II. The possibility of the modern consensus

2.1 Introduction to the chapter

One can still hear the echoes of the old revolutionary slogans in what he says: “The Europe of citizens that we must build needs the forces of fraternity, of mutual aid and solidarity, so that the weak, the needy, and the unemployed are also able to accept the European Community as an advance over existing conditions. This appeal for the promotion of fraternity, connected with the idea of citizenship, must be the central message of the celebration of the two-hundredth anniversary of the French Revolution.

Habermas, Between Facts and Norms

Robert Williams in the book Hegel’s ethics of recognition explains that he wants ‘to examine the PR as a phenomenology of intersubjective freedom’. Under this premise, the intersubjectively mediated freedom can be found in PR, as well as Hegel’s concept of recognition defined as the “right to have rights”. However, later in the same book, Williams will distance himself from above mentioned goal, and from the possibility of interpretation of the social world as the intersubjective phenomenology. To Hegel’s deductive method that was moving from the abstract to concrete concepts, Williams objects that

it creates certain problems for his interpreters, particularly for those who seek to understand the Philosophy of Right as a phenomenology of intersubjectivity, a social phenomenology of social institutions. Above all it is crucial to avoid the fallacy of misplaced concreteness, of mistaking an abstraction for the whole.

Habermas is another author who finds in Hegel’s theory of recognition the first step towards overcoming of the subjective-centred philosophy and the metaphysics of subjectivity. It is in the mutual and social recognition where we can find the basis for the intersubjective, communicative freedom. In other words, ‘Habermas believes that the concept of recognition of the early Hegel presents a counterdiscourse against the philosophy of the subject constitutive of modernity’. However, according to Haber-

113 Williams, Hegel’s ethics of recognition, p. 133.
114 Williams, Hegel’s ethics of recognition, p. 229.
mas, in the post-Jena period of Hegel’s philosophy the principle of absolute idealism that is based on self-reflective monolog subjectivity, settles in the usage of force and in exclusion of the other. This way, the critique of subjectivity presented in the philosophy of spirit and in the philosophy of right, was possible ‘only within the framework of the philosophy of the subject’.\(^{116}\) Hegel’s philosophy doesn’t reach the word intersubjectivity. Under the same token, we can conclude that modernity is incapable to understand it, and as Milović observes, it remains the articulation of the social subjectivity and of the capitalism. Throughout this chapter will be shown the thesis of Jürgen Habermas for whom there is still point to be modern.

What we have learned from Hegel’s philosophy, is that the modern thought begins with the affirmation of subjectivism. Nevertheless, this affirmation indicates the dominance of the general structure of subjectivity over particular. Therefore, world history can be understood as a scene of domination that is easily traceable in the history of Balkans. This domination has all the European characteristics, and it was brought by a historical change in European rationalization. That is why, in the Introduction of Protestant Ethic and the Spirit of capitalism, Max Weber asks why the cultural phenomenon that became universal was created only in the Western societies. The answer to this question he grounds in the Protestant ethic that managed to connect ‘modern economic ethos with the rational ethics of ascetic Protestantism’.\(^{117}\) This rationalization is based on the instrumental and strategic rationality, and therefore it is a social pathology.

Moving towards democratic pathologies, Habermas shows the shortcomings of both republican and liberal models of law and politics, and offers a deliberative model of law and democracy, formulated through the theory of discourse. This chapter will attest the way his democratic model is supposed to overcome the problem of the relation between popular sovereignty and human rights. Throughout his theory, Habermas always looks for a golden ratio, avoiding extreme points that threaten to produce tyranny of majority or disable democratic process of joint decision-making. Instead of these extremes, theory of the communicative action is searching for the cooperation between individuals and their mutual acceptance. Moreover, in the situation when the political autonomy of individu-

\(^{116}\) Habermas, *The philosophical discourse of modernity*, p. 41.

als is not applied only through general law, but grasped by the communicative modus of discursive formation of opinion and will, popular sovereignty and human rights find their inner connection. ‘The legitimacy of the law does not exclusively rely on individual rights (according to liberal interpretation) nor on virtuous state of sovereign people, but on the communicative mediation, [and] on discourse principle of law’.118 By presenting his discontent with the liberal and republican model of law, Habermas develops the thesis of “co-originality” that goes hand in hand with a dualism between facticity and validity, when the moral as the inner feature, is too weak and needs its institutionalization in existing legal frame.119

For the deconstruction of his legal theory, perhaps the most important source for this chapter will be the book BFN. It is in this book where the “shift” in Habermas’s philosophy towards more normative theory of society is apparent. Relying on the earlier writings about the discourse ethics, Habermas defines the discursive principle of law as an ethical principle superior to the positive law. Therefore, in BFN, he makes a distinction between moral and law to which discursive ethics precedes. By presenting rationality to discursive theory as its central standpoint, as well as the feature of social participants that are communicating in the lifeworlds, the “rational discourse” becomes the tool used by actors in their discussions on law, moral or norms. According to Habermas, this discourse under premises of free and equal communication ‘should include any attempt to reach an understanding over problematic validity claims’.120 Furthermore, the institutionally recognized rational capacities of social actors carry the idea of deliberative democracy as the only one that can grasp and lead communicative relations within rational discourses.

Previous chapter showed how Hegel needs to step out of the social sphere in order to find its fundaments, the essential and universal. Opposite to him, Habermas calls for philosophy to stay inside of the social sphere, and to search for its reason in the social relation that are always based on human communication. What finally binds Habermas’s philosophy of knowledge and communicative action together is the intersubjec-

118 Reese-Schäfer, ‘Jürgen Habermas i deliberativna demokracija’, [Jürgen Habermas and deliberative democracy], in Politička misao, p. 9.
119 This is linked to the distinction between moral and democratic principles. See Habermas, BFN, p. 108.
120 Habermas, BFN, pp. 107-108.
tive reason. However, the illusion of pure theory grasped in the unity of knowledge and interest (as well as in the unity of philosophy of law and democracy), acts using the strategic action, lacking the radical critique of the modern reason. Paths from more Hegelian to the pure Kantian project, from Marx to the liberal concept of deliberative democracy, from criticism of technology to its marginalization, from the absolute of non-violence to justified violence, are high lightening what we can call Habermas’s dialectics and, what is more important for this paper, they represent the bridge his philosophy has built towards the modern legal theory. However, the idea of intersubjectively organised society remains the strongest pillar of his oeuvre, the pillar that perhaps still offers an argument to think the new world. More importantly, intersubjectivity holds up the idea of democratic consensus that is capable of breaking the coil of violence, which can render not only ideal, but a real possibility between different nationalities in the Balkans. It is with this goal that the following reading of Habermas’s work will be presented.

2.2 From the freedom of the bourgeois public sphere to the instrumentalized liberal public sphere

One of the common conclusions of both Schmitt and Habermas was ‘that the people is a concept that “becomes present only in the public sphere”’.121 Work that first put Habermas in the academic attention was The structural transformation of the public sphere [Strukturwandel der Öffentlichkeit]. This was his Habilitationsschrift,122 a postdoctoral dissertation, published in 1962, eight years after completing his doctoral dissertation. This work proved to be very important to understand his later writings, and even though the first English translation came to light after more than two decades (in 1989), many authors find the roots of BFN and The theory of the communicative action in this book.

122 It is interesting that, as a condition for the professor shift at the university, Habermas’s habilitation was rejected by Adorno and Horkheimer. Two years after the rejection, Habermas will return on the request of Adorno and take over Horkheimer’s chair in philosophy and sociology.

II. The possibility of the modern consensus
Strukturwandel der Öffentlichkeit carefully examines the historical genesis of the public sphere and its structural changes throughout the contemporary era. What he calls Bürgerliche Öffentlichkeit (in English “the bourgeois public sphere” is used as a suitable translation) began to appear in the 18th century as the realm between the civil society and the state. In the Hellenic times, oikos was reserved for private matters of the household, which was a self-governing realm by the head of the family. Only in the public sphere is freedom and permanence possible as part of competition among equals. Unlike the old Greek concept of the public sphere, Roman law did not recognize a private law that allows and recognizes the public sphere in which private people can enter. “The public sphere was constituted in discussion (lexis), which could also assume the forms of consultation and of sitting in the court of law, as well as in common action (praxis), be it the waging of war or competition in athletic games”.123

In the 18th century, a space between the private realm and the state power emerges, a space called the bourgeois public sphere. Like in ancient Greece, this sphere has its lexis and praxis, seen in the organs of information and political debates. These were found in the literary and political journalism, reading societies, salons and coffeehouses, basically all places created by a society where people could share their public opinion, their needs and point of view, and most importantly, where they could express their critical standpoint about the world around them. This public sphere created in public salons and literary clubs, represented a certain system of free process of sharing ideas, without any domination over the process itself, and therefore, can be considered as a certain realm of freedom and permanence.

