavia. The first basic principle of the “new Yugoslavia” defined in the long Introduction part of the Constitution, was that nations and nationalities of Yugoslavia are sovereign, and one of their main rights is the right to secesseion that is justified in their recognised freedom for which they fought together in the National Liberation War and Socialist Revolution. Consequently, these nations have a free will to leave the federation, but, as Preamble continues, they are ‘aware that further consolidation of their brotherhood and unity is in the common interest’ and that the goal of the federation is to ensure ‘the interests of each nation and nationality separately and all of them together’. Therefore, there are at least three main concepts found in this text: nation and nationalities, history and interest. What was supposed to bind them together was this Constitution. Only in the fist Article we come to the clear definition of its federal character:

The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntarily united nations and their Socialist Republics, and of the Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Socialist Republic of Serbia, based on the power of self-management by the working class and all working people; it is at the same time a socialist self-management democratic community of working people and citizens of nations and nationalities having equal rights.

396 The text of this introductory part has almost no difference from the previous Yugoslav Constitution of 1963, which was amended 16 times before 1971.
In other words, the principles of socialist self-management that are held to connect nations and nationalities in their joint history and interests, were separate from the democratic principle of equal rights. Moreover, ‘the working people, and the nations and nationalities’ \(^{399}\) (in Serbian: *radni ljudi, narodi i narodnosti*), were holding the power to exercise their sovereign rights in the Federation. Hence, from the reading of this Constitution, it is clear that the sovereign was not federal units, and that the idea of national equality that belonged to the independent republics that had the right of succession, became the basic idea for the sustainability of the state system. In other words, the idea of national equality was ‘to prescribe and produce a wanted (...) reality’.\(^{400}\) Therefore, the ongoing aspirations, instead of being discussed and resolved by means of a new constitutional and legal framework of the federation, were left to the disappearing communist idea that continued to promise ‘an ideological resolution of the national question through a social revolution that subsumed class and national distinctions within a socialist framework’.\(^{401}\) The process of losing sovereignty and the federal character of Yugoslavia, have left the processes of democratization and, on the basis of that, rise of the civil society, far from a platform where all federal units could participate in a somewhat public discussion. The new constitution was never even close to offering proposals for this platform, and that is why, in the last decade of Yugoslavia, people were going back and forth between the demands to continue with the communist project coming from the so-called federal level, and between the projects of nationalization happening on the level of the federal units. The Constitution of 1974 was supposed to provide a legal framework for these processes, but it ended up being the last constitutional voice of socialist Yugoslavia, and mostly remembered as the herald of the

\(^{399}\) It is possible to debate about the English translation of the word *narod* with “nation”. In fact, a more suitable translation of this Serbo-Croatian word would be “people”, as “people” is a much broader term than ”nation”. In Serbo-Croatian language there is also a difference between the words *narod* (people) and *nacija* (nation), but in my opinion the mistake becomes even greater in translating the word *narodnosti* with “nationalities”, as the latter term refers to the ethnical and folkloric aspects of one people, and not to the features derived from the fact of belonging to one political, geographical or legal union.

\(^{400}\) Dimitrijević, Introduction to Đinđić, *Jugoslavija kao nedovršena država*, p. xv.

\(^{401}\) Pešić, ‘Serbian nationalism and the origins of the Yugoslav crisis’, in *Peaceworks*, p.vi.
nationalist future of the republics, a future that was already incorporated in their socialist character.

4.2.1 Political and legal debate prior to the Constitution of 1974

The constitutional debate prior to the Constitution of 1974 was focused on which model new Yugoslavia should embrace after the death of President Tito. The so-called “Kardelj’s federal concept”, years before the adoption of the constitution, was seen as the official interpretation of the future Yugoslavia. This concept was built on the Marxist idea of “the withering of the state” (Engel’s term Überwindung) in socialist society for which Yugoslav society was supposed to strive. Federal unity should thus be organized under the logic of nations and their nationalities that by the logic of socialist self-governing will carry out the socialist project. The federal state in the future would exist only as a protector of the minorities in Yugoslavia. This vision of the ‘most Marxist Yugoslav communist’ served as a model for the new constitution that abandoned the creation of a new “Yugoslav nation”, and instead offered a new federal model under which six nations could develop. One could say this was an opposite model to the one Habermas proposes for the EU, and certainly different from Schmitt’s homogenous legislative state. Contrary to the conclusions about the non-existence of sovereign states that were presented above in the writing of Đinđić, Kardelj advocated that the new constitution should depart from the premise of the full statehood of all six republics by recognizing their political character and their sovereignty. They were legitimized by the people of that republic, and although, for example, Croatian or Macedonian people were living in the Serbian state, under the constitution, the sovereignty of each state was limited to its borders.

Thus, the new constitution and growing constitutional debates were held on the lines between suppressing the liberal strings coming from Serbia (intensified in 1972) and a rising nationalism in Croatia (especially in

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402 Edvard Kardelj was a Slovenian journalist and politician, the 7th President of the Federal Assembly of the Socialist Federal Republic of Yugoslavia and, according to Jović, in the crucial years of finding the idea for the new Yugoslavia, he became the second most influential person of the federation, after president Tito.
1971, the so-called “Croatian spring”\textsuperscript{403}. President Tito and other party officials seemed to keep these two movements under control by constantly replacing the political and academic representatives. However, “[i]t was not only the conflict (…) between Tito and the republican leadership in Serbia and Croatia, but it was primarily the conflict inside of the political elites in those two republics”\textsuperscript{404} which marked the pre-constitutional period. That is why the functioning and political-legal rationalizing of these elites should not be highlighted only in the context of the Constitution of 1974, but also as the finish line of the increasing nationalism that managed to rise from the communism. When those elites ‘gave up on political centralism and initiated programmes of administrative decentralization, any notion of realizing a unified Yugoslav culture was likewise abandoned’\textsuperscript{405}

These programmes got their legal framework in the Constitution of 1974, and its project to use nationalities – narodi, to fill the expanding hole where public sovereignty was supposed to be.

What is peculiar to this constitution, is that its creators were inspired by very Marxist and communist ideas, thinking they are leaving the room for the development of people under the rules of self-government. It is exactly in the name of the latter that the nationalities were supposed to serve. The awareness of the difficulty to produce Yugoslav culture or the Yugoslav national identity, while insisting on the federal project of Yugoslavia, led the constitutional fathers to the conclusion that the lack of intersubjectivity and legitimacy of the Yugoslavian project could be overpassed on the level where strong republics would be left in their own development. Their solidarity with the constitution and the idea of socialism and self-governing was the only thing that kept the federation existing. As Habermas discusses in his works, the constitutional patriotism should provide the conditions for a stable union and leave national debates to civil societies and their discourse processes. However, in the same way that this project does not

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{403} “Croatian spring” is the name used to describe the MASPOK – masovni pokret or the mass movement – a cultural, political and social movement happening in the last years of 60’s in Croatia, until 1971. During the movement, participants were asking more autonomy for the Socialist State of Croatia. For more information, see Ante Batović, \textit{The Balkans in Turmoil – Croatian Spring and the Yugoslav position Between the Cold War Blocs 1965-1971}, LSE Ideas, 2003.
\item \textsuperscript{404} Jović, \textit{Jugoslavija – država koja je odumrla} [Yugoslavia – the state that died out], p. 165.
\item \textsuperscript{405} Wachtel, \textit{Making a Nation, Breaking a Nation}, as cited in Ramet, \textit{Thinking about Yugoslavia}, note 32, p. 62.
\end{itemize}
\end{footnotesize}
work in the European Union, in Yugoslavia it did not get further than promoting the legal aspects of the federation.

The constitutional debate and political crisis prior and after the enactment of the Constitution of 1974, revealed not only the legitimacy and national crisis of Yugoslavia, but also touched upon the concept of political and legal sovereignty by questioning who has the power to decide on certain issues of the federation. The “game” among particular national interests and the fight for the survival of the universal idea of Yugoslavia, in the years prior to the constitution, became a political fight aimed at protecting the interest of those elites whose particular affairs were the only guiding system of their actions. The Federal Constitution from 1974, although in theory was based on very Marxist ideas of the further development of socialism, did not offer a framework for federal development towards the new future. Instead, through it “the federation provided the structure in which republic elites competed not for the support of Yugoslavs, but for the support of the people of their respective republics”.

Therefore, in the light of this reading about Yugoslavia, we can conclude that the concept of nationalism, which was developing even more after the Constitution of 1974, was very closely related to the political interests of the elites in each republic. In return, we must assume that it is necessary to include the nature and actions of these elites when considering the disintegration of Yugoslavia.

4.2.2 Yugoslav nationalism as the specific consequence of the Yugoslavian communism

One cannot observe the rise of nationalism after Tito’s death and the violence in the wars in Bosnia and Kosovo, as a consequence of Serbian or Croatian nationalism, which belonged to the pre-modern rationalization among their citizens. Nationalism, the way it was defined above, entered the political vocabulary before the fall of the socialist Yugoslavia through the legal definition of the nations and nationality as the new carrier of the socialist idea in the 1974 Yugoslav Constitution. The national and separatist aspirations that existed prior to this constitution have never been part of a federal or constitutional debate. That is why they were used as a tool

406 Ramet, Thinking about Yugoslavia, p. 67.
by the political elites who, at the moment when the gap between the communist and non-communist future opened, decided to use nationalism as the main material for the bridge towards the new future. Within it, they were hoping to answer all social, political and legal questions of the new statehood, but more importantly, to continue to occupy the positions of political power. This is the same material Slobodan Milošević will use a decade after the war in Bosnia, during the war in Kosovo, which confirms the thesis of the specificity of these conflicts.

Prior to the war in Bosnia, the Yugoslavian communist society was already going through the certain changes. The uncoupling was happening in the dual identity of citizen and communist. The 1963 Yugoslav Constitution did not refer to Yugoslavian citizens as the carriers of the constitution. The upcoming constitution still did not recognize citizens as part of the political action, giving them certain rights and obligations. For Đinđić, keeping the concept of citizens away from the political sphere, refusing to define it sociologically and not only logically, was in order ‘to prevent the transformation of the working democracy (...) into political democracy’. 407 According to this author, in socialist Yugoslavia, there were citizens, and every person living in that country was a citizen. In order to protect its socialist ideas and future, the socialist system recognized a possibility for the individual to be a citizen or a communist, or both – a citizen and a member of the working class. This is related to our first claim from the aforementioned Serbian author: in socialism, the state had no sovereignty. The communist party in order to retain its political and metaphysical power, and maintain its order, had no interest in creating a civil society.

Refusing the citizens to enter into the processes of political deciding and to introduce them into the ongoing process of development, a civil society that was about to emerge led to ‘the dreadful rigidity of its internal political structure and its consequent chronic inability to adapt to both internal and external change’. 408 The truth was that the reality of Yugoslavia was already influenced by the ongoing changes in the sphere of production and in the world that will soon celebrate the fall of the communism. The public and the private sphere were becoming increasingly separate, and the first signs of what civil societies of six countries will become, were seen in the years prior to the Bosnian war. This change was very quiet and

timid, and the rise of these forthcoming civil societies was parallel to their own process of rationalization that was forming their political character. Meanwhile, it became quite unclear, whether in Yugoslavia one could be at the same time a communist and a Yugoslav. It seems that the concept of citizen was not only left to each federal unit, but was confined (especially with the Constitution of 1974) to the legal definitions of nationalism.

That is why in the years before the war, Đinđić called Yugoslavia as an “unfinished project” which he diagnosed with two autonomous diseases: on the one hand, with the impotence of the state system to respond to the changes coming from its environment, in the words of Weber, to adapt to the newly established modes of production and incorporate a new rationalization coming from the strategic purposive world of actions; and on the other hand, he observed the ongoing change in the rationalization of the social sphere that began to feel constricted in its old clothes and asking for more space. In the case of the never-existing civil society and subjectivism in communism whose hopes were finally killed by nationalism, the differentiation of the communist system did not correspond to the levels of rationalization in the social sphere. Individuals, subjects, subjectivity, intersubjectivity were all seen as the enemies of the hardly built “unity and brotherhood” in the socialist Yugoslavia, because these categories had never really reached the point of questioning and controlling the distribution and origin of power.

4.2.3 At least two arguments to think nationalism in former Yugoslavia

In the last years before the war, the call for the independence that will become the “trade mark” of the Balkan Peninsula, created the contra reaction in Serbia, formulated in the pure nationalist idea of the project: “all Serbians in one state”. It is hard to tell how much ratio this parole had for Yugoslavian comrades. Since there was no Yugoslavian civil society to appeal to, or a normal state of affairs to count on, the above mentioned parole can be viewed as politically coined mantra whose purpose was to allow the power holders to maintain their positions. This can be traced back to the constitutional debate, and to the reasons why the federal units decided to accept the new constitution. According to Jović, one cannot be guided by the popular political interpretation that Serbia was forced to accept the imposed constitution. Quite the contrary, ‘Serbia accepted that constitution because it was always corresponding to the perceptions of Serbian
national interests, the way that the political elite in that time has seen it. The same argument stands for the other Yugoslav republics’. Therefore, as stated above, nationalism in the case of Yugoslavia cannot be observed without reflecting on the power game of the political elites in all six republics.

Pešić, on the other hand, offers two possible ways of defining this very distinct nationalism that had marked the last years of the socialist Yugoslavia, and ultimately led to the war in the region. According to the first argument, nationalism is seen as a power game, specifically as a type of political game. At the moment when the federation was giving signals for a change, moving towards democracy, the political elites of the six republics started to use the concept of nationalism as a means of maintaining their positions of power. Therefore, according to Pešić, nationalism can be defined as:

the most convenient strategy for Yugoslavia’s republican political elites, particularly when they could easily manipulate public opinion through their control of their respective republic’s major sources of information.

However, although this definition finds its reason in many historical events, on the theoretical level ‘[s]uch an understanding of nationalism as “false consciousness” discounts the power of national sentiment among the region’s ethnic groups’. In this way, the history of the struggles in Yugoslavias are put only under the realm of nationalist struggles, overlooking the other aspects that could, for example, include the link between those nationalisms and their political communities, as the part of their social development and social integration.

Thus, the second view that Pešić presents observes nationalism in the Western Balkans where Yugoslavia is seen as the historical and comprehensive concept that emerged in the process of developing the political character of the holders of those nationalist feelings. Observed in this way, nationalism is a by-product of modernity in the case of contemporary societies. Against Habermas’s tendency in setting borders between traditional and post-traditional societies, we can add that ‘[n]ationalism seems to be the form of pre-modern consciousness, but in Eastern European countries

409 Jović, Jugoslavija – država koja je odumrila, p. 159.
410 Pešić, ‘Serbian nationalism and the origins of the Yugoslav crisis’, p. 2.
411 Pešić, ‘Serbian nationalism and the origins of the Yugoslav crisis’, p. 2.
nationalism was a specific consequence of communism’. In other words, in order to build its own national character in the environment of the more and more hermetically sealed communism of the multinational federation, under conditions of modernity, the states of Yugoslavia moved towards their homogenization, to the level of nationalist ideas, since the abstraction of the ideas of communist ideology proved to be insufficient. Charles Tilly, for example, thinks that the modern era legitimated the principle ‘that states should correspond to homogeneous peoples, that members of homogeneous peoples owe strong loyalties to the states that embody their heritage, and that the world should therefore consist of nation-states having strongly patriotic citizens’. Tendencies to be defined as one independent national state, or as a part of a multinational formation, are showing their rise in the modern political discourse. This phenomenon is what Schmitt observes in the modern democracy and later uses for his theory of the total state:

A democratic state that finds the underlying conditions of its democracy in the national similarity of its citizens corresponds to the so-called nationality principle, according to which a nation forms a state, and a state incorporates a nation. A nationally homogeneous state appears then as something normal. A state lacking this homogeneity has an abnormal quality that is a threat to peace. The national principle thus becomes the prerequisite of peace and the “foundation of international law.”

With the Constitution of 1974, the multinational character of the Yugoslav federation was reinforced, and the processes of statehood development in the federal units gained their legal basis. The concepts of nations and nationalism were supposed to be under the rule of the socialist self-governing democracy, which was one of the ten main pillars of the legal framework of Yugoslavia. The writers of this very long constitution justified giving more power and independence to the national states with the logic that only the development of its units could lead to the federal development. However, with rising problems to control the power and sovereignty holders in the socialist system, this legal shift did not bring upon a new reason. The national equality that was supposed to correspond

412 Milović, ‘As metáforas do poder na Iugoslávia’ [The metaphors of the power in Yugoslavia], p. 2.
414 Schmitt, CT, p. 262.
to the principle of self-governing failed to fulfil the goal that its authors prescribed – to become an idea that can both produce and reproduce the desired reality under the auspices of the higher socialist idea of development. Therefore, the holders of the highest power, as Đinđić observed, were in a certain meta-constitutional, over-political and over-legal space. Furthermore, the link between the political and legal power can be read according to the grammar of a non-existent Yugoslav civil society, where ‘a Serbo-Croatian compromise represented the foundation of Yugoslavia’.

According to this point of view, the legal provisions of the Constitution of 1974 only gave support to the already existing feelings of resentment, which existed among the members of the ethnic groups who were in the process of building their political character. This is, according to Pešić, related to the national feelings seen as the main “raw” material used for crafting a very new structure of nationalism that could no longer be rooted in certain historical or ethnical facts. It is precisely at this point where the meta-constitutional and above-political powers find their potentiality to maintain their stations. Therefore, the best viewpoint towards Yugoslavian nationalism comes from both arguments presented above. Nationalism that was the ‘political strategy of communism’ that did not ‘allow the development of civil society’, followed with feelings of resentment, and joined in the political, historical, sociological and legal definitions. With the course of events before the war, this latent hostility became an open conflict held on the lines of the power-defined nationalism.

4.3 The “logic” of Balkan violence

The story of the rise of the second and fall of the third Yugoslavia and their relation can imply that they are more attributed to Schmitt’s concept of the political than to the theory of deliberative democracy. Therefore one might rapidly conclude that this is the case because the latter tells us

415 Pešić, ‘Serbian nationalism and the origins of the Yugoslav crisis’, p. 2.
416 In the article ‘Serbian nationalism and the origins of the Yugoslav crisis’ Pešić talks about the “atmosphere of resentment” that was existing at least a decade before the War in Bosnia. Besides the Serbian and Croatian nationalism, she takes this atmosphere as the main reason for the violent disintegration of Yugoslavia.
something about the modern world, while the former investigates the phenomenon dating from the traditional world. Modern world, modernity, is what both Schmitt and Habermas consider in their respective theories, albeit they take its very different positions and aspects as the crucial ones. Modern political and legal events such as: the migration crisis, the ongoing conflicts and wars, the under-controlled and imperialist banking systems and corporations, the oligarchies hidden under the cape of democracy, and many other contemporary and emerging problems, perhaps more than ever, refer to Schmitt’s concepts and diagnosis that can tell us more about the continuous and profound crisis in the modern world.

Yugoslavian communist society was a conscious carrier of political and legal practice, and historically it represented a social community where the social reality stemmed from its social practice. That is why its nature corresponds to the Hegelian modern world that was defined in the first chapter of this work. In this manner, its existence was not happening on the borders between the traditional and the modern world, but better on the lines between the different alternatives that Yugoslavian society was about to reach. These lines were explained above in the constitutional debates before the Constitution of 1974 was adopted. Those debates and that constitution were the heralds of the new Yugoslavia that even President Tito knew it was supposed to come. However, even the greatest pessimist could not have guessed the scenario that revealed a new path that the so-called third and last Yugoslavia was about to take. Therefore, the outbreak of violence in the War in Bosnia was a consequence of modernity. Moreover, its modern rationality failed to lead the political or legal actions prior to the conflict, and it was replaced by the radical discourse of nationalism.

In addition, another violent conflict that occurred in Kosovo, at the end of the 90’s, can be analyzed in the light of the war in Bosnia as a consequence of political interests for the preservation of power. We have seen that in socialist Yugoslavia a communist myth based on the logic of “annulment of reality” was replaced with a nationalist myth that was based upon the logic of political fight for maintaining the power. Following this logic, in the last years of the nationalist and authoritarian rule of Milošević, the myth about Kosovo managed to transform Serbian politics into a myth. That is why the second monument to specifically Serbian tragedy is Kosovo. The link between these conflicts puts us in front of the

418 See Đinđić, Srbija ni na istoku ni na zapadu [Serbia neither east nor west], p. 50.
historical dilemma of the violent and separatist Balkan coil where the particular truths and stories became the only way to experience and confront the past. This connection between the logic of Yugoslav wars in the 90’s, one in Bosnia and other in Kosovo, provides us with another important key argument for the story about modernity – the violence as its consequence.

The war in Kosovo shares the ethnic and nationalist nature of the war in Bosnia, usually described in Serbian aspirations against the separation of this region and its open nationalism aimed against the Albanian population. Ramet for example, considers the “Kosovo riots” of 1981 as the turning point in Yugoslav history, and as the place where the first serious crisis after Tito’s death started and accelerated. This corresponds to what Milović calls a long, historical, political silence between Serbians and Albanians that was used to create another irrational and nationalist feelings, redirecting the social energy according to the interests of the holders of political power. When those elites could not base their ruling in the state, and when a new democratic change appeared on the horizon, they acted the best way they knew – playing on the card of Serbian nationalism, just this time in the name of Kosovo. Along these lines, Serbian nationalism became an open concept against everything that is not Serbian, which in the conditions of the ethnically diverse Balkan Peninsula meant Serbia and Serbians against everyone else, and everyone against them. This equation offered politicians a platform where they could act authoritatively, disguising economic and social problems with a call for the protection of territorial integrity and national sovereignty. That platform still

419 “Kosovo riots” refer to a student protests held in March and April of 1981 in Priština, the capital of Kosovo. They started as the student demonstrations asking for the better conditions for Kosovo’s students (according to Julie Mertus, in Priština only, at that time almost one in ten adults in the city were students) and have further developed into more political demonstrations asking for the “Republic of Kosovo” inside of Yugoslavia. On 1st and 2nd April there was an escalation of the protests in nine cities of Kosovo. In consequence, the leadership of Yugoslavia proclaimed the state of the exception, sending more police to break the riots. Many students were killed during month of April in Kosovo. According to the Yugoslav press, eleven civilians had been killed by police, while Amnesty International reported that the number was above three hundred victims. More about this event see Julie Mertus, Kosovo: How Myths and Truths Started a War, University of California Press, 1999.

420 See Ramet, Thinking about Yugoslavia, p. 66.
exists and the same discourse is active today, except that now it is more focused on reviving the past crimes and fights, mostly those involving violence against Serbians and Croatians, with the emphasis on growing aspirations for Greater Albania as the scapegoat. This type of political activity is based on mythological violence and mythological interpretation of the past, and it maintains itself in the conditions of modern democracy and its law.

On the other hand, the possibility of reaching intersubjectivity in modernity, and thus opening the system for the processes of legitimization that would within the intersubjective environment join together the dialectics of particular and universal into one social realm, still remains an appealing and unfinished project. This example from history serves only as a sociological, political and legal mirror in front of which modernity is placed, and within the theory, before which both of the above mentioned authors are put. Why the conflicts in Yugoslavia did not become part of perhaps some type of antagonist model of democracy in Mouffe’s definition, and why its society did not legally and politically recognize new levels of intersubjectivity that would lead to a new federal consensus which might have replaced nationalism with constitutional patriotism, under the logic of universal reason?

In what follows, I will reflect upon those questions. Firstly, I will argue that Habermas’s theory of communicative action, and the project of finding the “mind”, the rationality in modernity, has failed in Yugoslavia due to its inconsistencies and its inability to think of a true alternative to the positivist order of normative democracy. I firstly trace those in the discourse theory in the form of exclusion and violence within certain communicative processes. Later, as the outcome of that exclusion, his reaction to the NATO bombing of Serbia as a consequence of Serbian military activities in Kosovo, reveals Habermas’s ambiguous relation to violence. By defending the principle of using violence in the name of the categories that were not defined in an open communication process, and therefore do not carry within themselves a legitimacy, Habermas ended up defending the possibility of the imperialist system that Schmitt predicted for the future of liberalism.
4.3.1 War as the strategic action

Habermas’s short, but very intense experience in the WWII left traces in his social theory. Therefore, one of the main goals of the communicative reason is to be able to fight against hidden violence, and modern law is the shield and armour of that reason. That is why, for Habermas, violence has to be connected to communication, and it is its disordered form. Therefore, its extreme version – terrorism, would also be a type of communicative pathology. Accordingly, ‘[t]he spiral of violence begins as a spiral of distorted communication that leads through the spiral of uncontrolled reciprocal mistrust to the breakdown of communication’.421 That is why his writings about the NATO bombing of Serbia represent a caesura in his thinking about violence from the perspective of the theory of the communicative action, and as will be shown below, in his legal thinking.