In the 19th century we can observe the beginning of the “liberal public sphere”. The system of sharing ideas from the previous century becomes an empty concept where ideas are suffocated to the level of commodity. The so-called “refeudalization” of the bourgeois public sphere was established on the destruction of the holy separation between society and state. Habermas depicts two simultaneous actions whose development allowed a new, liberal public sphere to arise: the “societalization” of the state, and the “stateification” of the society, which is reflected in the transfer of public functions to private corporate bodies and the extension of public au-

123 Habermas, The structural transformation of the public sphere: An inquiry into a category of bourgeois society, p. 3.
authority over sectors of the private realm. Both processes supported each other, and by extending themselves to politics, private interests at the same time opened the back door for the state to enter into the private realm. Subsequently, in the name of legal, social and security protection, the liberal state had the perfect position to merge the social and state level to the required political level, which was carefully executed in new projects of human rights at the end of the 19th century.

The intervention of state authority in the private realm was mostly done through the law. ‘The new interventionism of the waning nineteenth century was embraced by a state that in virtue of the constitutionalization (...) of a political public sphere tended to adopt the interests of civil society as its own’.124 Moreover, the expansion of the public service sector has allowed the state to administrate many aspects of the private sphere, as its interests moved outside of its borders. The administration of private life has never existed in this extent until the liberal concept of state and law. Furthermore,

[through law and regulation the state intervened deeply in the sphere of commodity exchange and social labor because the competing interests of the societal forces translated themselves into a political dynamism and, mediated by state interventionism, reacted back on their own sphere.125

The newly formed, repoliticized, social sphere in the social welfare state was marked by the merging of private and public. This is best seen in the private law that served as a means of the capitalistic public law. ‘With the state’s “flight” out of the public law (...) the flipside of the “publification” of private law also became apparent: the privatization of public law’.126

These legal changes in the late 18th century brought the concept of human rights and freedom to the centre of state attention, where it was treated as a “holy grail” under the protection of the state. The following century brought a certain shift in the concept of human rights and liberties. They still remain the universal concepts of liberal states, but besides providing their guarantees, the state policy of protecting certain corporation interests turned states into pests of the human rights project. This happens when the law gained the power to protect the rights and liberties of citizens from the

124 Habermas, The structural transformation of the public sphere, p. 142.
125 Habermas, The structural transformation of the public sphere, p. 148.
126 Habermas, The structural transformation of the public sphere, p. 151.
interests of their states, and nowadays, from economic interests of large corporations.

The public sphere in these situations mutates into the object of mass consumption and corporate interests. Rational discussions of public matters that were once freely held in a protected and separate private sphere are now lost in the amalgam of private and public interest under the rules of a growing consumer society where separation from the critical mind is noticed. This shift ‘from a culture-debating (kulturräsonierend) to a culture-consuming public’\(^\text{127}\) is the way in which the bourgeois sphere from ‘the world of letters was replaced by the pseudo-public or sham-private world of culture consumption’.\(^\text{128}\) Instead of providing a place for communicative interaction and criticism, the public sphere has become another instrument disposed to control.

The work of Habermas on the change of the public sphere gave important historical argumentation to the Frankfurt circle, and even more, has put this German philosopher on the stage of the most important critical writers. Many ideas of his future work, as we will see in what it follows, can be traced back to the ideas explored in \textit{The structural transformation of the public sphere}. For example, his detailed and lengthy description of the 18\textsuperscript{th} century salons, literary clubs and coffeehouses can be interpreted as a certain introduction to the theory of communicative action. The merging of private and public life can be read as a herald of the upcoming uncoupling and colonization of the lifeworld. More importantly, the role of law and space that was given to the legal analysis, are reappearing in \textit{BFN} in their original tone.

On the other hand, it may be interesting to think which idea from the book of young Habermas will disappear in his later works. When he refers to the moment of degradation of the bourgeois public sphere, we cannot fail to notice a certain exaltation of reasonable discussions of citizens of the 18\textsuperscript{th} century who reminded him of the Aristotelian political. The historical “fall” of the manifestation of reason among people in a public discussion provoked two emotions in Habermas’s writings: first, more fearless critical tone that penetrated the liberal theory and came to the core of its ideological character that acts in the name of humanity, a word taken away from its subject; and second, a certain melancholy for the lost poten-

\(^{127}\) Habermas, \textit{The structural transformation of the public sphere}, pp. 159 ff.

\(^{128}\) Habermas, \textit{The structural transformation of the public sphere}, p. 160.
tial of an independent public sphere that can be saved today only through the modern law. In the recent Habermas’s writings (more precisely, those coming after *Faktizität und Geltung*), these two emotions are almost completely abolished. His critical tone has lost its general character and has focused on certain problems of modern states, and on its way it has excluded a wide range of other social phenomena that became marginal concepts. One of them is his critique technology, as well as his relation with the student protests. In my opinion, the intersubjective reason was also first rooted in Habermas critique of the technical reason and ‘its apologetic service-ability, [where] “rationality” is weakened as a critical standard and degraded to a corrective within the system: what can still be said is, at best, that society is “poorly programmed”’.\footnote{Habermas, *Toward a rational society: Student protest, science and politics*, pp. 83-84.} Without further discussion about this notion, the next part this chapter will immediately focus on the theory of communicative action, which will finally lead us to the pathology of the modern world and the possibility of its overcoming.

### 2.3 Towards the communicative reason

After Adorno’s death in 1969, and after distancing himself from the student protests, in a somewhat different academic climate, Habermas decided to leave Frankfurt and dedicate the opportunity to move forward to a more complete critique of theory of society. His critical theory had to be an interdisciplinary social theory, and whatever its course was, it had to pass the democratic test. In his “transition” works that precede the publication of *TCA*, Habermas worked hard to connect the concept of ordinary communication and the reflexivity that is capable of presenting a certain form of knowledge, which in turn has the capacity to criticize the growing positivist philosophy and hermeneutic historicism. In *Knowledge and human interests*, he takes into account Freud’s psychoanalytic conclusions that he applies to human communication and its speculative potential. ‘The dialectic of general and individual made possible in the intersubjectivity of talking and acting can also make use of the accompanying flow of spontaneous expressions of bodily movements and gestures and correct itself by means of them’.\footnote{Habermas, *Knowledge and human interests*, p. 168.} In order for language to express the intersubjec-
tivity, it is not enough to have a “pure language”, but also the corporal gestures that finally with the interaction can induce knowledge from the act of communication. Only in combination with the gestures, the ordinary language can interpret itself, and ‘[w]ithout the supplement of non-verbal objectivations, natural language remains fragmentary’.Basically, with the non-verbal corporal communication, the language is able to express itself and reach the level of self-interpretation where it raises above the fragmentary level to the speculative level of inner reflection. Before describing the communicative action, I will reflect on three points that are in my opinion necessary to understand better his theory of communicative action.

2.3.1 Social systems and their crises

In the period before publishing *TCA*, Habermas was addressing problems of the post-capitalistic societies, where the modes of production and economic domination became insufficient to describe the social reality. He had found the level of analysis at which the connection between normative structures and steering problems becomes palpable in a historically oriented analysis of social systems. This complex analysis he begins with the notion of crisis, which represent the social moment where the historical change from early to late capitalism is seen more clearly.

Habermas says that ‘[c]rises in social systems are not created through accidental changes in the environment, but through structurally inherent system-imperatives that are incompatible and cannot be hierarchically integrated’.

Therefore, Marx’s analysis of the crises in early capitalist societies cannot be applied for the late capitalist societies. ‘The history of social theory since Marx might be understood as the unmixing of two paradigms that could no longer be integrated into a two-level concept of society that connects system and lifeworld’. The cause of a certain crisis is no longer found in the reaction to the change from the outside environment that surrounds social systems. Social systems in the late capitalism are highly differentiated and they have developed capacities to cope with very complex environment by altering their values or certain system

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131 Habermas, *Knowledge and human interests*, p. 169.
elements in order to adapt to the changed conditions. However, in the process of adaptation, their identity becomes obscured, and this is the level at which a new type of crisis appears. The experience of the crisis can be both system and subjective. According to the first, social systems also have identities that they can lose, and Habermas finds the example of this in a situation when some system falls into a void after their traditional structures disappear. The subjective definition of crisis is based on the argument that only members of a society can experience these structural alternations that can interfere with their social identity. Nevertheless, the crisis is always a loss of the identity that is connected with steering problems. Social subjects are not fully aware of those problems, but they create ‘secondary problems that do affect consciousness in a specific way – precisely in such a way as to endanger social integration’.

2.3.2 Work vs. interaction

Habermas justly observes that if the new rationalization is indeed the political domination that takes its “Reason” from the technical development, then the concept of interaction is taken away from the political domain, and our society is left only with the instrumental and strategic action. For him, there is a significant difference between work and interaction, and in this distinction is the origin of the difference between traditional and modern society.

*Work* is a type of purposive-rational action in which ‘the conduct of rational choices is governed by strategies based on analytic knowledge’.

This kind of knowledge is based on the deductions from the existing value systems and decision-making procedures, and at its core one can observe three types of actions: purposive-rational, instrumental and strategic action. The Instrumental action governs itself by the technical rules, deciding whether some action is appropriate or inappropriate due to relation with the given conditions in reality. The strategic action is guided by the correct evaluation, in other words by the calculation of possible choices, while the purposive-rational action helps us to achieve the pre-established goals in given conditions.