Although the war in Kosovo and violence in that region was analyzed immediately in many academic debates, it took a bit longer to gather major theoretical reactions to the decision of NATO to bomb Serbia. A month and five days after the bombing started, Habermas wrote an essay for the German magazine Zeit, where he took the position of defending the necessity of violence when it comes to protect other population. It is interesting that the title of this essay – Bestialität und Humanität Ein Krieg an der Grenze zwischen Recht und Moral is clearly connected to Schmitt’s slogan about humanity, and in it, Habermas refers to Schmitt more than couple of times. The main conclusion that can be reached while reading this essay is that “a workable peace option”, or what Habermas calls the “cosmopolitan condition” can be war and violence. According to the author, NATO was fulfilling its responsibility to protect cosmopolitan citizens from large-scale killings, ethnic cleansing, and serious violations of international humanitarian law for which sovereign governments were unwilling to prevent. Like this, NATO bypassed the international law and the UN, and became a legitimate institution that has validity to protect citizens under the logic of humanitarian action. In other words, by using force and violence, NATO was using reason and universal justification of the cosmopolitan condition, which was necessary to protect the universal rules of human rights. Therefore, the validity of human rights directly defends the inter-

421 Borradori, Philosophy in times of terror: dialogues with Jürgen Habermas and Jacque Derrida, p. 64.
ventionist wars that after 1999 practically became a symbol of the post-modern imperialism, and its guiding ideas ended in an open, legalized and brutal violation of the most basic human rights, which today is generally referred to as the counter-terrorist legislation.\textsuperscript{422} Habermas justification of this politics is focused on the brutality of the conflict:

The terrorist misappropriations of state power [in the Kosovo case] transforms classical civil war into mass murder. When nothing else is possible, neighboring democratic states should be allowed to rush to provide emergency help as legitimated by international law.\textsuperscript{423}

While commenting on the 78 days long bombing, his arguments were surprisingly far from any communication disorders as the cause of violence. In this case, the violation of the international and martial laws, bypassing the UN Security Council, and thus, the questions about the legitimacy and legality of this bombing were excluded. Moreover, in this article Habermas was using only official NATO data about the number of the victims, while praising German military intervention whose advanced technology supposedly was defining some new type of war. Hence, the opening argument of this philosopher is that ‘the “surgical precision” of the [German] air strikes and the systematic attempt to minimize civilian casualties perform an important legitimizing function.’\textsuperscript{424} Moreover, his preoccupation with obvious violation of the international law seems to be in the background of what he, at one point, calls ‘unfinished character of global civil society’\textsuperscript{425} Even more, the unsuccessful UN intervention in the case of the massacre of Serbian army in Srebrenica, according to Habermas, gave legitimacy to the illegal NATO interventation. Precisely because the UN, which in 1995 had all international legitimacy, didn’t manage to protect civilians from this horrible event, in contrast, NATO, which held no legitimacy from the Security Council had ‘to appeal to the moral validity of international law – and to norms for which no effective and universally recognized instances assure their application and enforcement.’\textsuperscript{426} Finally, this politics of the USA, according to Habermas, shows the difference between the hegemonic instrumentation of human rights and ‘the precarious

\textsuperscript{422} More about this, see Vanja Grujić, ‘Human rights and counter-terrorist legislation’, in Global education magazine, Dec. 2015.
\textsuperscript{423} Habermas, ‘Bestiality and humanity’, in Constelations, p.271.
\textsuperscript{424} Habermas, ‘Bestiality and humanity’, p. 263.
\textsuperscript{425} Habermas, ‘Bestiality and humanity’, p.271.
\textsuperscript{426} Habermas, ‘Bestiality and humanity’, p. 269.
transition from classical power politics to a global civil society’. Nevertheless, he admits that this interventionist doctrine should not become the rule. Therefore, the NATO bombing, as another military intervention, represents a type of the state of the exception, that in our recent history, wanted Habermas to openly admit that or not, has become a rule that dictates the new world order. Moreover, the violent protection of human rights in the case of the Kosovo War had managed to stop an ongoing aggression, but not to bring a new law and new rationality in the region. In this fashion, the concept of war that always operates under the rules of strategic action, becomes justified in the philosopher’s opinion. Therefore, the global civil society stays deeply connected to the violence and war.

In addition to searching the legitimation for killing of civilians (because those bombs were not so “surgically precise”) it is possible to observe how the justification of the strategic action is possible, if it represents the condition for the future rational discourse. ‘Bestiality and humanity’ opens the rational systems of law to use the irrational, strategic action oriented towards the rational goal. According to these conclusions, Habermas’s theory became the guardian of human rights and liberal values in their fight against the enemies of humanity, which is a liberal formula that Schmitt criticized in a great deal, because it justifies pure violence. Habermas defines human rights as juridical in their nature. However, the modern reason became moral in Habermas’s concept of human rights. By developing the idea of the universal human rights as the solution for democratic crisis, Habermas protects what Marcelo Neves calls the “imperialism of human rights”. According to Neves ‘[t]he danger of resorting to “morality” and “reason” without legal proceduralization is that the lack of a legal framework could lead to uncontrollable abuses and hence to the impunity of those who are strongest’.

Finally, with the demonization of the enemy (in this case of Serbia) the objective input on the sociological, legal and political consequences of the conflict in Kosovo is disabled. This is giving wings to the political elites to debate about the conflict, again reviving the myth about Kosovo whenever their power is put under the question. Nearly two decades have passed since the NATO bombing of Serbia, and the silence between Albanians and Serbians is still an ongoing problem. The only communication

that takes place within the official international politics held in the presence of officials from other countries, which appears like the imposed dialogue that neither Kosovo nor Serbia want to be a part of. Meanwhile, in the social sphere of both countries, nationalism does not appear to languish. On the contrary, it is intensively recruited by the political elites as a potential weapon to maintain the power, and perhaps provoke another conflict. That weapon is already defined as “legal” due to the Serbian Constitution from 2006, which in its preamble and Article 1 calls for the protection of Kosovo as an integral part of its territory. Moreover, the legal status of both Bosnia and Herzegovina (Bosnia) and Kosovo continues to be frightening, and in the case of Bosnia, there is an articulated opposition in Republika Srpska\textsuperscript{429} that has a loud separatist policy. Therefore, peace in the region and a peaceful solution for the population living in Kosovo is used in terms of the political will of several politicians in the region.

4.4 Implausibility of the ideal speech situation

In the process of defining an ideal speech situation, Habermas was mainly influenced by the philosophy of language and the development of pragmatics, a subfield of linguistic and semiotic studies. These studies were developing in the second half of the 20th century as a reaction to structuralist linguistics, which was unable to explain real communication. Linguistic communication cannot be described merely by observing the grammar and semantics in ideal sentences. The meaning in speech acts is shared, determined and built not only by the conventional content that can be encoded in dictionaries, but also by the communicating subjects’ intentions, experience, partially shared knowledge and vision of the world, context, etc., as well as the willingness to cooperate in order to understand and be understood, the ability to imply, deduce and induce, to relate emotions and connotations to words, etc.

Similar to the contextual framework of communication, we can observe the concept of an ideal speech situation. For Habermas, it represents the proof of our commitment to rational debate, and also represents a model for observing the differences of the violent act disguised as rational, in

\textsuperscript{429} Repblica Srpska in English is “Serbian Republic”. This is one of two constitutional ethnicities of the Bosnia and Herzegovina. The second is Federation of Bosnia and Herzegovina.
other words, for clarifying the difference between communication oriented towards understanding and communication oriented towards power. Therefore, the ideal speech situation ‘is an expression of the symmetry between partners in dialogue’. In this definition, there are two words we can closely observe: symmetry and partners. The latter is connected to the principle of equality as one of the conditions of the ideal speech situation, and it basically means treating our communicative partner or partners as subjects, and not as things. Thus, we promise that our relationship is driven by the communicative action and intersubjectivity, and not by the strategic or goal oriented action. The word “symmetry” means that the speech is peacefully oriented, and that the only force that can be used is the force of a better argument. For Habermas, violence is at the core of the strategic action, in which involved parties look for asymmetry as the way of imposing their interests. In other words, it is only via communicative action that we can act non-violently, searching for symmetry between arguments, and thus reaching understanding, consensus.

Moreover, contrary to Kant’s definition of “ideal” as a regulative concept, the ideal speech situation offers a constitutive argument because its existing is presupposed by participants in communication, and this is a necessary condition for reaching understanding. Even if there is no particular experience of the condition of ideal speech, the presupposition of its existing and its necessity orients our action towards a rational consensus. Hence, we can see how Habermas derives the ideal speech situation from his concept of rationality and from the study of pragmatics in linguistics. By assuming that this situation is possible, and by giving it a constitutive meaning, we presuppose a certain context that can be observed as a shared or universal. On the other hand, as Adams will conclude, the “ideal” does not correspond to Hegel’s definitions either, as it cannot be prescribed as a “product” of a historical manifestation, ‘[i]n other words, there is no place on a map that you could visit to experience the ideal speech situation’.

According to Richard Bernstein, in the case of the communication where the participants are committed to using only the power of better arguments, what Habermas avoids reflecting upon is ‘[w]ho decides what is and what is not an argument, by what criteria, and what constitutes the force of the better argument?’. Additionally, what are the criteria for the

430 Adams, Habermas and theology, p. 27.
431 Adams, Habermas and theology, p. 33.
presupposed symmetry that the participants are silently committed to it? Therefore, the main Habermas’s fallibility starts in the definition of the ideal speech act. It is from that definition that his dualism, seen as the dialectics between communicative and instrumental reason, guided by the rules of social development and integration, will departure and reach the levels of discursive theory. Consequently, it will carry a fear from irrational, seen in the exclusion of whatever is not corresponding to the action oriented towards understanding or that is not coming from the lifeworld, to his normative theory. When a society reaches the discursive level of justice and law, and within it, the intersubjective mind, what once belonged to the pre-discursive and non-discursive levels of development disappears. It becomes marked as the irrational, and thus unwanted in the definition of society, it loses the possibility of a political definition. In regards to this, Hirst comments:

Habermas’s “ideal speech situation”, in which we communicate without distortion to discover a common “emancipatory interest”, would appear to Schmitt as a trivial philosophical restatement of Guizot’s view that in representative government, ‘through discussion the powers-that-be are obliged to seek truth in common.433

Finally, if one needs to say something about the pre-discursive level of social rationalization, or about the pre-conventional level of moral development, one can easily observe that both of these processes correspond to the pre-political and traditional level of rationalization and integration. The conditions for the critical reflection on these levels are not possible, and that is why societies cannot find the way to incorporate the social reason into their moral or legal norms. Simply put, we can only talk about the legality or procedural correctness of the norms, but not about their understanding and legitimation. However, on the way from one level of development to another, Habermas defines the forces of traditional reason as mystical, irrational and apolitical. This position can be seen best in his critique of postmodernism that threatens to ‘replace reason and truth with an undifferentiated chaos’.434 It is interesting to mention that Slavoj Žižek, in a shared traditional and modern sense, sees the potential for true postmodernism. The Balkans has that potential, since ‘there is no oposition at all

434 Coole, ‘Habermas and the question of alterity’, p. 223.
between modern and tradition-conscious people. (...) In this sense, the 'West' can learn very much from the Balkans'.

4.4.1 Remaining possibilities of modernity

Habermas thinks power separate from justice, which requires a new type of justice based on a new communicative rationality. That is why he talks about post-traditional societies as the carriers of the new justice. In order to reach this level of rationalization, society needs to be built on the communicative rationality that is the product of the processes in the discourse. Therefore, the discursive theory takes on the project of the post-metaphysical justice using the power of the communicative reason. This is justified in the fact that the moral and legal norms in modern societies cannot be based on the metaphysical or religious notions. They need to find their dialectics of secularization and their reason in the practical world of communication. By reflecting on the binding norms of our societies, the above mentioned processes can take place in the discourse, because the ability to justifie those norms is 'the ability to stand up to critical scrutiny and prove acceptable to those who have to live by them'. In other words, the project of critical mind is possible in practical discourse, via argumentative communication conducted under the rules of freedom and equality. With the belief in the universal moral foundation, Habermas leaves the door wide open to welcome the project of universal law-making, the so-called “U” principle.

The bridge between cosmopolitan law and action oriented towards understanding is in the basis of the discourse theory of law. And the realization of the latter is part of the social and moral development, seen as its transition from the pre-modern to the modern operating structures. This transition leaves the pre-modern in the past, in the traditional structures that are packed with irrational content that disables social reflection and thus the process of legitimation. That is why, according to Habermas,

435 Žižek and Đinđić, ‘Interview’ in Dvogled, 27. 08. 1999.
436 The “separative theory of law” is perhaps most notably observed in the works of Walter Benjamin who makes the difference between the mythic and divine law as the difference between law and justice. See Benjamin, Zur Kritik der Gewalt.
“those” postmodernists who still believe that pre-modern societies can tell us something more about the today’s world, are on the side of the sacred, and in their arguments are very archaic. Habermas’s debates with “sceptics” who do not see the difference between mere modernism and true modernity always end with his critique of their conservative discourse, a discourse that can be divided into three branches: antimodernism, premodernism, and postmodernism, or in other words: the young, the old and the new conservatives. What the philosopher tells us here is that searching for the system of thoughts beyond modernity a priori means a fall into the traditional, into the reinvention of the past. In the above mentioned division, Derrida and other poststructuralist belong to a group of young conservatives who focus on “a decentred subjectivity”, while the old conservatives (such as Leo Strauss and Robert Spaemann) search for “positions prior to modernity”. Schmitt on the other hand, belongs to a group of new conservatives due to his relation to the aesthetical, as something that belongs only to the private sphere, and together with moral questions cannot be part of the political argument.

In conclusion, as a true protector of the main goals of the Frankfurt circle, Habermas decides to defend modernity as a part of his Enlightenment legacy. That is why the chapter of this work dedicated to his theory, starts right after Hegel’s modern world. Even though the modern ‘paradigm of the philosophy of consciousness is exhausted’, it is possible to replace it with ‘the paradigm of mutual understanding’. By the same token, the philosophy of subjectivity in his theory moves towards the philosophy of language guided by the new main principle – the intersubjectivity. Accordingly, the difference between the old and the new world vanishes in modernity. Adorno, the author and friend he admired perhaps the most, in the Introduction of Negative dialectics under the title ‘The possibility of philosophy’, writes that ‘[p]hilosophy, which once seemed obsolete, lives on because the moment to realize it was missed’. According to Habermas, we are still living that moment. Finally, as Hegel found the main quest of the new world in finding the Allgemeinheit, a true community that would replace the old one, Habermas puts this quest in front of the philosophical discourse of modernity.

438 See Habermas, ‘Modernity: an unfinished project’, in D’Entrèves and Benhabib (eds.), Habermas and unfinished project of modernity, p. 53.
439 Habermas, The philosophical discourse of modernity, p. 296.
440 Adorno, Negative dialectics, p. 3.
However, although his critique of the post-structuralist and post-modern thinkers is often too strong, it reveals a very important feature of both the theory of communicative action and discursive theory. It was shown that in TCA not every communication, like everyday communication for example, is considered relevant and capable of reaching the necessary levels for rational consensus. It is only the argumentative communication which happens under the conditions of equality and freedom that is promised with that right and capacity. This logic of exclusion flows from TCA to the theory of discourse, where violence is performed to what we can at this point name as “the other”. In order to avoid further misunderstandings, I would like to state that the way notions of the “other” or “outside” are used in this paper does not require the definition and existence of the “one” or “inside”. Likewise, both “other” and “outside” are examples of the latter notions, which in their reflexivity refer to what can be observed as their opposites, and as their integral parts. Therefore, they represent an integral part of the subject’s and system’s speculation process, and they are not concepts that stand against their opposites, or that can, due to this presumption, carry a negative or excluding meaning. Therefore, they are integrated into the definition of a subject we choose to observe, as its feature, which becomes apparent in the dialectical process of its self-definition. The question of the “other” may also be presented as the question of alterity, and in what follows I will search for it in the modern discourse and see what emancipatory potential Habermas gives to it.

4.4.2 Post-traditional society and new rationality

According to Habermas, modernity is still capable of finding the reason of our existing. He does not share Weber’s pessimism about modernity, and even though he talks about its pathologies, through his theory he wants to reconstruct, re-think modernity, and ultimately, correct it by means of communication, reason and “liberation” of the LW. His critique of modernity is grasped in the pathologies of modernity that are primarily seen in the loss of legitimacy due to the colonization of the LW by the system. However, for Habermas, opposite to Weber, there is no danger in the existence of the system as a social organization of the instrumental and strategic reason. When crisis arises, disappering of legitimacy occurs only when the system starts imposing its reason on the communicatively organized LW, and when it starts cancelling the communicative space of the LW.
Habermas’s thesis is clear: a society that cannot derive its social meanings from the existing traditional religious and moral claims begins the search for the new meaning, a journey that will lead it to a post-traditional society. Therefore, dialectics of modernity is between the LW and the system, between communicative and instrumental reason. The questions about the other, or the struggle between rational and irrational, occur only in the transition from premodernity to modernity. That is why this transition is based on exclusion that is rooted in the emancipatory project of modernity. According to Coole:

*history’s* schematic evolution into modernity is, like that of the *subject* into maturity, reconstructed as a process of eliminating – that is, rationalizing away – any otherness that might have played within traditional cultures or immature ego-development*.441

It was shown above that the first exclusion of non-wanted content in modernity is being performed under the premise of an ideal speech situation that leads the communication process from simple to argumentative communication, i.e. from the pre-discourse to the discourse level. Perhaps at that point, we can first observe the *other* in Habermas’s theory, according to Bernstein442, as a partner in a communicative act. However, if this partner is not committed to the ideal speech conditions, moving only towards the symmetry which is in its nature oriented towards universalization, the communication becomes the means of exclusion.

Therefore, Coole’s statement that Habermas’s theory ‘posits too sharp a break between modernity and premodernity, with the former in crucial but mistaken ways *defined* by its impossible purging of alterity from its life-world’,443 stands as correct. Habermas largely ignores the irrational veil of politics and power, and by submitting political processes to the law, the irrationality can become law’s *protégé*, a consequence that is not hard to observe in contemporary events. Furthermore, when defining the pre-modern as archaic and traditional, he refuses to allow access for modernity to the *other*. Habermas’s theory of discourse remains with some difficulties in dealing with the irrational residue that is left behind in his theory of social and moral development. This residue, the *other*, or alterity, remains only in the aesthetic sphere, in art and religion, without the possibility of enter-

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441 Coole, ‘Habermas and the question of alterity’, p. 224.
443 Coole, ‘Habermas and the question of alterity’, p. 226.
ing into the debate about definitions of a modern mind. Consequently, the shadow is cast on the intersubjective finalities of his theory, and the “break” between the old and the new world permits violence to enter into the political and legal structures of modern societies.

In the second chapter was shown how the discourse theory comes to the deliberative theory of democracy, and how that connection is seen as a strong link between law and discourse. What does this link mean for the traditional societies, and how do traditional ideas move towards post-traditional rationality, towards modernity? Đinđić correctly observes that there is a synthesis between crisis and knowledge. When the bases of our societies are starting to be questioned is when the crisis arises. But without it, a new reflection is impossible, and thus, it is a necessary condition for a new knowledge. If we observe the constitutional debate prior to the Yugoslav 1974 Constitution as a crisis that triggered a new discussions about the meaning and future of Yugoslav society, why did it not bring about the emancipatory knowledge? Why it did not allow the principle of intersubjectivity to produce a social consensus? In other words, can we observe nationalism that led to the war as the final solution for the socialist Yugoslavia, as something preceding the reason, as the other, irrational and thus traditional? Finally, how can its expressive existence in some of the ex-Yugoslav republics after the war, and its latent existence today, be explained under Habermasian reason? Understanding these question need to be connected to the universal definition of law. As shall be presented, corresponding to the different definitions of society, there are different concepts of law.

4.5 Centripetal and centrifugal force of law: formal and political concept of law

In order to bring Habermas’s claims about modernity closest possible to Schmitt’s concept of the political, it is necessary to observe where these authors choose to root their thinking about the legal. The former is representing the liberal concept of law based on the liberal claim that there is no social phenomenon or any idea of the state life that cannot become part of the statute. This liberal phenomenon was used as an argument for the sovereignty of law that is part of the “formal concept of the law” that
Rechtsstaat adopts, and for Schmitt it is ‘completely wrong-headed’.\(^\text{444}\) The obsession of the legislative state to give a form to all aspects of the social existence in order to put the concept of sovereignty under the “legal legitimacy”, creates an obsession for the sovereignty of law. The concept of law appointed here, works according to centripetal force, bringing all established relations and rules to the center of the Rechtsstaat. Here they get their form according to the general norm, and from that moment their legitimacy is shared with the norm. It is exactly this force that makes the entire system to rely on the administrative power of its structure, and on the “legal-rationality” that comes with it. This rationality is part of what Chantal Mouffe calls ‘the post-political Zeitgeist’, and her theory tends to challenge and criticize its inner logic.

The formal concept of the law is based on the statutory form of the law, and in Schmitt’s view, is an instrument used in the continuous process of the historical neutralization of domain, which avoids the separation of sovereignty from the law, and which gives the law the power to create sovereignty. Agamben approaches this problem in the discussion about the differences between constituting and constituted power.\(^\text{445}\) In the legislative state of the WR there was legality with no content, absolutely neutral, value and quality free. Therefore, neutralization is the first step toward depoliticization. According to Schmitt, the formal law of a logically consistent Rechtsstaat exists alongside the political concept of law, since the component of the constitution is not sufficient to answer the legal requirements of modern societies. By ignoring and neutralizing the political component of the law, a Rechtsstaat avoids answering the questions about sovereignty outside the law, and, more importantly, it breaks the links between legitimacy and legality.

Contrary to the statutory law, which was explained above as a formal concept of law, Schmitt defines the law in substantive sense as ‘a legal norm or legal principle, a determination of what should be right for everyone’.\(^\text{446}\) Therefore, the law has a meaning outside its form, and consequently, it has a form that does not belong only to the legal nature. In order for the state to fulfill the “criteria of legitimacy”, it is not enough to have only the law in its statutory form. The law needs to refer also to a set of ‘a preconstitutional and prelegal substantive values or concrete decisions to

\(^\text{444}\) Schmitt, CT, p. 187.
\(^\text{445}\) See Agamben, State of exception.
\(^\text{446}\) Schmitt, LL, p. 21-2.
which appeals might be directed when the formal rules of liberal or social-
democratic regime collide or appear vulnerable’. 447 This substantive crite-
rion is what Schmitt sought and finally found in the figure of authority, of
sovereign. And this criterion, and not the law itself, can be a source of le-
gitimacy for a given regime.

Therefore, besides the given critique of the law of the Rechtsstaat,
Schmitt focuses on the ability of the political concept of law to truly grasp
the political in the law, instead of transferring it into its statutory form. In
the formal concept of law, the law is always a legal norm. On the other
hand, ‘[l]aw in the sense of the political concept of law is concrete will
and command and an act of sovereignty’. 448 Following Hirst conclusion,
in the political concept of law it can be observed that

[s]overeignty is thus not a matter of formal constitutional doctrine or essen-
tially hypocritical references to the people; it is a matter of determining which
particular agency has the capacity – outside of the law – to impose an order
which, because it is political, can become legal. 449

Therefore, this concept of law operates under a centrifugal force that
keeps the political will away from the absolute possibility of becoming the
part of the general norm, so it maintains its essential feature to describe a
will or command. To understand this better, we have to return to the mo-
ment when the first democracies started to develop under the principles of
absolute monarchies. At that time, people were asking not only for a new
Rechtsstaat that could protect their rights, but also for the greater power of
their parliaments. In this transitional times, the democratic force of the
law, the one that is pre-constitutional and best conveyed in the syntagm
“will of people”, intertwines with the rising idea of Rechtsstaat and its for-
mal concept of law ‘whereby at that time the people were replaced, entire-
ly self-evidently and for the most part tacitly, by the will of the popular
assembly, of the parliament’. 450 According to this, the political form of
law is a democratic concept of law that existed before the formal concept
of law. When the rule of law became the rule of the popular assembly, a
strategic rejection of the political sources of law was implemented. In or-
der to intrude into freedom and property, there must be a legal norm with

448 Schmitt, CT, p. 187.
450 Schmitt, CT, p. 188.
certain qualities. By avoiding the political definition of law, liberalism is threatened by a condition of politics which converts the ‘rule of law’ into a merely formal doctrine. If the ‘rule of law’ is simply the people’s will expressed through their representatives, then it has not determinate content and the state is no longer substantively bound by law in its actions’. In what it follow, the main claims and Schmitt’s critique about cosmopolitan law based on the formal conception, will be examined.

4.5.1 Cosmopolitan law as “humanist” law: Schmitt’s critique

In *The inclusion of the Other*, Habermas tries to answer the challenges coming from Schmitt’s concept of the political that relate to his interpretation of the cosmopolitan order and international wars. According to him, Schmitt’s “anti-humanist” position is a wrong-headed returning to the classical international law, which makes his position “anti-human” in its refusing to condemn the war. Habermas’s claim about the war in its political-legal interpretation is focused on defending the cosmopolitan order and the value of humanism as its basic point. He admits the level of the “momentous forces” of the international war, but claims that

[these forces are still more likely to be tamed through the sanctions and interventions of an organized community of nations than through the legally ineffectual appeal to sovereign governments to conduct themselves in a reasonable manner.]

Therefore, the war as the clash of forces between two or more states in the anarchic international environment belongs to the traditional world and its traditional law. Pressuposing that the world moving towards a more cosmopolitan order, a new cosmopolitan law through the democratic legal principle is able to incorporate moral concepts into its legitimized structure. In other words:

Cosmopolitan law is a logical consequence of the idea of the constitutive rule of law. It establishes for the first time a symmetry between the juridification of social and political relations both within and beyond the state’s borders.

451 Hirst, ‘Carl Schmitt’s decisionism’, p. 11.
452 See Habermas, *The inclusion of the other*, pp. 193-201.
453 Habermas, *The inclusion of the other*, p. 194.
454 Habermas, *The inclusion of the other*, p. 199.
In other words, the logic of a cosmopolitan law is capable of penetrating into the traditional concept of sovereignty. Even though Habermas’s model doesn’t ask for the abolishment of the traditional national state, it finds the middle way where the sovereign states are going to be enforced by the stronger cosmopolitan argument (that is the “language of humanity”) to respect its rationality. Therefore, an intervention in anarchic international relations is not only necessary within its normative argument, but also within human and universal argument. However, this conceptualization of the problem of war, doesn’t mean full pacification and moving towards an exclusive peaceful solution for the emerging conflicts. Defense of the principles and values of humanity is above peaceful demands. Humanity is thus the absolute highest value that can be carried only by the cosmopolitan law.