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135 Habermas, *Toward a rational society*, p. 92.
Interaction, on the other hand, is what Habermas calls communicative action, and is based on symbolic interaction. The binding character of consensual norms is used to govern these types of actions, while the produced social norms are imposed through sanctions. ‘While the validity of technical rules and strategies depends on empirically true or analytically correct propositions, the validity of social norms is grounded only in the inter-subjectivity [emphasis added] of the mutual understanding of intentions and secured by the general recognition of obligations’. \cite{136} In the case of the communicative action, the behavior that does not correspond to the consensual norms is going to be declared as deviant behavior, while in the case of a strategic action we can observe the so-called incompetent behavior which in relation towards the achievement of certain goals means a failure or lack of success.

If work is the feature of traditional societies and is based on instrumental and strategic action, then the goal is to overcome it in the project of modernity that can base itself upon interaction and within it communicative action. ‘The central problem of Habermas’s thought has been to demonstrate that an exclusively instrumental or strategic understanding of rationality is somehow inadequate’. \cite{137} Indeed, Habermas dedicates a great deal of time and space to show that instrumental and strategic action are in their essence “teleological”, and in many ways not good for social development. Therefore, the social systems can be defined according to its dominant rational action oriented to some goal, where we have communication on the one hand, and instrumental and strategic actions on the other. ‘The traditional societies perpetuate themselves until the subsystems of rational action oriented towards an end, remain within the existing limits of legitimacy’. \cite{138} Habermas finds that Weber is the first to give scientific social reflections on rational action in the modern world. However, in his opinion, Weber’s finds the rationality of action mostly in the instrumental action that is teleological. In what follows, I will show how Habermas overcomes this one-sidedness in the typology of social action.

\begin{thebibliography}{9}
\bibitem{136} Habermas, *Toward a rational society*, p. 92.
\bibitem{137} White, *The recent work of Jürgen Habermas: Reason, justice & modernity*, p. 25.
\bibitem{138} Milović, *Filosofia da comunicação – para uma crítica da modernidade [Philosophy of communication – for a critique of modernity]*, p. 22.
\end{thebibliography}
2.4 The specific nature of communicative action

In *TCA*, Habermas presents the solution for the lost reason of modernity, moving towards the reconstructive social theory. This solution is marked by the replacement of the practical reason with the communicative reason, which is based on communicative action briefly described above. The following are three main points of difference between these two reasons. Firstly, Habermas wants to define a new communicative reason in view of its linguistic medium, and not according to individuals or some other macrossubjects, such as the state or society. This opens the door for more system understanding of the world, the idea he has already tested in his *Technik und Wissenschaft als Ideologie* when he wrote about Weber’s subsystems. This linguistic medium enables a communicative reason by allowing people’s interactions to come together and form specific life structures. ‘This rationality is inscribed in the linguistic telos of mutual understanding and forms an ensemble of conditions that both enable and limit’.139 Secondly, as will be fully explained later in the chapter, the communicative action, based on the linguistic medium (just like a strategic action) is oriented towards understanding. However, while in the case of the practical reason based on the strategic action, the goals are successfully or unsuccessfully realized due to the competence of the calculated action, the goal of the communicative action defined as reaching understanding, ‘can critically turn against its own results and thus transcend itself’.140 Finally, the given tension between ideas and reality, as the prime motivator of any action, manages to be understood in the facticity of linguistically structured new forms of life. Although these forms of life can reach a wide range of validity claims, they cannot manage practical tasks per se. ‘Normativity in terms of obligatory orientation of action does not coincide with communicative rationality’.141 However, these insights have a normative character only if actors in the communication commit themselves to certain prescriptions. Unlike the participants in action that bring upon a certain form of practical reason, in the case of a communicative action, a certain idealization is required, and consensus is actually possible only if the participants are ready to accept the obligations that are coming from it.

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139 Habermas, *BFN*, p. 4.
140 Habermas, *BFN*, p. 4.
141 Habermas, *BFN*, p. 5.
2.4.1 Instrumental and communicative action

There are two main types of social action according to Habermas: (a) action oriented to success, and (b) action oriented toward reaching understanding. In connection with these basic modes of action, we can later examine instrumental and strategic action (which belong to actions oriented to success), communicative action (which belongs to actions oriented toward reaching understanding), as well as normative and dramaturgical action that Habermas calls the “limit cases”.\(^{142}\) All of these actions are rational to some degree which can be defined as the possibility to defend their arguments against criticism, better said, in their characteristic validity claims. Also, every social action is used by social actors in their relation with the “formal world-views” in which the validity claims are rooted. In these “world-views” validity claims are related to social actions in a conceptual and necessary way. In other words, every social action has its corresponding validity claim depending on its goal orientation. Therefore, the validity claims of instrumental and strategic action are truth and effectiveness. When it comes to normative actions, those are rightness and sincerity, whereas authenticity belongs to dramaturgical action. The communicative action is the only one that has the power to reduce all the above mentioned validity claims.

How do social subjects orient their action only to certain validity claims which are later used to derive a certain type of knowledge? This is regulated by the conceptual frame of “world-views” that serves as a coordinating system for social actors. Habermas has adopted a three-world concept, and each of them has a corresponding validity claim that provides a rational framework assumed by the social actors. Instrumental and strategic action presupposes only an objective world where something is defined by the pre-existing states of affairs or the ones that can be brought, and where statement is true. Normative action relates to the social world of legitimately ordered relations, where something is obligatory and statement is right with respect to the existing norms which are legitimate with respect to values. Finally, validity claims of dramaturgical action come from the subjective world that is internal to the subject composed of ‘the totality of the experiences of the speaker to which he has privileged access’.\(^{143}\) In

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142 See Habermas, *TCA*, *Vol. 1*, pp. 95 and 258.
143 Habermas, *TCA*, *Vol. 1*, p. 100.
this world, subjected experiences, desires and feelings are truthfully expressed. What is interesting is that this world is conceptualised from components coming from both objective and social world. When participating in communicative action, social actors are potentially referring to all three worlds and their validity claims.

In modernity, social actors conceive each of these worlds, and through the communicative action they reflect upon them. When social actors use their language, they always seek to reach understanding in terms of their plans that they can realize only through a direct action inside some of the three worlds. According to Habermas, during this process, they are always faced with two choices: to understand or to success. In the case of the former they promise their commitment to consent, while in the case of the latter they search to make an influence, interest or arbitrary choice. Therefore, as another strong dualism that Habermas’s theory tends to insist upon, we can limit ourselves in talking about the strategic and the communicative action that stand on the opposite sides of social rationality. The prevailing of the latter happens in the lifeworld, which is the only one that can reconcile the three worlds with the communicative action.

We have seen above that the difference between work and interaction, which is based on the goal orientation, can be observed as a criterion for separating traditional from modern society, in the case of social actions the conclusions are not so clear. In TCA, we can read that the ‘types of action are differentiated by their orientation and not according to whether they are goal oriented’.\textsuperscript{144} In other words, all types of action must be rooted in a certain form of teleological structure that involves the communicative action. For Habermas, on the way of differentiating one social action from the other, the realization of their goals according to consent or influence is far more important than their goal orientation. These differentiations that enable the transition from traditional to modern society, from sacred to profane, from irrational to rational society, happen within the realm of the lifeworld where the integration of his triadic triptych is possible in ‘a non-reified, communicative practice of everyday life’.\textsuperscript{145} In what follows, we will come closer to his dual model of the modern world, where only on the plan of lifeworld is possible to reach the intersubjective reason.

\textsuperscript{144} Johnson, ‘Habermas on communicative and strategic action’, in Political Theory, p. 185.

2.4.2 Naïve and reflective levels of the speech

The feature of being oriented to understanding is not connected only to the communicative action. In the same way, not all linguistically mediated actions will manage to reach understanding, or what Habermas likes to call the “inherent telos” of human communication. Theoretical commitments thus compel him to demonstrate that these other sorts of interaction are “parasitic” on the “original mode of language use” (i.e., those oriented toward reaching understanding).\(^{146}\) It was explained earlier why young Habermas had chosen communication as the basis of what would become his multidisciplinary critical theory. The reason was that only ordinary language has the ability to be reflexive and self-aware, and thus to produce a certain type of knowledge. In his later writings, this aspect of everyday communication loses its reflective character which will become reserved for discourse.

There are two intertwined types of communicative action: everyday communicative practice, and discourse or argument. On the level of former, participants involved in everyday communication discuss their positions in the world. ‘This process of mutual interpretation remains largely implicit, transpiring against the assumed backdrop of common “cultural tradition” that encompasses what Habermas calls the “lifeworld”’.\(^{147}\) On the level of discourse or argument, implicit validity claims are openly thematized and discussed. This means that participants in a discursive communicative action are not only in direct relation with the world around them, but also in reflective relation. Therefore, the possibility to derive rationality from the communicative action is reserved for reflectively reaching understanding. In the words of Habermas, ‘the concept of communicative rationality (...) can be adequately explicated only in terms of a theory of argumentation’.\(^{148}\) That is why, besides glorifying the communicative over the strategic action, one has to remain careful when reading some of his works, since the use of the adjective “communicative” can often be misleading. For example, the practical discourse for Habermas is a demanding form of argumentative formation of will that is possible due to the reflexive nature of discourse, what Habermas calls the “idealistic assumptions”. On the other hand, it is possible to reach the practical dis-

\(^{146}\) Johnson, ‘Habermas on communicative and strategic action’, p. 188.