This law for Schmitt is not only a dangerous tool of liberalism and its policy of human rights, but its reason is hypocritical. Using the “theology of humanitarism” in order to avoid political conflicts and the political, imply modern wars in the name of humanity. Humanity thus becomes a value that masks the goal of war or conflict, where the enemy is the enemy of humanity, of the highest moral concept us humans could possibly share, and thus its demonization is inevitable and it immediately justifies the most horrible violence. Schmitt breaks the opacity of wars in the name of humanity, in more contemporary words – the interventionist wars, by reminding that:

Humanity as such cannot wage war because it has no enemy, at least not on this planet. (…) That wars are waged in the name of humanity is not a contradiction of this simple truth; quite the contrary, it has an especially intensive political meaning. When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy. The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism.455

Therefore, this modern paradox grasped in the war as the exception from the normal state which is peace, is not only in the moral character of the

455 Schmitt, *The concept of the political*, p. 54.
concept of humanity, as Habermas insist. Besides rightly noticing that humanity has no enemy, Schmitt’s critique is mostly derived from the impossibility to legitimize the concept of humanity as homogeneous, whose definition is shared and interpreted in the same way in the whole world. Consequently, the democratic legitimation of it, on which Habermas insists upon, is doomed to failure, and that is why its usage is left to the logic of political, economic or ideological sphere where it is re-interpreted and used to serve particular interests. In other words, Schmitt’s critique of this democratic principle that tends towards universalization, breaks ‘with the very deeply entrenched conviction in Western democracies that they are the embodiment of the ‘best regime’ and that they have the ‘civilizing’ mission of universalizing it’. Revealing and reminding that in the end of any discourse (liberal or democratic) the non-moral definition of what is suitable to be the “human value” is not a decision of general popularity of the world, but rather a political decision that is prone to changes.

4.5.2 Cosmopolitan law as “humanist” law: Habermas’s answer

Aware of the weaknesses in promoting the integrative power of the “human value” as the carrier of universal morality, Habermas develops the standpoint to which this value is reflected in the concept of human rights that have exclusively a juridical nature as the individual, subjective rights. Therefore, the protection of these rights becomes a new cosmopolitan orientation that can move from a transnational to a more universal level. Distancing human rights from the moral rights and natural laws is double folded in Habermas’s argument. On the one hand, he is very clear, that both historically and philosophically, human rights exists in their positive form, as part of the positive law. In his interpretation of public sovereignty expressed in the right to communicate and participate, he goes even further and claims that ‘the rule of law is expressed in those classical basic rights that guarantee the private autonomy of members of society. Thus the law is legitimated as an instrument for the equal protection of private and public autonomy’. On the other hand, the legitimacy of these rights, as well as for every other law, is placed solely in morality. Besides protect-

456 Mouffe, On the political, p. 83.
457 Habermas, The inclusion of the other, p. 258.
ing individuals, law is ‘better understood as a functional complement of morality’. However, with regard to their justification, universal human rights show a different character, since they answer only to the moral claims of all people:

Basic rights, by contrast, regulate matters of such generality that moral arguments are sufficient for their justification. These arguments show why the implementation of such rules is in the equal interest of all persons qua persons, and thus why they are equally good for everybody.

It is obvious that Habermas’s defense from Schmitt’s claim about the liberal usage of humanity as the highest moral value, goes back to its beginnings – with the strategic reconstruction of the modern law and politics of human rights, where the basic rights add new moral content to his communicatively based law and deliberative democracy. Additionally, it is interesting that in one of his recent books, About the European Constitution, at its very beginning, Habermas lists three claims about cosmopolitan human rights. The last claim is defending his theory of human rights against the total rejection of the same with the radical content of Carl Schmitt. However, after the historical justification of human rights and the fight for human dignity, contrary to the announced dialogue with Schmitt’s political, there is another liberalist monologue about the flaws and dangers of the politics of human rights, referring to Carl Schmitt’s critique of that politics only once, in the footnote. Hence, his “defense” is actually another mild discourse that offers even milder critique of the danger of humanitarian wars and the constant restriction of human rights, for which there were more than enough easily accessible cases from a recent history to refer to. Moreover, he does not discuss the imperialist politics of the United States of America when he refers to Schmitt’s claim about abusing the politics of human rights in order to impose particular values or political interest, usually using violence. Habermas does not enter into any discussion of this kind, and continues with the same arguments given in the essay ‘Bestiality and humanity’.

The moral content of modernity, therefore, is no longer connected to the identity of one nation or group, but rather is derived from modern rationality and human dignity. Therefore, how does Habermas reflects on those

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458 Habermas, The inclusion of the other, p. 257.
459 Habermas, The inclusion of the other, p. 191.
460 See note 39 in Habermas, Sobre a constituição da Europa, pp. 33-34.
potential traditional obstacles for his politics of human rights? As any other enforcement, the enforcing of human rights a priori provokes and uses some kind of violence, in terms of enforcing of human rights politics. That is why they ‘cannot be imposed on this practice as an external constraint’. This is an understandable claim connected to pluralism and the validity of norms. According to Habermas, even though they have a special character in relation to other constitutional rights, their justification and empowerment cannot come from the outside of the state. Furthermore, legitimacy can be claimed only if all people involved in the discourse have reached consent. However, what Schmitt’s political analysis demonstrates, is that even if the existence of more or less universal consent is possible, the implementation and respect of human rights relies solely on the political decision of national states. This can be applied to any international treaty that can be signed, but not respected at the same time. Therefore, signing of the Universal Declaration of Human rights does not mean a commitment to its idea of global protection of human rights. In other words:

The statute is the basis for, the general presupposition of, but not the instrument of the expropriation. For this reason, the guarantee of the liberty rights of individuals includes over and over again the turn of phrase that an intrusion into the guaranteed sphere of freedom is permissible only on the basis of statutes. Finally, by insisting on the discourse of human rights as the carrier of the cosmopolitan project, and confronted with the political reality of civil wars, Habermas ends in advocating that ‘human rights would have to be implemented in many cases despite the opposition of national governments, international law’s prohibition of intervention is in need of revision’. This opinion was clearly demonstrated above, and it is actual today, just the way Schmitt was warning that the concept of mankind excludes the concept of the enemy. Habermas’s cosmopolitan claim, thus, goes beyond the change of the international law into a more legal order that would replace the state of nature that still exists there without discussion. His rhetoric of cosmopolitanism moves from the “particular” politics to the standardization of politics. As Castrucci will conclude:

461 Habermas, The inclusion of the other, p. 259.
462 Schmitt, CT, p. 192.
463 Habermas, The inclusion of the other, p. 182.
Habermas’s thesis of the pristine, indestructible, juridical stature of the human rights (…) is an ideological thesis of post-natural law legitimation of the power structures functional to the domain of certain political parties, which obviously cannot pretend to be ‘a totality’, but which are aware that only this fiction makes the exercise of their command admissible.\footnote{Castrucci, ‘Jürgen Habermas and the political realism: a critique’, p. 293.}

4.5.3 Possibility of equality in modernity

In The philosophical discourse of modernity, Habermas thinks about the co-originality of law and politics in modernity, by narrowing the political system. For Bernstein, the absence of political ‘is the philosophical discourse of modernity’.\footnote{Bernstein, ‘The causality of fate’, in D’Entrèves and Benhabib (eds.), Habermas and unfinished project of modernity, pp. 225-226.} That is why we can rather talk about “an absent politics” in Habermas’s work, than about a specific political theory. In the place of absent politics, we can find normative, constitutional solidarity. For Schmitt, on the other hand, one of the most important conditions for democracy, is the hegemony of people in the state. The hegemony that no constitution or representative body manages to incorporate in its normative-procedural structure because the essence of the state, as well as for Hegel, for Schmitt is in the pre-political, in the authority and its decision. Habermas’s critique of this argument is grasped in the next statement:

It is true, that democracy can only be exercised as a joint practice. But Schmitt does not construe this commonality in terms of the higher-level intersubjectivity of a discursive agreement between citizens who reciprocally recognize one another as free and equal; instead he reifies it into the homogeneity of members of a single people.\footnote{Habermas, The inclusion of the other, p. 135.}

Indeed, instead of revealing the fundamental human equality that is recognized in the reflexive process of people in modernity, Schmitt observes a fundamental inequality both in front of the law, and as an ideal used to define the liberal democracies. For him, law can promise only abstract equality in the limits of a norm, and not before the individual command, or decision.

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\textsuperscript{464} Castrucci, ‘Jürgen Habermas and the political realism: a critique’, p. 293.
\textsuperscript{466} Habermas, The inclusion of the other, p. 135.
because, in terms of content, it is entirely determined by the individual circumstance of the single case, while the law in the sense of the Rechtsstaat means a normative regulation, which is dominated by the idea of justice, and under which equality means justice.\footnote{Schmitt, CT, p. 194.}

This meaning of equality corresponds to the formal concept of law, and as such, it is non-political because it does not consider inequality as a possible situation. Hence, the decision of the highest executive power brings to our sight the difference between the statute and the decree, the difference that liberal concept of law fails to see. In January 2017, when the president of the United States signed the executive order 13769 titled ‘Protecting the nation from foreign terrorist entry into the United States’,\footnote{Full text of this order is available on the https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states [Last accessed on 30/07/2017].} the power of this decree went above the power of the statute, and the limits of a general equality before the law were revealed. According to Schmitt’s analysis of the 19\textsuperscript{th} century monarchies, this decree issued by the highest executive power ‘would not be considered law’\footnote{Schmitt, CT, p. 189.} because it is outside of the statute. Thus, in modern democracies, what tells us more about the normal state of law is the situation when that state ceases to exist on its own merits, the state of exception. Situation in which the link between law and politics shows its full strength.\footnote{See in this work Chapter three, Section 3.5.3, ‘Ausnahmzustand as the definition of sovereignty’.}

\section*{4.6 Nationalism seen as the enemy of cosmopolitanism}

For this work, challenges coming from both consensus and conflict, as the basis for a political and legal dialoge are at the core of understanding its relation to democracy. Therefore, the concept of nationalism employed here highlights the ruptures in modern theory that Habermas protects, ruptures that within themselves carry legitimate deficits that always mean exclusion and violence. For Schmitt these are products of the neutralization and depoliticization of liberal societies. On the other hand, in his recent works, Habermas’s focus is on Weber’s modern pathologies that are the expected product of modernization. However, as this chapter tended to
show, the radical critique of those pathologies and their rationality is not essential for the democratic improvement.

Habermas distinguishes at least four types of the development of the nation-states: in Western and Northern Europe the development was moving from state to nation, and from nation to state; in the post-colonized period, primarily in Africa and Asia, ‘artificial states had to be first “filled” by nations that coalesced only later’. Even though the beginning of the nation is possible only in the commonly organised structure, that is state, Habermas distinguishes two independent process – the formation states, which happened long before the formation of nations, and they merged into national state only after the French Revolution. In the case of the former Yugoslavia, thinking with Đinđić’s thesis, we can observe that first nations were created inside of the “non-existing” federation, and then followed the creation of the state. The same process stands for Kosovo. Therefore, the formation of these nation-states ‘made possible a new mode of legitimation based on a new, more abstract form of social integration’. In other words, the legitimation problems coming from the different world-views was solved in the nation-state, the same with which Habermas in his latest writings about the European Union doesn’t know how to deal with.

One of the strong arguments that protect the possibility of the reformation of the national states Habermas founds in the actuality of the world. For him, nation-states are not capable to answer on the global challenges, for example economic or climate. At this point he is certainly thinking only about European national states. Naturally, his most important writings about the future of the national states is bound to the EU. There are many obstacles for the Union’s development towards higher political integration, among which, the hardest one is coined in the sovereignty. The new model is supposed to offer a new concept of sovereignty where the carrier of rationality and the driving force of society doesn’t have to be national identity, which can be replaced with the cultural identity that can grasp the fine feeling of the members of one community. A similar “reformation” he prescribes to religion in a post-secularized society. Connected to this as-

471 Habermas, *The inclusion of the Other*, p. 106.
472 Habermas, *The inclusion of the Other*, p. 111.
pect, the culture stocks are able to produce social solidarity, which is, on its other end, bound to the normative system, to the constitution. The notion of solidarity, for the Balkan countries is perhaps the most appealing part of Habemras’s theory. However, to enable this reformation, the always and already known cultural and historical stoks have to abandon any nationalist definitions. In other words, nationalism as the social product has to be excluded from the cosmopolitan idea of Europe. That is why the above mentioned analysis of the development of nation-state is based upon conceptual history, where the nationalism shows its impossibility to cope with the problems arriving from the globalized world.

That is why in the third chapter of Inclusion of the Other, he defines nationalism as a traditional phenomenon, which is placed in the same category as religion. The “ethnonationalism” is an even more dangerous because it breaks the traditional distinction between “ethos” and “demos”. The former is always linked to blood and kinship ties, and it is a pre-political dimension that through the social development becomes substituted with the category of “demos”. In the case of the former Yugoslavia, adding ethnic content to the national, was a process that culminated during the war, but which had certainly started before. However, it seems as that Serbian or Croatian “ethnonationalism” needed to be first put in the same state in order to produce violence.

4.6.1 Future of nationalism

It is in their writings about nationalism as the foundation in the case of Schmitt, or unwanted, irrational leftover of the modern democracy in the case of Habermas, where we can see a true motive and potential of their respective theories. For the latter, nationalism implies violence, exclusion, the possibility of bestiality and absolute destruction of society. It opens the door for one or a group of subjects to use nationalism in order to disguise their violence with the political process, and impose their subjective will, circumventing the social and intersubjective reason that is in its nature universal. Looking back on the case of socialist Yugoslavia, it is not hard to deduce a similar conclusion. It was the subjective will of few political

474 See specifically Chapter Three, title five – ‘On the Relation between the Nation, the Rule of Law, and Democracy’, pp. 129-155.
elites who first usurped the right to decide on the interpretation of the constitution according to their political needs and goals, oriented by the strategic action. Later, those elites, whose grounds were already shaking, took the project of nationalism as their official politics and began to re-define the values and categories of Yugoslav society.

If we follow this line of thoughts, we can conclude that the violence and Yugoslav break-up at the beginning of the 90’s, were indeed a specific history, but under the “logic” of nationalist politics, which was already very familiar in Europe. Nevertheless, in this explanation we fail to answer two paradigmatic questions: why in Serbia the consequence of the dissolution of the federation was a cruel nationalism where the “collective amnesia” was systematically put above the intersubjective development of society; and why the politics focused on national and ethnic questions led to other violence, this time on Kosovo? Habermas fails to see the importance of the connection between those conflicts, and thus re-think the intersubjective postulates of modernity offered by his theory.

Schmitt, on the other hand, finds one of the main consequences of modern political and legal theory in the process of demonization of enemies who become enemies of “universal” morality. By being defined as the enemies of humanity, their destruction is morally justified. Therefore, for Schmitt, by taking the right to define and pervert the notion of enemy from the realm of political actions, modernity defends its hegemony over a system of values, depoliticizing the social sphere where the recognition between friend and enemy is possible. This mythology of violence tucked within the modern discourse of exclusion and politics of enemy can be observed in the history between the second and third Yugoslavia, and in my opinion, it can still be seen in the contemporary Serbian politics.

The intersubjective world, together with the logic and rationality of modernity, according to Habermas, has its historic chance under the tenants of consensus and dialogue. The function of the law is to stand between the lifeworld and the system, embracing the logic of both of them, understanding their standpoints, and thus preventing the conflict. However, for Schmitt, the complementary character of law and moral reflected in human rights, is based on a liberalist comprehension of modernity. Humanity, on the other hand, becomes a moral subject capable of legitimizing the policy of human rights that protects the lifeworld. How is then possible to talk about a humanitarian war, a humanitarian intervention, or a war in the name of humanity when violence is used in order to prevent other violence? Moreover, where is the consensus on the definition of that...
humanity, on its powers, means and limits, and how can war for humanity
an intersubjective expression of human reason? These are the questions in
which Schmitt’s political theory and his critique of liberalism find their ar-

Finally, exclusions that I have presented above, one happening in
Habermas’s definition of the ideal speech acts, and the other on the way
from pre-discursive to discursive argumentative levels of communication,
are both embodied in his faith in wester rationalization and modern law.
By excluding what one might interpret as traditional, we do not protect
modernity from, for example, nationalism. By institutionalizing normative
structures that impose and promote dialogue, equalize private and public
sovereignty and protect human rights, we will again fail to eradicate subtle
conflicts and antagonisms between nationalities or ethnic groups, even
though they share the same constitution. As Adorno says, ‘[t]he premier
demand upon all education is that Auschwitz not happen again’.\textsuperscript{475}
Auschwitz cannot happen again, just as the ethnic war in the Balkans can-
not be repeated. We have to put our energy into education, where true
ideas and relations within society can be thought. However, what has hap-
pened and is still happening in Guantanamo ‘was no civilization break
(…) [; it] was the realization of the Western policy’.\textsuperscript{476} That is why there
is an increasing demand to re-question the fundaments and logic of that
policy, which is the goal of the following section.

In sum, opposite to Habermas, Schmitt sees the homogeneity of people
and their shared destiny are the basis for the pre-political and pre-legal
foundation of law and nation. In \textit{State, movement, people}, he defines ‘the
People, as the apolitical side, growing under the protection and in the
shade of the political decisions’\textsuperscript{477} However, the category of “the People”
has no meaning until it becomes part of the triadic structure, where in con-
nection with the state and movement, under the rules of decisionism, be-
comes an expression of the political. In relation to equality, the law of one
country holds the idea of equality for its citizens who are part of the politi-
cal unity that, in order to be stable and united, has to have some level of
homogeneity. Likewise, ‘[i]t is through their belonging to the demos that
democratic citizens are granted equal rights, not because they participate

\textsuperscript{475} Adorno, \textit{Education after Auschwitz}, p. 1.
\textsuperscript{476} Madung, \textit{Politik und Gewalt}, p. 129.
\textsuperscript{477} Schmitt, \textit{State, movement, people}, p. 12.
in an abstract idea of humanity’. Any kind of forcing towards universal concepts would lead to the depoliticized world. Therefore, according to Schmitt, the politics of the modern national states is an endless struggle guided by national interests. Under these circumstances, nationalism arises as an important part of his political theory. The political struggle organized in the logic of the friend-foe relationship, provides nationalism with an important feature – the particularity. Thus, the political fights in one state spread from the national level towards the inside of the state, to the rivalry between different interest groups. That is why Schmitt sees the world filled with particular struggles of particular people with their particularly motivated interests in particular national states. Habermas’s cosmopolitan model would like very much to abolish this world, along with hostility and violence, to submit it to the universal normative concepts, and to the corresponding universal and transcendent moral content. Likewise, he is ready to take a risk and create the world where there would exist only legality under the cape of legal cosmopolitanism, where the possibility of legitimacy would have to be searched in the law and rational consensus, while the questions of exclusion/inclusion would be depoliticized and placed into the realm of morality. Finally, the world that, in its tendency to abolish antagonism, risks to create a situation where the political struggles of different world-views may arise in major antagonistic conflicts guided by the logic of violence. Only having this on our mind, we can understand violent conflict in Yugoslavia as the supressed antagonism of the different projects for future.

4.7 Political responsibility and decision

It is in the theology of law where the “emptying of the political” takes place in modernity, and for Schmitt, it is absolutely related to the liberal politics of human rights. Even though he was a jurist, Schmitt, at the end of his arguments, wants to protect the political, not the law. That is why, for example, his constitutional debate with Hans Kelsen was actually a critique of liberal equalization of the state, norms and law under the liberal “logic” of sovereignty. Since, for Schmitt to talk about the truth is not pos-

478 Mouffe, *The democratic paradox*, p. 41.
479 See in this work Chapter three, Section 3.3.1, ‘Guardian of the Constitution’.
sible through positive liberal politics. An example of this politics is, for instance, seen in the way ‘Kelsen solved the problem of the concept of sovereignty by negating it’.\(^{480}\) In this way, liberalism continues in its tentative to cancel the concept of the state, and detach it from the law. For Schmitt, altogether – romanticism, liberalism and positivism are focused on removing subjectivity and personality from politics. Consequently, ‘[t]he modern state seems to have actually become what Max Weber envisioned: a huge industrial plant’.\(^{481}\)

Liberal law can never be observed as some neutral expression of an equal and open deliberation of all free and rational people. It is rather a product deeply negative politics that decides what is good and what is bad, turning questions of politics into questions of ethics. Thus, the Hobbesian claim “\textit{autoritas, non veritas facit legem}” does not lose its reason in the liberal democracy. It is simply masked under the new political theology of humanism and cosmopolitanism. This argument is clearly articulated in \textit{Political theology}, whose main goal is to reveal the decision behind any order, including the juridical.

But sovereignty (and thus the state itself) resides in deciding this controversy, that is, in determining definitively what constitutes public order and security, in determining when they are disturbed, and so on. (…) After all, every legal order is based on a decision, and also the concept of the legal order, which is applied as something selfevident, contains within it the contrast of the two distinct elements of the juristic-norm and decision. Like every other order, the legal order rests on a decision and not on a norm.\(^{482}\)

Likewise, from the analyses of the 1974 Yugoslav Constitution, in the time before the war what was revealed was not irrationality of the law, but the decision behind it. It can be said that decisionism is in the core of the definition of the legal order in Schmitt’s works. Moreover decisionism may be described as a window through which Schmitt observed the world history since the 16\(^{th}\) century. It is also the main tool for distinguishing responsibility from authority in modern politics. According to Falk:

\begin{itemize}
  \item \(^{480}\) Schmitt, \textit{Political theology}, p. 21.
  \item \(^{481}\) Schmitt, \textit{Political theology}, p. 65.
  \item \(^{482}\) Schmitt, \textit{Political theology}, pp. 9-10.
\end{itemize}
Schmitt’s political theory can be read as an attempt to understand the possibility of modern authority, that is: responsibility. (…) Decisionism claims that this ultimate responsibility always falls on a person, never a mere norm.483 Therefore, in his critique of liberalism, we can see how the notion of responsibility is removed from the political authority, from the holders of the power in one state, and placed on the people who can act for or against humanity.

This chapter began with the dialectic of the historical and cultural dissolution of Yugoslavia – a federal, communist state that left some questions unanswered. In addition to its particularity, Yugoslavia’s disintegration was part of universal, global changes between the “West” and “East”, where communist regimes lost “the cold war”, and liberal capitalism took the victory, leaving its enemy demonized. Besides the power of the universal and history, another consequence of this disintegration was violence. The question of the historical possibility of communism can be very attractive, and Yugoslavia can serve for that kind of study. However, this work does not have this as its central question. Instead, in order to show the nodal points of Habermas’s theory and how Schmitt’s critique of liberalism and theory of the political relate to those points, the main questions are: why there was no consensus between ethnicities, and why ethnicities in Yugoslavia did not reach the level of intersubjective recognition under the flag of one state? The “legal” consensus was given in the form of the communist politics offered in the Constitution from 1974. This legal document became the only source of the political unity, and it was providing the idea of Yugoslav people. However, the political interpretation of this statute was standing in opposition to it, which can be observed in the decisions of the federal states. Naturally, the will of the majority of Yugoslav people could have been opposed to the Constitution, demanding a different system, more democratic and focused on civil liberties, for example. Albeit, such presuppositions are also not part of this paper, as the political-historical reasons for the fall of communism are not either. Nevertheless, the consequences of that fall are able to reflect on both communism and the current democratic system in, for example, the Republic of Serbia. This argument is envisaged in the post-war nationalist regimes that were marked by the liberals as just a “temporary delay” on the road towards un-

avoidable democratization, or as ‘a short parenthesis before rationality
reimposes its order, or a last desperate cry of the political before it is
definitively destroyed by the forces of law and universal reason’.484

Finally, we can talk about the specific disintegration process between
ethnicities and nationalities that has produced immense violence focused
on abolishing the enemies. This fall has led to the rise of the nationalist
politics in all states, the politics that continues nowadays. There was no
“Yugoslav law” to protect victims of the War in Bosnia, as there was no
respect for international law in the case of the NATO bombing of Serbia.
Both of these conflicts represent the state of exception per se, where poli-
tically led decisions showed their power. From this perspective, Haber-
mas’s arguments do not answer on the above posed questions and where
his argument fails to answer, it seems like Schmitt’s political and legal the-
ory can continue. Therefore, where Schmitt’s concept of the political elab-
orated in the previous chapter, and the above-summarized critique of liber-
it can present for the questions asked at the beginning of this chapter?

The answer is again in Schmitt’s critique which some authors have
managed to use towards a more productive reading of Schmitt’s work.
One of them is most certainly Chantal Mouffe, who shares a similar style
of writing as Carl Schmitt, presenting her main points very clear and open,
staying firm in her statements. Even though her political theory has much
more to offer than what will be shown in the following text, her usage of
Schmitt’s concepts and, most importantly, of his critique of deliberation
and consensus, is in the context of the need for radical democratic politics.
Finally, what she calls “agonistic democracy”, apart from offering an alter-
native to the liberal model of democracy, represents a model where ongo-
ing social conflicts (that are in reading of Schmitt always political) can de-
velop into a type of social energy, instead of becoming open antagonisms
like in the state of war. In the following text, I tend to present the way
Mouffe uses “Schmitt against Schmitt” that is based on the productive us-
age of Schmitt’s critique of liberalism and liberal democracy, with the aim
of empowering and helping liberal democracy to question some of its pre-
suppositions in order to become more stable and more inclusive. There-
fore, I will start from Schmitt’s critique of liberalism that will put forward
the fundamental arguments for further discussion about agonistic democ-

484 Mouffe, The return of the political, p. 1.
racy. The goal of the second part of this chapter is not to solely discuss Mouffe’s political analyses and certain democratic features, but to see how her interpretation of Schmitt casts a light on the possibility for an intersubjective structure in pluralist democratic conditions. However, before reflecting on her thesis, I will summarize the main points of Schmitt’s critique of liberalism as presented by his excellent reader, Jean-François Kervégan.