\(^{147}\) Johnson, ‘Habermas on communicative and strategic action’, p. 186.

\(^{148}\) Habermas, *TCA, Vol. 1*, p. 18.
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course ‘as a process of communication’,\textsuperscript{149} which in turn enriches the speech act with the possibility of achieving intersubjectivity.

Moreover, the separation between argumentative and non-argumentative communication goes hand in hand with his progressive philosophy of history that sees societies moving from the traditional to the post-traditional level. It is finally on the post-traditional stage of the development where Habermas finds a new type of justice based on the communication reason. He also criticizes both critical theory and post-structuralism for not seeing the emancipatory capacities of this reason in modernity. However, if this emancipation and social integration takes place on the level of the new reason that is always intersubjective, the communicative action has to be the medium rather than the means of forming a consensus. Diane Coole sees this as an argument ‘that the narrative/formal reconstruction Habermas unfolds posits too sharp a break between modernity and premodernity’.\textsuperscript{150} With too strong and violent separation in his progressive theory of reason, he performs obvious violence against the pre-modern, pre-discursive and finally pre-political reason. ‘Habermas largely ignores the non-systematic, non-discursive processes of power and politics that continue to circulate within the lifeworld even in modernity’.\textsuperscript{151} The question of the “Other” or, better said, of the violence and the exclusion of it from the modern discourse is put under the tenets of universality and rational reflection, and Habermas decides to ignore it whenever possible or to reduce it to questions of art and religion that belong to the discourse ethics, and are therefore depoliticized. That is why this “Other” seen in the relation between the body and the mind, conscious and unconscious, senses and desires, imagination and intuition, finally defined as the latent alterity, in the practical discourse of modernity, many times is classified simply as irrational. This very important question will be discussed again in the last chapter where the notions of violence and exclusion within Habermas’s discursive theory will re-emerge on the plan of modernity and modern law

\textsuperscript{149} Habermas, \textit{Comentários a ética do discurso [Erläuterungen zur Diskursethik]}, p. 17.
\textsuperscript{150} Coole, ‘Habermas and the question of alterity’, in D’Entrèves and Benhabib (eds.), \textit{Habermas and unfinished project of modernity: Critical essays on ‘The philosophical discourse of modernity’}, p. 226.
\textsuperscript{151} Coole, ‘Habermas and the question of alterity’, p. 227.

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that ‘close up the fissures from which alterity might leak, while modernity is itself defined by its exclusion or transcendence’.  

2.4.3 Social development and social integration

Before we move deeper into Habermas’s dualism of the System\(^\text{153}\) and the life-world, and how their relation is the one that actually causes the ongoing legitimation crisis, I would like to present his historically oriented analysis of the social systems using his graphic that covers above mentioned classes of crisis, and social and system integration. The primitive society is the only social type that is not a class society, and it has no distinction between social and system integration. On this preconventional level, morality is based on the kinship relations where the communication produces both validity claims and reality of the social system. With the class society, a perfect interpretation of the world around them through the language gets lost. The functional differentiation between the system and the social integration begins and brings the first identity crisis. On the last, post-conventional level, we can see that the unpolitical rule allows economic systems to take over the tasks of social integration, and therefore we can talk about the system crisis, the deepest one with the most severe consequences for societies.

On the path of developing his communicative theory and finding the communicative reason in the modern societies, Habermas follows the structure of social systems due to system theory. To begin with, he defines three universal properties of social systems:\(^\text{154}\)

1. **Adaptation** – the interaction between social systems and their environment takes place in production and socialization through the medium of language (utterances that admit the truth), and the norms that have the need for justification (discursive validity claims – *Geltungsansprüche*).

2. **Variations and changes in the goal values of social systems** – the latter are changeable by the state forces of production and by the degree of

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152 Coole, ‘Habermas and the question of alterity’, p. 232.
153 In what follows, I will refer to Habermas’s concept of system with capitalised S. Every other usage of this word is not necessarily connected to his world’s dual model concept.
system autonomy. The former also do not depend on the active subjects, because they are limited by a logic of development of worldviews [Weltbilder].

(3) Development of a society – depends on the institutionally permitted learning capacity, ‘in particular by whether theoretical-technical and practical questions are differentiated, and whether discursive learning processes can take place’.\(^{155}\)

According to the social systems theory, different social systems develop due to their power of autopoesis. This biological concept, when applied in the social science, secures its basic meaning – systems that are autopoietic can (re)produce themselves because of the elements they possess. Even though Habermas adopts many aspects of this theory, when he deals with the question of social and system integration, he uses the combination of arguments from the systems theory and the arguments borrowed from Weber, because after the process of adaptation (which can, as shown above, provoke a system or social crises) social systems experience the ongoing process of integration. Perhaps this is even easier to observe by briefly considering Parson’s social theory.

Additionally, in *TCA, Vol. 2*, Habermas uses Parson’s AGIL acronym to show better the space that System and LW occupy. In this acronym A stands for adaptation (cognitive symbolization); G equals the goal attainment (expressive symbolization); I stands for integration (moral evaluative symbolization), and L comes from social system latency (constitutive symbolization). According to it, when we refer to the symbolic reproduction of society, we employ the concept of social integration, and we refer to material context of society, we are dealing with the social integration. In the social integration the systems of institutions in which speaking and acting subjects are socially connected in producing the normative structures (values and institutions), are established. On this level social systems are defined as life-worlds. On the level of the system integration, we can find the specific steering performances of a self-regulated System. Here, the emphasis is on the events and states that the system is experiencing in the process of maintaining its borders and its existence in relation to the complex and instable environment. Finally, the most important aspect of this dualism is that it can be grasped and answered only on the empirical level.

2.4.5 Durkheim’s two-level social development

Another valuable source for Habermas’s thesis is coming from Durkheim’s two-level theory of the social development. On the way of explaining the transition from archaic societies to modern societies, Durkheim adopts a moment of solidarity, he especially observes the difference between the mechanical solidarity in segmentally differentiated societies that transforms into the organic solidarity in functionally differentiated societies. Correspondingly, ‘[c]ollective consciousness is constitutive for archaic societies whereas in modern societies the life-context is constituted by the division of labour’. 156 What accompanies the “transition” of solidarity is the development of the “social partner”, and the development of the labor division, meaning that even the organic form of solidarity needs to be rooted in values and norms. However, these moral rules stem from the division of labor that, following Durkheim’s argument, can show its dysfunctional character due to the lack of normative regulations: ‘If the division of labor does not produce solidarity (…) it is because the relations of the organs are not regulated, they are in a state of anomie’. 157

The same anomie seen as a sense of confusion and rootlessness, according to Durkheim, can provoke a type of suicide. 158 The contradiction of these claims Habermas calls Durkheim’s paradox. When the differentiation of social systems is not followed by the growth of an independent moral structure that can carry the process of social integration, Durkheim’s distinction between normal and anomic division of labor does not provide the answer to the paradox he is caught in. However, Habermas agrees with Durkheim’s theory of social development that needs to imply both System and LW differentiation. However, Durkheim’s social theory remains partially metaphorical because it does not ‘discover how the collective consciousness is communicated, via illocutionary forces, not to institutions but to individuals’. 159

158 See Durkheim, *Suicide*, chapter five: ‘Anomic Suicide’.
Therefore, Habermas’s theory of uncoupling is deeply rooted into Durkheim’s two-level theory of social development that corresponds to Habermas’s two-level integration. The idea is to follow the rise of more complex social and economic systems, like the ones coming from modernity, and of their inner relations. In order to achieve a balanced integration of social and functional reality, the levels of development that one part of the system reaches, need to correspond to the levels in other. In the transition from traditional to modern societies, what is needed is a situation where ‘the lifeworld is sufficiently rationalized, above all if law and morality have reached a corresponding stage of development’. ¹⁶⁰ Hence, the social integration is directly related to the development of law and morality. Habermas gives three stages in the development of their relation: at the first level, moral and law are not separated, they begin and end in the other, like in the archaic societies (pre-conventional level); the second level occurs when the separation triggered by the processes of differentiation emerges, at a higher level of world development (conventional level); and, at the last stage, morality becomes deinstitutionalised and anchored only in the personal systems or social actors, as an internal control of behaviour (post-conventional level). The law, on the other hand, becomes the external force ‘to such an extent that modern law becomes an institution detached from the ethical motivations of the legal person and depends upon abstract obedience of the law. This development is part of the structural differentiation of the lifeworld’. ¹⁶¹ In the modern world, with the processes of modernization, the uncoupling is reinforced with a new differentiation of the systems that does not correspond to the levels of rationalization in the lifeworlds. In other words, the institutionalization of the new mechanisms arising from the System differentiation, need to be introduced by the changes in the moral-legal framework of the institutional domain. And how does the lifeworld rationalize itself? This brings us back to the theory of communicative action. The lifeworld becomes rational in the communicative processes inside the given discourse, using validity claims from the three worlds and the power of intersubjective knowledge, which is a by-product of communication oriented towards understanding between the social actors.

By distinguishing the two levels of society (System and lifeworld), as described above, we can observe two models of integration – system and social. The system integration for the actor is beyond his or her spectrum, because it is based on the functional coordination of the actor’s activity outcome, because for him or her, the social dynamics is the product of social consensual reproduction by communicative action. The actor is not part of the symbolic reproduction of societies, and that is why the whole dynamic start to look like a systematic stabilization or, better said, functional-rational acting, where the actor loses aspects of intersubjectivity and communicative rationality.\(^{162}\) The goal of the theory of communicative action is to make a synthesis between these two-level societies within the three-world model, where the energy of intersubjective rationalization and its communicative reason would spread across lifeworld and its discourse like fire.

Finally, corresponding to the two-level integration, there are two approaches to the social reality: one that social actors share – a social approach, and the other – structural-functionalist approach, that happens via System. In the case of their development, the differentiation in one reality needs to be followed by a suitable rationalization in the lifeworld. In the modern pathology presented as the ongoing uncoupling, the differentiation in the System is too fast and too big for the lifeworld, which fails to incorporate the actions and phenomenon coming from the System into its rational structures. This in turn produces a gap in the legitimacy, which is \textit{harmartia} of modern societies.

\section*{2.5 The Lifeworld and its colonization}

A society that is formed in the context of a commonly experienced world ‘which in a certain sense merges into the dimension of the lifeworld, is omnipresent; to put this another way: it reproduces itself as a whole in every single interaction’.\(^{163}\) Nevertheless, with unequal development at the system and social level, the more System gets developed, the more lifeworld gets provincial and suppressed. In the situation of an ongoing uncoupling, the social idea should be brought to its original ideas, to its be-

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ginnings, when the new mechanisms adopted by the System, need to find a way to anchor their meaning in the LW via family status, the authority of the office, personal values, etc. If the new mechanisms cannot find their rationalization in their lifeworlds, the two parts of social reality will not correspond to one another, and social pathologies will arise.

Since ‘[t]he lifeworld is constitutive mutual understanding where speaker and hearer come to an understanding from out of their common lifeworld about something in the objective, social and subjective worlds’,\textsuperscript{164} it is in the lifeworld, by the means of communicative action, where the reconciliation between the two parts of society happens. If we understand the social integration of modern societies as the product of the communicative action, the lifeworld in this situation is relates to the three worlds explained above. This means that subjects in the lifeworld orient their actions towards mutual understanding based on their common definitions of situations. Seen this way, the notion of the lifeworld is a type of macrostructure, the totality of social reality in which the three worlds (objective, normative and subjective) are connected and reinterpreted by communication and culture stocks. In \textit{TCA, Vol. 2}, Habermas demonstrates this virtue of the lifeworld by using the example of communicative action between two workers at the constructing site, where the older worker gives an order to the younger worker. In this communicative relation, Habermas will say, we can see the spatio-temporal dimension of communication, and we can also notice the normative framework in the given situation. Thus, in the everyday communicative situation, as in any other, communicative action in the lifeworld is always connected to the three worlds and the common definitions that actors bring from these worlds; for example, the age difference between the two social actors, the place where the conversation takes place, the hierarchical relationship between them, etc.

Another level of defining the LW is a phenomenological level. If we observe the LW as a framework for mutual understanding, used as a phenomenon, its nature can be used to explain spatio-temporal and social organizations. In the same example of the older and younger worker, by making some changes in the story, by adding new informations, Habermas wants to show that the LW is a moving structure that starts to move in the event of a change. When these changes occur, one actor will have to redefine the situation by using new definitions or arguments that the other ac-

\textsuperscript{164} Habermas, \textit{TCA, Vol. 2}, p. 126.
tor made in their communicative relation. This redefinition of the communicative situation is based on the suppositions of commonality in respect to the objective, social and each other’s own subjective world. However, what plays the main role in these situations is the knowledge that comes from the cultural stocks. These stocks make the relation between actors already pre-interpreted, and that is why, when the shift happens, we can redefine the situation due to this pre-interpretation. According to Habermas, we can never find ourselves in a void, even if we go out of the horizon, because the culture stocks are “always already” familiar.

Nevertheless, the biggest power of the LW is in the concept of intersubjectivity. For Habermas, people are living beings who live in the public domain, but only with social skills they become persons. Therefore, the human mind is always intersubjective, always moving towards intersubjective production of “Ich”. Habermas takes this motive from G.H. Mead “ideal social roles” that are based on the processes in which social subjects who have the power to make moral decisions, succeed in placing themselves in the position of the other subjects influenced by the particular legal or moral norm. This is the “moral point of view”, according to which ‘all free and equal individuals in question take part, in a cooperative search for truth, in which the only thing that matters is the strength of the best argument’. Aforementioned is also one of the conditions of the intersubjectively or communicatively produced “Ich”. Therefore, the processes of subjectification of reflexive development empower subjects to think both individually and collectively, to feel that their definition in the given world is at the same time part of a script to define that world, and that definition always stems from the society. In addition, only in the lifeworld, as a level of coexistence, the reason is already implicit in intersubjective communication.

2.5.1 Different possibilities for the dual-model society

Until this point it has been presented how the lifeworld and the System compose the two levels of Habermas’s social analysis of the modern world. In it, the post-capitalistic period began to accelerate the processes

165 Habermas, Comentários à ética do discurso [original title: Erläuterungen zur Diskursethik], p. 17.
of differentiation, bringing about the new institutions and relations that challenge the levels of rationalization in the lifeworld. In what it follows, the three main possibilities will be summarized as three scenarios, each presenting a different scenario of the relation between social and system integration. These scenarios can be useful to define the exact position of the law in the sphere of communicative action.

(1) Naturally, we should start with the ideal situation where the system and the LW are one, their cooperation is constant and instant, and there is no exact line where one starts and the other ends. The decisions and agreements from the LW, with total openness and elasticity, immediately become part of the System, and vice versa. The economy in this relation stands outside of the circles, and law and politics stem from a unique social reality, as its extended arm, maintaining the social relations possible and active. This model is homogeneous and is characteristic for the pre-modern societies, such as the societies organized by kinship and tribal hierarchized societies, which due to their simplicity and incapacity cannot comprehend certain complex modern relations.

(2) Opposite to the homogeneous world, we can talk about the complete colonization of LW, in the sense that it is still already included in the System, and its existing depends on the System where it moves and changes its nature. In this scenario, the LW actually doesn’t exist. It represents a unique social valve, a part of the System that is channeling and processing social feelings, memories and discussions into a systematically predefined structure. As mentioned above, ‘[i]t is not only qua system and qua lifeworld that they are differentiated; they get differentiated from one another at the same time’. So, this scenario represents the possible future of the modern project, the complete colonization of the LW, and the improbability of any social integration that can trigger a further process of rationalization.

(3) Finally, the third option represents Habermas’s proposed alternative for overcoming the shortcomings from the second scenario. Habermas’s solution is in the two-way communication where both parts can process and understand problems that come from each other’s subsystems. The modern law in this scenario is defined according to its potentiality to be a unique medium which can enable equal and free communicative flow. Moreover, it can establish the conditions and institutions for democratic

procedures of discourse theory. Using its own procedures, the modern law can give stimulus to the rational capacities of communicative actors who are motivated by an action oriented towards reaching understanding. The legitimacy flow in this scenario would be considerable, and any decision would be traceable to the social subjects and confirmed in their rational capacities. The System and the LW with each other’s subsystems would be able to fully understand each other for the first time. Money and administration would remain the basis for social integration, but due to the shared values and joint decision-making solidarity would prevail. This way, money and power subsystem would co-exist with the solidarity, capable of legitimizing their structures.

It was shown above that one of the goals of Habermas’s theory is to overcome shortcoming of the social systems theory. For him, law in this theory retains its marginal position. It loses normative connotations and has its own language that prevents communication with the social actors. More importantly, in the process of objectification, the law becomes a system capable of reproducing and maintaining itself, where its communication is still separate from the social meaning and social integrative processes. In the words of Habermas, it refers to the self-organization of a legal community capable of dealing only with the induced problem, without the means to deal with social problems. ‘Legal norms and legal acts thereby lose all connection with the supposition of rationally motivated processes of reaching understanding within an association of legal consociates’.167

According to the systems theory, societies consist of different subsystems that try to communicate between each other, using their specialized communication that is unique and common at the same time.168 While having an interaction through the communication that is peerless to each subsystem they integrate more and, thus, unconsciously create a common social communication. This dual facing of communication between the

167 Habermas, BFN, p. 50.
168 ‘Any legal act is at the same time – uno actu – an event of general social communication. One and the same [i.e., similar, gleiche] communicative event is linked to two different social discourses – specialized (and institutionalized) legal discourse and diffuse general communication. Interference between law and other social discourses does not mean that they merge into a multi-dimensional superdiscourse, nor does it imply that information is “exchanged” between them’. Teubner, ‘How the law thinks’, p.745, as cited in Habermas, BFN, pp. 53-54.
broken social subsystems, leaves each of them with their own language, which ultimately prevents them from understanding each other. Habermas cannot accept this situation because the language employed in the discursive communication is multilingual and capable of understanding problems formulated in a foreign language. As it was shown above, ‘law functions as a hinge between system and lifeworld, a function that is incompatible with the idea that the legal system, withdrawing into its own shell, autopoietically encapsulates itself.’\textsuperscript{169} The two-way communication between System and lifeworld is intertwined to such a degree that it does not leave any independent subsystem on its margins. The modern law should connect and bypass these two horizons, and by using its typical rationality that comes from its form and language, manage to surpass the communication breaks and problems on both levels of reality. What interrupts this relation are the steering media of money and power, because they do not understand the ordinary language. They are based on the instrumental and strategic action, and their language is deprived of the communicative reason, leaving it to function in the name of administration and detached economy. In this situation, ‘[l]aw thus functions as the “transformer” that first guarantees that the socially integrating network of communication stretched across society as a whole hold together.’\textsuperscript{170}

For this reason Habermas chooses modern law to carry out the project of publically deliberated sovereignty. He finds the normative theory of justice at risk of recognizing some solid political events, while the social theory can be blamed for its positivism. In \textit{BFN} he uses a multidisciplinary and integrative approach to overcome the shortcomings of these two theories. Idea of the law as the solution for the modern pathologies is crucial for this work, because modern law is not supposes exclusively to carry the legitimation force of the communicative reason to its normative structure, but more importantly, to protect the social sphere from the violence. As the last chapter will show, the case of Yugoslavia shows how the force of the political can abuse and go beyond the force of law. Finally, only by following his reflections on modern law, is possible to understand his constitutional and democratic theory. Before advancing towards the deliberative model of democracy, in what it follows, justice and solidarity will be presented as two pillars of the potentiality of modern law.