4.7.1 Critique of liberalism in a nutshell

There are three characteristics of liberalism that Kervégan distinguishes from Schmitt’s writings: political negation of the political, optimistic individualism and ethics of discussion, and metaphysics of indecision.485

(1) The first point reveals the political paradox that liberalism presents as its critique of the political. According to Schmitt, the liberal critique of politics is only existing as a cancelation of the political that is the main product of the “political critique of the political”. Consequently, liberalism finds the main enemy in the modern state due to its monopoly over politics. Therefore, ‘liberalism is a policy of denial of the political, a political critique of politics and its normal vector: the modern state’.486

For Schmitt, politics that limits the power of the state is nothing else than the destruction of the political. This leaves the state too weak to respond to the challenges coming from the social world that in its essence includes radical politics coming from both left and right. This argument is very important for two reasons: first, as it will be shown below, it allows the connection between the principles of liberalism and parliamentary democracy. The merging of these two different concepts can also be seen in a constitutional theory where ‘the liberal bourgeoisie established a certain ideal concept of constitution in its struggle against the absolute monarchy and identified it with the concept of constitution in general’.487 Consequently, liberal politics stands out as the only type of politics, leaving the “other types” outside, marking them as their enemies. Under the same token, ‘there is a constitution only when private property and personal freedom are ensured. Everything else is despotism, dictatorship, tyranny, slavery, or

485 See Kervégan, Hegel, Carl Schmitt, pp. 96-118.
487 Schmitt, CT, p. 89.
whatever designations may be, not a “constitution”. In consequence, as Schmitt observes, ‘the modern, bourgeois-Rechtsstaat constitution (…) [is] often equated with the constitution as such and “constitutional state” is given the same meaning as the “bourgeois Rechsstaat”’. This merging of two different concepts, liberalism and democracy, according to Chantal Mouffe, is one of the main features of the modern democracy and is one of the reasons of its irrationality.

On one side we have the liberal tradition constituted by the rule of law, the defence of human rights and the respect of individual liberty; on the other the democratic tradition whose main ideas are those of equality, identity between governing and governed and popular sovereignty. There is no necessary relation between those two distinct traditions but only a contingent historical articulation.

(2a) Secondly, the main goal of liberal politics is to limit, and ultimately to destroy the concept of the sovereign state. Its critique of the state power, and the never-ending fight against the state that with the project of universal human rights calls for the origin of law outside of the state and constitution, shows how the law became means, and not the goal of mass democracies. Therefore, as Schmitt concludes, one cannot speak of the positive, but only about the negative politics of liberalism that is grasped in its cancellation. Related to this he writes:

But this is neither a political theory nor a political idea. Although liberalism has not radically denied the state, it has, on the other hand, neither advanced a positive theory of state nor on its own discovered how to reform the state, but has attempted only to tie the political to the ethical and to subjugate it to economics.

In other words, liberalism doesn’t develop theory of state as the basic political doctrine, because ‘[t]he political element cannot be separated from the state, from the political unity of a people’.

(2b) Moreover, ‘the radicalism vis-à-vis state and government grows in proportion to the radical belief in the goodness of man's nature’. Therefore, the second argument about liberalism relates to the anthropological

488 Schmitt, CT, p. 90.
489 Schmitt, CT, p. 169.
490 Mouffe, The democratic paradox, pp. 2-3.
491 Schmitt, The concept of the political, p. 61.
492 Schmitt, CT, p. 169.
493 Schmitt, The concept of the political, pp. 61.
roots of the human nature that liberalism choses to employ. Between “good” or “bad” people, by their own nature, the imaginary state of nature can be defined. For Schmitt, the meaning of the modern state is always derived from a certain theological meaning.\textsuperscript{494} In order to be theological, it always has to observe humans as sinners, as “bad” by their nature, and the rejection of this nature is the rejection of the political. Additionally, according to the definition of the political as the real possibility of one enemy, ‘political conceptions and ideas cannot very well start with an anthropological optimism’.\textsuperscript{495} Liberal faith in a good human nature is not the one that a true anarchist, for example, can defend, because it is used as an anti-political idea about humans who do not need the state in order to develop their nature. Therefore, in this interpretation of modern society, the accent is put on the individual nature that from the fact of belonging to the human race acquires certain liberties and rights, without the need for the state. As Kérvegan observes, this “optimism” in liberal theory shifts its meaning and ‘from a hypothesis about the nature of the individual it becomes a speculation that deals with the benefits, even though unforeseeable, of the great society and its complexity’\textsuperscript{496}

(3) The last characteristic that Kérvegan examines in relation to liberalism is the metaphysics of indecision. Regarding this point, we can see that Schmitt goes to the core of liberal “logic” and there he finds a metaphysical system that is used to justify its ethic of discussion and cancelation of the political. However, Kérvegan believes that the “metaphysical nucleus” of liberalism is not so clearly defined in Schmitt’s “negativity” towards liberalism. A related question for this doubt is whether Schmitt’s decisionism represents the alternative for the metaphysic of indecision? In this regard, Kérvegan reflects upon the last paragraph of the first chapter in Political theology, where Schmitt quotes the passage of ‘one Protestant theologian’ about the importance of the exception, and its opposite but still essential character in defining the general. This theologian is Søren Kierkegaard, and according to Kérvegan, it moves us closer to what Schmitt finds at the core of liberal metaphysic.

\textsuperscript{494} ‘All significant concepts of the modern theory of the state are secularized theological concepts’ (Schmitt, Political theology, p. 36.).
\textsuperscript{495} Schmitt, The concept of the political, p. 64.
\textsuperscript{496} Kervégan, Hegel, Carl Schmitt, p. 105.
Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception.497

Without knowing what to do with pure sovereign decision, law place it outside the norm, in the exception, but keeping its power bound to the law because there can be no law outside of law.

In this paradox, law defines authority that is behind sovereign decision in the law, by the right to decide on the state of exception. Therefore, Schmitt needs the norm to define and show the sovereign, while simultaneously the sovereign is apparent in every political and social expression in the process of deciding. On the other hand, law in Habermas deliberative democracy is used to hide the true sovereign, to hide the most important decision. However, Schmitt, as well as Habermas, doesn’t define a norm that can put order in the chaos. Schmitt’s answer is not legal, but political. To observe decisionism as an alternative to liberalism is possible only on the plan of politics, because Schmitt’s argument is precisely in the exception. When the law fails to prevent or stop the socially unwanted situation, the solution is possible only in the sphere of the political, where the authority and decision find their anchor, and not in the ideas of legally defined humanity as Habermas’s will suggest. The question is how this political answer to the flaws of the modern state can be related to a law without the need for exclusion or violence. With these questions in mind, and with the story of Yugoslavia as the ideal background, in what follows, I will present in more detail the way Chantal Mouffe sees the pacifying, inclusive and finally intersubjective potential of the social conflict above consensus.

4.8 Re-thinking the political

The enemy is the embodiment of your own question.
Theodor Däubler, Hymne an Italien

497 Schmitt, Political theology, p. 15.
Following Schmitt’s political theory, Mouffe thinks that we first need to observe the antagonistic structure of social reality, in order to envisage the democratic politics that are grasped in a set of practices and institutions that form a democratic order. My reading of Chantal Mouffe, which will be presented as the final part of this chapter, is divided into the following points: (1) (re)interpretation of Schmitt’s notion of the political – about “friend” and “enemy”; (2) the “undecidability” as opposed to universal rationalism; and (3) from the critique of liberalism towards the new model of democracy.

4.8.1 Re-thinking of “friend-enemy” relation

(1) Mouffe is aware of the victorious interpretation of the post-communist world by the liberals, and how they jumped into conclusion that the antagonisms that have emerged in that period as archaic, pre-conventional, traditional, bounding them in their irrationality to the concept of the political. In this way, by cancelling the antagonisms, the political is also cancelled, and the possibility of violence, hostility or war is replaced with peace. The same way Schmitt was criticizing the liberal interpretation of peace as the opposite of war, in the sense that if there is no war, there is only peace and vice versa. In regard to the newer world order, Mouffe finds similar dangerous liberal politics regarding antagonisms as ‘an impotence that, at a time of profound political change, could have devastating consequences for democratic politics’.498

In every social organization, in every democracy, there is a division between “we” and “they” that is usually defined in the legal definition of citizenship. In order to be part of the “we-group” one must be part of the demos, and this is possible through her citizen’s rights. Therefore, “they-group” has no access to the rights of demos, and cannot share experiences and benefits with that demos. This is best seen in Schmitt’s critique of human equality, which counts on humanity as the source of its power. The juridical reality of the “we/they” relationship proves its “friend/enemy” character in the never-ending possibility of antagonisms, the possibility entailed in the political character of that relationship, according to

498 Mouffe, The return of the political, p. 2.
Schmitt. Mouffe shares this opinion, but she observes the “friend-enemy” distinction as just one of the possibilities of “we-they” relation.

In the field of collective identities, we are always dealing with the creation of a ‘we’ which can exist only by the demarcation of a ‘they’. This does not mean of course that such a relation is necessarily one of friend/enemy, i.e. an antagonistic one. But we should acknowledge that, in certain conditions, there is always the possibility that this we/they relation can become antagonistic, i.e. that it can turn into a relation of friend/enemy.  

This argument is essential in her model of democracy, and one of the crucial corrections of Schmitt’s political theory. In order to define her position more precisely, she makes a distinction between two forms of antagonism: the one that she calls “antagonism proper”, and the other she calls “agonism”. The former is grasped in the Schmittian terms of the friend/enemy relationship that has no shared symbolic frame to count on, and where people see themselves as enemies. The latter, on the other hand, is the relationship between adversaries that are being defined in a paradoxical way as ‘friendly enemies’, that is, persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way.  

“Adversary” does not replace “enemy”, it just defines his or her position as non-wanted in the democratic context, and that is why the enemy ‘remains pertinent with respect to those who do not accept the democratic ‘rules of the game’ and who thereby exclude themselves from the political community’. Mouffe needs “enemy” in order to distinguish it from ‘adversary’ in the process of defining her adversary politics. That is why the concept of adversary does not change the Schmittian basis envisaged in the fact that the social, political world is agonistic, and that conflicts are naturally arising on the boundaries of that world. Moreover, by keeping the “antagonism proper” as the possible outcome of social interaction, Mouffe protects the potential of political pluralism.

However, the “we-they” division in liberal democracy and their antagonistic relationship is not enough to proclaim impossibility for liberal democracy, as Schmitt had concluded. Quite the contrary, Mouffe thinks

499 Mouffe, On the political, p. 15.
501 Mouffe, The return of the political, p. 4.
that the very differences can unite us together in the search for both individual and common identities. The moving between singular and universal meanings is indeed marked by the opposites, and conflicts might arise between those opposing strengths. Nevertheless, the possibility of these conflicts does not mean the call for their abolishment, their dissolution in “overlapping consensus” is justified by the universal reason. It brings a social potential, social energy and the will to argue, accept or reject, and not only to “interpret” pre-established rules and norms. It is in that possibility of the conflict, in the relationship between adversaries that “the political” is build and protected. Just as Mouffe observes them:

I believe (…) that it is the existence of this tension between the logic of identity and the logic of difference that defines the essence of pluralist democracy and makes it a form of government particularly well-suited to the undecidable character of modern politics. Far from bewailing this tension, we should be thankful for it and see it as something to be defended, not eliminated.  

4.8.2 The social impossibility of closure

(2) Contrary to the discursive tendency towards the “absolute non-fixity, or absolute fixity”, Ernesto Laclau and Chantal Mouffe propose the field of dicursivity that ‘determinates at the same time the necessarily discursive character of any object, and the impossibility of any given discourse to implement a final suture’.  

Only by recognizing this basis of the social communities we can think of the open system, instead of moving towards the closure of the system. The impossibility of fixing ultimate meaning means that in the social context it is possible to envisage only the pluralism of meanings. From the works of Ludwig Wittgenstein and Jacques Derrida, Mouffe continues developing the concept of “undecidability” that serves her political pluralism. This principle finally manages to break the metaphysics of decisionism, but not to cancel the political decision.