\textsuperscript{169} Habermas, \textit{BFN}, p. 56.  
\textsuperscript{170} Habermas, \textit{BFN}, p. 56.
2.6 Justice and solidarity of modern law

On the way of explaining the origin and position of the sociology of law and the philosophy of justice, Habermas uses the development of natural and rational law as an integral part of the bourgeois society, in order to establish his theory of uncoupling in modern societies. He depicts the transformation in the civil society as following:

Having begun as an ensemble of *authorizing* conditions that made freedom possible (...) it became an *anonymous* system independent of the intentions of unconsciously sociated individuals, a system that followed its own logic and subjected society as a while to the economically decoded imperatives of its self-stabilization.\(^{171}\)

In this situation, the forces of a highly differentiated social reality become too complex and too vast to be embraced by the natural law. This law was the property of ‘the political “superstructure” resting on the economic basis of a society in which the rule of one social class over other classes was exercised in the nonpolitical form of the private disposition over the means of production’.\(^{172}\) That is why Marx’s analysis of the early capitalist societies becomes a “frozen world of reified social relations”, and remains incapable of offering answers to the new modes of production and new levels of system and social differentiation in the late capitalism.

Certain subsystems tend to show a lack of opportunities for direct communication, meeting only on a horizontal level where they observe and balance each other by adjusting to the mutual environment from which they cannot escape. For them, the approach of social systems theory to the role or significance of the law represents an extreme devaluation, ‘as the most rigorous version of a theory that assigns law a marginal position (...) and neutralizes the phenomenon of legal validity by describing things objectivistically’.\(^{173}\) In his legal theory Habermas wants to give back to the law the important social role that it had lost in the social development:

\[\text{[T]he generalized role of the citizen gets neutralized and for it the welfare state also pays in the coin of use values that come to citizens as clients of welfare-state bureaucracies. “Clients” are customers who enjoy the rewards of the welfare state; the client role is a companion piece that makes political par-}\]

\(^{171}\) Habermas, *BFN*, p. 45.

\(^{172}\) Habermas, *BFN*, p. 45.

\(^{173}\) Habermas, *BFN*, p. 48.
ticipation that has been evaporated into an abstraction and robbed of its effec-
tiveness acceptable.\textsuperscript{174} In other words, the legal questions need to be observed as the questions of justice and moral, and they are developed in the social world via validity claims of normative rightness and legitimacy in regard to the shared norms and group relations. These questions Habermas develops in his theory of discourse.

Using \textit{Diskursethik} he tries to employ the concept of justice as the product of the argumentative formation of the will ‘which must guarantee only the general presuppositions of communication, the correction (or justice) of all possible normative consensus under these conditions’.\textsuperscript{175} At this point he follows John Rawls’s philosophy of justice. For Rawls, the public conception of justice is related to the free and equal persons with two moral powers (the sense of justice and the conception of good). It is placed within the state of congruence of the right and good, and carried by the overlapping consensus. The “reflective equilibrium” of this theory belongs to ‘the well-ordered society, so as to carry out the thought-experiment of an ideal theory of justice which ultimately meets non ideal needs and capacities’.\textsuperscript{176} Nevertheless, Habermas argues that ‘[t]he basic institutions of such a society must be set up according to a scheme that deserves the rationally motivated assent of all citizens because it can be grounded in justice as fairness’.\textsuperscript{177} Therefore, ‘the question of justice of the social can be understood only if the social institutions are not regarded as fateful-ly pre-determined sizes, but rather as something that can be \textit{shaped, changed and improved}.’\textsuperscript{178}

The other side of the practical discourse is coined in the fact that subjects are capable of placing themselves into the precarious position of other social actors who are damaged by some norms. This is when subjects act intersubjectively, in accordance with their capacity of solidarity with other social members. Only through the communicative process, when they share the ideal roles with other members of society, individuals can

\textsuperscript{174} Habermas, \textit{TCA}, Vol. 2, p. 350.
\textsuperscript{175} Habermas, \textit{Comentários a ética do discurso}, p. 17.
\textsuperscript{176} Oliveira, ‘Rawl’s normative conception of the person: A Kantian reinterpreta-
\textsuperscript{177} Habermas, \textit{BFN}, p. 57.
\textsuperscript{178} Madung, \textit{Politik und Gewalt. Giorgio Agamben und Jürgen Habermas im Ver-
gleich}, pp. 73-74.
answer on their moral and ethical questions. It is precisely this kind of solidarity that triggers social critique, and secures democratic development where the weight of the minorities’ problems is carried by the whole society. Moreover, by reflecting on what can be called “Balkan solidarity”, from the perspective of those ethical and moral questions, it is possible to think about the solution of the national question in the ex-Yugoslavian countries. Because the national strivings are organized around politically imposed and promoted impossibility of resolving the question of nationalities, through solidarity and politics of friendship it is possible to finish with this mythological violence.

Kant claims that there is only one thing that is unconditionally good – the good will. Moral goodness (the moral value of an action) is constituted in the fact of being “willed” for the sake of and in conformity with the moral law. And that is the main question for Kant’s ethics – what is a right and just action? The concept of “general will” that can grasp the will of all people in the definition of well-being can be seen thought Hegel’s philosophy. For Habermas, moving between Hegel’s general will and Kant’s universal reason, is the way of finding the place where the general will formed by the moral reasons meets and merges with the argumentative reason. Following Kant’s formal ethics, Habermas formulates two principles: firstly, the principle “D” starts with the claim that all people are capable of finding moral and answering some moral questions. At this level of deconstruction, he replaces Kant’s categorical imperative with the argumentation that gives the conditions for the general consent of all members who participate in the practical discourse. The “more” important communicative action, viewed as sharing of arguments rooted in the triadic system of worlds and validity claims, activates the rational capacities of participants who produce the norms that may call into question a certain validity. This is possible only if all participants are voluntarily involved in the argumentation by the principles of consent, which is basically defined by the conditions of the ideal speech situation. This is how we get to the principle “U” where it is possible to derive all the norms from the general compliance of those norms, in order to satisfy the interest of each person in the joint process of argumentation whose consequences in the practical discourse need to be voluntarily accepted by all participants of that discourse. Therefore, a consensus that we are reaching for, on the level of argumentation, depends on the “yes” or “no” of each individual, and forms their capability to overcome their egocentric orientations that bring the latent possibility of the conflicts.
II. The possibility of the modern consensus

2.6.1 The discourse theory and law

When we try to make rational choices, we look for them among different objectives (the question of what we need to do) that we define according to the existing preferences we have, or among the different possibilities of action (the question of what we want to do) that are determined by the relation between our means and goals. In the pragmatic discourse, we are in relation with the techniques and strategies that we can employ, while in the empirical discourse we are able to associate our empirical knowledge with certain goals or preferences and evaluate the consequences of our decisions. The pragmatic question “What do I need to do?” is not a question of moral for Habermas, because the questions of personal decisions have to be brought to the question “What is what I want to be?” which is a question of identity. This question concerns the way one sees oneself, and how one would like to be seen by other people and is directly related to the question of ethics – “What is a good life?” Therefore, the questions of ethics are always questions of the internal telos of my life, my history, my preferences and goals. However, on the discursive level where the argumentative steps have to be ‘comprehensible from the intersubjective point of view’, when we act in order to become the person we want to be, we are simultaneously questioning the world, seeking its validity and reorganizing its goals. In other words, in order to produce a conscious life that can make the difference between violence and reason, we need to employ the anterior/previous telos.

Accordingly, the Diskursethik abandons Kant’s concept of two worlds, one we are able to reach in our understanding, and the phenomenological one. Moreover, at the heart of its argumentation, it proposes the dialogue, instead of Kantian monologue. It was shown that on the post-conventional level society reaches the reflexive and discursive level. This happens when social actors begin to re-evaluate the rules, being able to define their own “I” together with the social “I”, answering on the question of identity through the intersubjective reason. Related to this Habermas writes:

It is only from the communicative presuppositions of a universal scope discourse in which all the possible involved individuals can take part and assume a hypothetical and argumentative attitude towards the pretensions of validity of norms and of modes of conduct that became problematic, which constitutes

179 Habermas, Comentários à ética do discurso, p. 111.
the higher level of intersubjectivity relative to an interlocking of the individu-
al perspective with the perspective of all.\textsuperscript{180} The idea of self-determination of social participants, which can understand their decisions and needs, is at the core of democratic ideas, and it needs to be transferred from the moral theory to the philosophy of law because ‘[t]he unity of practical reason can only be an unequivocal reality at the level of a network of forms of communication and public practices, in which the rational fomentation of the collective will has gained an institutional consistency’.\textsuperscript{181} In such a way, Habermas presents a model of deliberative democracy that can be considered as an attempt to implement the discourse ethics in the political practice, using the institution of the modern law as the carrier of the deliberative institutions. ‘Consequently, a discursive or deliberative model replaces the contract model: the legal community constitutes itself not by a way of a social contract but on the basis of a discursively achieved agreement.’\textsuperscript{182} This approach, as will be shown later, is used as a basis for his procedural theory of democracy in which participants do not aim to achieve justice, but rather a “good life” that belongs to the domain of ethics. Finally, when it comes to the discourse theory of law, Habermas tries to show the internal connection between the idea of human rights and popular sovereignty, and with the help of the discourse principle of law, to overcome the contradiction between liberal and republican legal approaches. Habermas, therefore, argues that private and public autonomy occur equally.\textsuperscript{183} The co-originality of private and public autonomy is necessary for the project of legitimization of law, and it is in the theory of discourse where the citizens are considered to be both creators and addressees of their rights. Thus, ‘[t]he substance of human rights then resides in the formal conditions for the legal institutionalization of those discursive processes of opinion and will-formation in which the sovereignty of the people assumes a binding character’.\textsuperscript{184} In this fashion, Habermas’s concept of modern law hovers between natural and positivist arguments, and his reading of the system of rights that does not belong to either moral or ethical reading of popular sovereignty takes him to the practical discourse of a deliberative democracy. There, the above men-

\textsuperscript{180} Habermas, \textit{Comentários à ética do discurso}, p. 112.
\textsuperscript{181} Habermas, \textit{Comentários à ética do discurso}, p. 117.
\textsuperscript{182} Habermas, \textit{BFN}, p. 449.
\textsuperscript{183} See Madung, \textit{Politik und Gewalt}, p. 103.
\textsuperscript{184} Habermas, \textit{Comentários à ética do discurso}, 104.
tioned reconciliation can be achieved through law which ‘compensates for the functional weaknesses of a morality’.  

Even though the stronghold of his argument is found in the theory of discourse, discourse needs to be able to act permanently, which is possible only through its institutionalization. In this symbiosis, principles of discourse are grasped by democratic principles, and the law operates in direction of forming a constitutional democratic state. In what it follows, I will reflect upon that passage.

2.7 From the discourse theory to the deliberative politics

With the strict separation of communicative and strategic action, Habermas remains with the clear glorification of the former action, insisting on its supremacy and social importance that the latter cannot reach. Even though action motivated by egoism is expected from individuals, there is a shared world that encloses the “we-identity” into common social reality shaped in the practical discourse, ‘[a]nd what for the individual is a particular life project, for an organized community is the idea of the common-weal’.  

For example, feelings of offense, guilt, indignation and the like, can become part of this discourse, when their implicit judgment that acts like proposition in individual’s moral acting, becomes explicit in the value judgment. Habermas acknowledges the existence of latent conflicts between the individuals involved in the ethical discourse, because they start with different preferences and values, looking egoistically after their interests, guided by the strategic action of behavior. However, he concludes that only in a case of a radical change in perspectives and attitudes, social participants will not conceive the interpersonal conflict as a moral problem. For him, ‘[c]onceived as intersubjectivity, the objectivity of value judgments is always indexed to particular communities. But in questions of posttraditional justice, evaluative standards come into play that transcend the context of existing communities’.  

In other words, when principle “D” meets the principle “U” on the pragmatic level of values and norms, these moral judgments that can be universally recognized are considered as the “right” judgments.

185 Habermas, BFN, 452-3.
186 Habermas, Truth and justification, p. 232.
187 Habermas, Truth and justification, p. 229.
The justification of norms in a discourse that is always part of the life-world is the way in which Habermas connects the communication between participants with the normative structure of their society. This connection is firstly seen in the moral judgment where something is morally right when it is universally recognized, and to become universal it needs to be communicated in the practical and ethical discourse where the rationally motivated recognition happens. This goes hand in hand with the assumption that comes from the theory of communicative action that people can always communicate their differences, and even if we disagree, we have to communicate to come to that agreement. In order to deal with the criteria of pluralism and social diversity and show how the universal can become recognized in both theoretical and practical world that becomes a communicated world, Habermas turns again to his discourse theory that is the cornerstone of the connection between the two reasons, and the bridge to the normative aspect of his philosophy, because it allows him to build a concept of democracy on argumentative reason. In other words, democracy is a precondition for the reconciliation of pluralism of legitimate world views, where ‘conflicts of justice can be resolved only if the disputing parties agree to create an inclusive We-perspective by mutual perspective-taking’.\(^{188}\)

Therefore, the path from discourse argumentative exchange to creating the concept of deliberation needs to be established by certain rules and institutions. They find their existence in democracy under the tenet of legal norms that have the responsibility of taking the communicative reason to its core. In the last part of this chapter, I will follow Habermas’s discourse theory to the deliberative model of democracy, where it is bound within a deliberated constitution. The practical appearance of this proposal is best seen in his numerous writings on the future of the EU, and that is why, at the very end of the chapter, I will reflect upon some of his conclusions regarding the EU. I will start with the conditions of the ideal speech act in order to understand two main conditions of deliberation: equality and rationalization, and then move towards definition of the process of deliberation as a specific way of communication. This will bring the argumentation to its last phase – deliberative politics in modern democracy and transformation of modern law as the answer for the ongoing uncoupling.

\(^{188}\) Habermas, *Truth and justification*, p. 235.
2.7.1 Equality

The difference between everyday communication and argumentative communication, as two types of linguistically mediated social interaction was presented above. The latter and its validity claims belong to the discourse, while the former surprisingly many times disappears from Habermas’s horizon. Before one steps onto the path towards understanding the way one subject comes to the communicative reason, one has to reflect upon what Habermas calls the ideal speech situation as the main pillar of his philosophy of language. He defines four basic conditions for the so-called ideal speech situation:

(a) publicity and inclusiveness: no one who could make a relevant contribution with regard to a controversial validity claim must be excluded; (b) equal rights to engage in communication: everyone must have the same opportunity to discuss the matter at hand; (c) exclusion of deception and illusion: participants have to mean what they say; and (d) absence of coercion: communication must be free from restrictions that prevent the better argument from being raised or from determining the outcome of the discussion.\(^\text{189}\)

The conditions (a), (b) and (d) refer to the concept of equality. One needs to enjoy the full equality that is recognized by other participants in the deliberation. The condition (c), however, refers to the other pillar of deliberation, the rational capacities of the participants to weigh the arguments on the way of finding truth. Even though they are clearly strongly idealized conditions that can hardly be achieved in the actual discourse, they represent the departure point for any participant who wants to engage seriously in the discourse. In the argumentative exchange, these conditions create the frame of expectations, which depends entirely on the rational capacities of the participants to adjust their arguments according to the rules of truth. ‘As long as the participants in argumentation proceed from the assumption that this is the case, they have no reason to worry about the inadequate procedural properties of the communication process’.\(^\text{190}\)

In order to ensure the minimum of conditions of equality, the society should construct and apply certain moral and legal norms that can be justified by their ‘universally and publicly cogent reasons’.\(^\text{191}\) This is a part of


\(^{190}\) Habermas, \textit{Truth and justification}, p. 108.

\(^{191}\) Habermas, \textit{Truth and justification}, p. 238.
the discourse theory where the concept of human rights is employed as the cornerstone of moral and justice, justified due to its universal merits. Habermas argues that moral and law do not stand opposite to each other, they co-exist in such a way that one can talk about ‘the complementarity of law and morality’. Human rights, thus, are not moral, but legal rights in the full sense. This position allows him to deconstruct the notion of public sovereignty that is divided and dispersed among different levels of integration, while the law enables the construction of the global politics of human rights. With this relation in our mind, we have to form a communication, constraining it to some of the norms that enable these conditions. Likewise, communication needs to reflect ‘the full inclusion as well as the equal, uncoerced participation oriented toward reaching mutual understanding on the part of all those affected so that all relevant contributions to a given topic can be voiced and so that the best arguments can carry the day’. Therefore, the paradigm of total inclusion via human rights is normative and universalistic claim of modernity.

On the one hand, for Habermas the human rights policy relies on single interpretation of modernity, and on the other hand, on the concept of humanity that becomes the only moral subject in the modern world, providing human rights with universal legitimacy. He defines his approach to human rights as modern, and thus beyond traditional debates about the positive and natural law. Moreover, understood this way, human rights offer a new modern moral content defined by the cosmopolitan claim. This content is added to the juridical structure, institutionalized and, therefore, rationalized. As the moralizing ingredient of the positive law, human rights exist before the legal norms, because any norm cannot be imposed justly without adherence to the presumed universal human rights policy, which in return signifies that human rights are sufficient for their justification. Furthermore, even though these rights continue depending on the structure of national states, this is on its way of changing towards the true character of universal rights. Hence, according to Habermas, ‘[t]he human rights depend from their institutional incorporation in one politically constituted world society’.