“Undecidability” in the name of a sort of contextualism first breaks with the concept of rational universalism. Habermas’s theory (as in the case of Ronald Dworkin or John Rawls) is focused on finding the universal truths that need to be organized by the reason, and therefore these

502 Mouffe, The return of the political, p. 133.
503 Laclau and Mouffe, Hegemony and socialist strategy: Towards a radical democracy, p. 111.
truths are necessarily the most rational because they are universal. Consequently, for him and for other liberals, the liberal, constitutional, modern democracy is not one of the possible truths, but the reasonable truth that people will reach when they stop being irrational and traditional, and become modern. Mouffe opposes this to Wittgenstein’s claim ‘that what is “reasonable” cannot be characterized independently of the content of certain pivotal “judgments”’.\(^\text{504}\) Instead of focusing on values and truths, pluralism develops around actions, and the present political language-games, because every identity is relational. By the same token, ‘[s]ociety never manages to be identical to itself, as every nodal point is constituted within an intertextuality that overflows it’.\(^\text{505}\) This means that social identities need to remain open and incomplete in order to move and adapt to different historical discourses. However, what is also important in understanding of this argument is that these unfixed identities or articulated relations do not flow without any fixation. The impossibility of the ultimate fixity of meaning implies that there has to be partial fixations – otherwise, the very flow of differences would be impossible. ‘Even in order to differ, to subvert meaning, there has to be a meaning’.\(^\text{506}\)

This “meaning” is what Schmitt would call “pre-political” or the condition of homogenous society. Similarly, Mouffe’s theory also asks for certain shared values of one demos. If we, for example, imagine Tito’s concept of “brotherhood and unity” as an attempt to provide the new state with a shared background, then the failure of that project is understandable under pluralist definitions. The “brotherhood and unity” served as the guiding link between six states in Yugoslavia, especially after the WWII when the unity seemed as the only way to continue with peace and progress. However, this communist mantra has never managed to incorporate the growing social antagonisms. The last attempt to reconcile pluralist visions of the future of Yugoslavia, and define them altogether, was the Constitution of 1974. Even though the text of this constitution tried to leave more room for nationalities and their states to develop, even the changed definition of the unity was not enough, because there was no political unity. There was no demos, or as Đinđić says, no citizens to refer to. In the end, the “brotherhood and unity” was just a myth that, after Tito’s death, many nostalgic politicians in Serbia were using to promote their re-

\(^{504}\) Mouffe, *The democratic paradox*, p. 65.
\(^{505}\) Laclau and Mouffe, *Hegemony and socialist strategy*, p. 113.
\(^{506}\) Laclau and Mouffe, *Hegemony and socialist strategy*, p. 112.
actionary politics, in the same way they will use the myth of Kosovo. That is why Milović’s opinion that the Serbian people were first victims of the communist, and then nationalist terrorism of these ideas, holds true to this today.

Therefore, in terms of rules and norms, the “undecidability” posits itself opposite to consensus and interpretation of rules. For Mouffe, each consensus is a type of exclusion, and not every institutionalized deliberation is equal and free in the same way for all people. These conclusions are derived from Schmitt’s strong critique of consensually based democracy, where rational deliberation is leading social actors to consent. For Wittgenstein, ‘obeying a rule’ is a practice and our understanding of the rules consists in the mastery of a technique. ‘The use of general terms is therefore to be seen as intersubjective ‘practices’ or ‘customs’ that are not that different from games like chess and tennis’. 507 If social actors react differently when faced with a certain rule, it is in pluralism of definitions of their identities where they will find arguments for obeying or disobeying the rule. In the case these rules are defined only by the principles of rationalism that decides which rule is correct, and not by the practice of different usages of them, one can only count on simply following the rule. Reflecting upon Habermas’s rational consensus, we can notice the possibility of applying Wittgenstein’s argument. If there is a notion of what is rational and therefore what is not, how can we talk about mutual consensus? If our understanding of the norms is rooted in our relation to them, defined in a particular experience that depends on the different identities we have, there must be pluralism of the interpretation of the same norm, and it is precisely in this pluralism that Mouffe discovers the intersubjectivity and social energy that can trigger a democratic process. Habermas, despite being aware of the different interpretations of the world, constructs the rational as homogenous and uniformed, able to impose the rightness of the norm without involving in further particular interpretations. Moreover, with the existence of different interpretations, it is natural there are conflicts around them, because they have to clash in their political existence. In other words, the social is

permeated by struggle where contesting discourses seek to invest things and relations with different meanings. It is the profound undecidability of meaning, and the consequent constant struggle over it, which render the social inherently “political”.\(^\text{508}\)

These conflicts, which are, according to Laclau and Mouffe, the essence of the political nature of the social, are excluded in the discourse theory which sees their interpretations as only factual, uncontested and natural. The neutralization of different life views is the product of the fear from conflicts that Habermas and other liberals have. By submitting processes of thinking about norms and rules to the principles of rational consensus, the main goal becomes to prevent those conflicts between different interpretations to emerge, as all sides promise to follow the reason of the better argument. However, a better argument always has to be rational, and any other is not acceptable. But, an “irrational” argument or interpretation does not disappear from the society with consensus. Quite the contrary, it continues to live in its particular life that will, in the first moments of crisis or instability, show itself as an open antagonism ready to enter into conflict, because it already has a clear political vision of the “friend-enemy” relation. Thus, if certain rules or norms are cancelling or denying parts of some social identity, this identity can, of course, change, but not solely because that is a ‘rational’ thing to do according to consensus. Moreover, by being in its irrationality outside of consensus, it can develop an antagonistic relation toward the “rational”. The only way to prevent this is to give it a political meaning, because it is only in pluralist politics where these antagonisms can be prevented. As Mouffe says: ‘The advent of liberal pluralism as well as its continuance must be envisaged as a form of political intervention in a conflictual field, an intervention that implies the repression of other alternatives’.\(^\text{509}\)

However, according to Mouffe, a certain consensus must exist, but not around symbolic liberal values, such as humanism or equality. She asks for consensus in democracy, on the principles of pluralist democracy. These principles are not found in cancelling the conflicts, but in ‘creating strong forms of identification with them. ‘This should be done by developing and multiplying in as many social relations as possible the discourses, the practices, the language games’ that produce democratic “subject pos-


\(^\text{509}\) Mouffe, *The return of the political*, p. 152.
In this way, unlike today, there will also exist a social and political environment where alternatives can emerge, when everything that is not grasped by the “western”, liberal idea of democracy is excluded from the right for interpretation. When Đinđić named his book *Yugoslavia as an unfinished state* he was, according to Žižek, referring to Habermas’s claim about modernity. Yugoslavia did represent an unfinished project, but not of modernity in the liberalist definition. That is why its tragedy is not only in the violent desintegration, but also in the demonization of its ideas all the way to its ideological core.

4.8.3 Towards the new model of agonistic democracy

(3) The world that Mouffe sees is different from the world Habermas thinks about. In her critique of the modern democratic environment, she reminds us of the aggregative model of Schumpeter’s *minimal democracy*, which was present in the second half of the 20th century, and developed under the influence of Rawls’ normative political theory. Mouffe believes that there are many versions of deliberative democracy, but that we can roughly divide them into two schools: one represented by Rawls, and the other by Habermas. Both authors think that they have found a solution to the problem of compatibility between liberalism and equality, which is a problem liberal theory deals with from its beginnings. On the other hand, Mouffe thinks that instead of finding a solution, they both end up privileging one dimension in relation to another: in the case of Rawls that is liberalism, in the case of Habermas it is democracy. As far as the latter is concerned, in *BFN* is obvious that one of the objectives of his procedural theory of democracy is to bring to the fore the “co-originality” of the fundamental individual rights and of popular sovereignty. On the one hand, the self-government serves to protect the individual rights; on the other hand, these rights provide the necessary conditions for exercising popular sovereignty. Once they are envisaged in such a way, ‘then one can understand how popular sovereignty and human rights go hand in hand, and hence grasp the co-originality of civic and private autonomy’. According to Mouffe, the trouble with deliberative democracy and with liberalism

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in general, is that they try to evade, and even have fear of, politics. ‘Their moralism invites intransigence, their rationalism denigrates the passions, their quest for consensus denies the tendency to antagonism, and their search for final answers flies in the face of value pluralism’.\textsuperscript{512} In conclusion, deliberative democracy is cancelling the true and inevitable nature of the political, failing to incorporate it in its theoretical and practical core. This can be observed in the rise of right-wing populist parties, which through the channels of the representative democracy are managing to occupy power positions in some democratic systems.

\section*{4.9 Conclusion to the chapter}

Habermas states that only political systems can “act”.\textsuperscript{513} Nevertheless, his critique of the ongoing uncoupling never ends in the critique of power relation. Quite the contrary, he keeps the institutional framework and power relation of the “traditional” liberal democracy. The public opinion worked in the democratic processes, ends up as a product of institutionalized channels for free and equal communication and deliberation, established by the decisions of the power holders and, according to Habermas, this system-dependent process will only point the use of administrative power in specific directions. This is apparent in his writings about the EU. Although the existence of a stronger parliament depends solely on the political decisions of the Council members, Habermas continues to develop his plan for a new Union without entering into the nature of that decision. Moreover, his romanticized and heroic view on the possibilities of the European Parliament is part of what Mouffe and Schmitt call the identification of liberalism with democracy. The goal of democracy thus becomes the creation of a consensus, and that consensus is only possible if people are able to put aside their particular interests and think as “rational” beings. However, according to Mouffe, in order to end the conflict and enable freedom, we must always allow for the possibility of conflict and provide an arena where differences can be confronted. The democratic process should provide that arena. A liberal democratic regime, while fostering pluralism, cannot equate all values, since its very existence as a political form of so-

\begin{thebibliography}{99}
\bibitem{Crowder} Crowder, ‘Chantal Mouffe’s agonistic democracy’, p. 8.
\bibitem{Habermas} Habermas, \textit{BFN}, p. 300.
\end{thebibliography}
ciety requires a specific ordering of values which precludes a total pluralism. A political regime is always a case of “undecidable decided” and this is why it cannot exist without a “constitutive outside”. 514

In *The democratic paradox*, Mouffe writes:

> The status quo has become naturalized and made into the way ‘things really are’. This is of course what has happened with the present Zeitgeist, the so-called ‘third way’, which is no more than the justification by social democrats of their capitulation to a neoliberal hegemony whose power relations they will not challenge, limiting themselves to making some little adjustments in order to help people cope with what is seen as the ineluctable fate of ‘globalization’. 515

Contrary to universalism and globalism, her approach answers with the image of the multipolar world, and the multipolar perspective that comes with it. This paper has shown that even in the proposed democratic model of Habermas, it remains unclear what are the rules that define what a rational consensus is. More importantly, by fixing rational consensus to liberal rationality, Habermas excludes potential conflicts of interests that are at the core of the political. Mouffe, on the other hand, proposes to observe the ongoing crisis in both left and right oriented politics, from a different angle. Her critique of liberalist army of rationality and cosmopolitanism challenges not so often the questioned premises of the contemporary Western world. Her input is not only in showing the shortcomings and flaws of the claims that modern democracy presents as its own, but it goes beyond critique, opening the door towards a different world, and finally to pluralism of rationalities. First of all, the “apparent” triumph of the current model of liberal democracy needs to be questioned and analyzed in order to leave room for other solutions and types of democracy. Her agonistic model is one of those types, such as the deliberative model of Habermas. In any case, her model has a tendency to offer a political platform in which conflicts, interests and pluralistic structure of preferences and values can clash in the political way as social “adversaries” whose clashes are not going to be interpreted as irrational and “bad” for the stability of the system, but as the social engine that enables the political unity. A platform that did not exist in Yugoslavia, where the only “consensus” was constitutional, and thus the only unity was the legal unity. Pluralism in Yugoslavia,

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514 Mouffe, *The return of the political*, p. 152.
515 Mouffe, *The democratic paradox*, pp. 5-6.
seen in the differences between the six nationalities and even more ethnicities, at least theoretically and academically, can be interpreted as the opportunity that could have been used in the ongoing change of Yugoslav society.

In addition to the limited interpretation of Mouffe’s ideas that was presented, there is at least one question that she can be asked, and it considers the modern law. It is clear that Mouffe writes in the name of the excluded, the different, and she writes against intellectual colonization, for open, democratic, political society, where people will have more room to decide upon their future because their clashing interpretations of the world will be part of democratic politics. In this society, the concept of justice and the interpretation of norms must also be organized under the logic of “the impossibility of closure”. In other words, they must be a specific type of practice, and not just interpretation. However, “the legal” in her theory is heavily dependent on the political unity that (although less than Schmitt’s theory) still requires a high degree of homogeneity. It remains unclear how, in the agonistic model of democracy, that “traditional”, particular, will provide the part of the normative structure for polity. Moreover, can this social structure, which is partially un-fixed in its pluralist meaning, and partially fixed in its shared values, be used for the legal framework of the new pluralistic model of democracy or will it bring upon an even wider gap between the new politics and the democratic, constitutional law? Following these questions, it is possible to state that Mouffe is lacking the new model of law to serve her political structure, the law that will not only institutionalize social conflicts in the political manner, but will be flexible enough to simultaneously accept pluralisms into its normative structure, while referring to justice. Otherwise, there could emerge an antagonistic structure around and in the law itself. The law might always be serving the political in both Schmitt’s and Mouffe’s view (or in the case of any other “serious” leftist reader of Schmitt), but in her case, there is a need for a more interpretative law that could understand never fixed and always relational social identities. It can be concluded that Mouffe manages to scratch behind liberal rhetoric, not in order to reveal its complete absurdness and tragic fate as Schmitt does, but, on the contrary, to prevent the tragic destiny of the project that, according to her, can still be reformed in a way to serve people. In this way, she challenges both Habermas and Schmitt, since she can provide both of them with a very strong critical insight.