192 Habermas, BFN, p. 453.
193 Habermas, Truth and justification, p. 251.
2.7.2 Rationalization – another condition of practical discourse

Besides equality, another important condition of deliberative democracy are the rational capacities of participants who are willing to be participate in the discourse, following and understanding the arguments on the way of reaching understanding. Rationality in the theory of communicative action is considered to be the ability to understand what is best for the society and to be prepared to give up their opinion because the other proposal is rationally better. In discourse, whether some belief – which is considered irrational, will become rational, depends solely on a good reason. In democracy, rationality is embraced on the argumentative level of public communication in a discourse where opinions and procedures of will formation produce the discursive rationality which in turn makes the democratic administration to be bound solely to the law and statute. When they are produced discursively as the part of the democratic process enriched with the legitimating power, the striving subsystems cannot rule by themselves. Therefore, ‘[r]ationalization means more than mere legitimation but less than the constitution of power’.195

According to Habermas, the discursive rationalization comes with a consensus among the participants. This discursively reached consensus is determined by the participants, and has the power to ground the norm that is based on the intersubjective recognition. In other words, ‘a discursively reached agreement entitles us to take a proposition to be true’.196 This, of course, must occur under the prepositions of the above stated ideal conditions. I will return to them in the last chapter, but what is important to note at this point is how Habermas follows rationality from a certain “form” of communication, under the idea of an ideal speech situation, to the practical reason of communicated truth and justice. Moreover, all cognition is conceived discursively, meaning that the individual reason is not enough to reach a rational consensus,197 and that we need to find a publically and universally cogent reason. This reason can induce certain knowledge in

195 Habermas, BFN, p. 300.
196 Habermas, Truth and justification, p. 257.
197 As a counter argument, Mouffe urges the “Habermasian theorists” to distinguish a mere agreement from a rational consensus. While reflecting about deliberative democracy, she concludes that the “[c]onsensus in a liberal-democratic society is – and will always be – the expression of a hegemony and the crystallization of power relations’ (Mouffe, Democratic paradox, p. 49).
the common social world that has the capacity for a new justification in modernity. As a result, both moral rightness and truth, as the components from the practical and theoretical world, are found in the discursive, public and universal reason that appears in the linguistic medium of communication. Therefore, following the logic of rational consent, ‘an agreement about norms and actions (...) warrants the rightness of moral judgments’. Moreover, in his pragmatic approach to the theory of truth, Habermas concludes that the truths are available to people ‘only in the form of what is rationally acceptable’.

2.8 Deliberation in the modern world

On a procedural level, deliberation is much more than just a talk: it is a very particular kind of public talk. Correspondingly, a deliberative democracy in its classic formulation represents an account of political legitimacy ‘that outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by all those subject to the decision in question’. A democracy that takes into consideration the individuals who are active, rational and ready to consent, is differentiated from other types of democracy. In this regards, the institutions of representative democracy allow whatever preferences people might indicate, as long as the procedure is being respected. Additionally, the institutions based on constitutionalism (such as supreme courts and constitutions) are contrary to the pure idea of democracy, since they effectively remove the power of decision making from the people. ‘In contrast, deliberative democracy retains the commitment that no decision should be beyond the reach of the people, and that institutions should be structured so that people are able to make their decisions on the basis of good reasoning about the relevant information’. Therefore, individuals who through public communication express their arguments under the prepositions of ideal

conditions and rationally come to a consensus, are remedy for a deficiency of legitimacy. However, the deliberative decisions will continue to be illegitimate for those who were not part of a given discussion.

Another problem can be related to the claim that individuals are willing to change their preferences, interests and goals, because of their readiness to consent, which in the discourse ethic is found in solidarity, as explained above. One of the possible solutions for this problem is that the deliberative theory “loosens up a bit” its structure, and instead of insisting that ideas have to be exchanged between all individuals, allows a lot more people to become part of the deliberative process as the observers. This Rawls’s suggestion, according to Przeworski, in return might lead to the situation where deliberation may lead people to hold beliefs that are not in their best interest. For Przeworski, deliberative models of decision making justify ideological domination because deliberation alters individual consciousness under the coercive pressure of collective action, which questions the condition of rationalization. ‘People may discover that their arguments are not sufficient to persuade others, they can listen to their arguments and yet vote in favor of their interests’.202 That is why every deliberation will end up with aggregation, because people will not deliberate only by their ratio, on a basis of a good reason, but also by their own preferences. In other words, under conditions of unequal rational capacities or certainty to defend one’s argument, people might follow ideologically what just seems to be the strongest argumentation.203

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203 Following Gramsci, Przeworski distinguishes two types of beliefs (technical and equilibrium) and in Gramscian language, a system that comprises both classes of beliefs is called “ideology” (Przeworski, ‘Deliberation and ideological domination’, p. 143). In other words, if all people are equal in their possibilities and rational abilities, they should logically come to the same conclusions without the need for discussion. This can make one think that in deliberation the beliefs are altered as a result of communication, therefore, it must be because either (a) individuals have unequal access to information, or (b) they see themselves as having unequal reasoning capacity (Ibid, p. 145). His formula is quite simple: first, deliberation can occur only if someone pays for it; second, deliberation can be effective only if there is inequality, either of access to specific information, or of calculating capacity; and last but not least, with an unavoidable dose of a self-interest. This can easily lead to manipulation, indoctrination and brain washing. Technical beliefs are difficult to manipulate, but equilibrium beliefs are endogenous: they are true only if they are shared and individuals have little direct
2.8.1 Deliberative democracy between liberal and republican political theory

By keeping social subjects and the constitutional norms active, Habermas again proves his shift from the philosophy of consciousness to the philosophy of language, and from a subject-centered to a communicative conception of reason and rationality. Accordingly, ‘[d]iscourse theory reckons with the higher-level intersubjectivity of processes of reaching understanding that take place through democratic procedures or in the communicative network of public spheres’.204 This communicative network is based on the subjectless communication used in discussion and decision making on the rational opinions and will-formation. The latter may in some instances even replace certain political matters, because people will discuss and deliberate on the matters that are truly important for society. That is why in Habermas’s model of democracy, the democratic process is taken in its maximum form, and there is no place for idling in the political debate.

The political theory of deliberative democracy and civil society seeks to mediate between the sociology of law and the philosophy of justice in order to show that what can guarantee the constant openness of system are not the established institutions of restricted law, but the sovereignty of public deliberation. In regard to this, Habermas’s main goal is to define how the communicative power ought to be related to the administrative and social power. Therefore, he proposes a model between liberal and republican, criticizing and deconstructing both of them. ‘The reading proposed (…) differs both from the liberal conception of the state as guardian of an economic society and from the republican concept of an ethical community institutionalized in the state’.205 Reaching the political totality that will transform political action on all levels of society and in all subsystems, re-politicizing a depoliticized population can be achieved in a deliberative democracy that is not rooted in either the republican or the liberal model of politics. It is precisely in the mediation between the theory of

knowledge about the beliefs of others (Ibid, p. 154). Therefore, the ideological manipulation he is talking about occurs by manipulating the mutual expectations. Like this, deliberation can coordinate beliefs and lock individuals into equilibria (Ibid, p. 155).

204 Habermas, BFN, p. 299.
205 Habermas, BFN, p. 296.
discourse and the law where Habermas decides to define principles of the *Rechtsstaat*. One thing remains clear – the latter is not possible without democracy.

In his critique of the republican model, accent is put on the state-centered understanding of politics that constitutes a powerful part of the republican argument, and that can only give up on the idea of ‘citizenry capable of collective action’. Moreover, Habermas argues that ‘[t]he meaning of legal arguments is exhausted by their function of reducing the surprise value of court decisions (...) and increasing the actual acceptance of such decisions by clients’. Clients are citizens in front of the courts, and lawyers naturally decide to follow the logic according to which ‘reasons justify the decisions and not decision the reason’. In sum, he argues that in republicanism the constitutional court is transformed into some type of the authoritarian agency that is operating with the pre-given constitutional orders made and written by the legislative founders of what today should be reproduced as a common will of people. Moreover, ‘this expectation of virtue pushes the democratic process, as it actually precedes in welfare state mass democracies, into the pallid light of an instrumentally distorted politics, a “fallen” politics’.

On the other hand, the liberal model depends on the constitutional provisions that enable the functioning of an economic society that defines the act of satisfaction of personal life plans and private expectations of happiness as a common good. This is practically a summary of Habermas’s critique of modernity that encages the political activity of citizens in the electoral periods, which might lead to the disability of citizens to achieve their political nature and fulfill their roles as members of society that represents the extension of their identity. The liberalist legal paradigm understands the law as a means of enforcing the private interests of economic subjects. Therefore ‘the liberal state is “der Hüter der Wirtschaftsgesellschaft”’.  

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206 Habermas, *BFN*, p. 298.
207 Habermas, *BFN*, p. 50.
208 Habermas, *BFN*, p. 50.
210 *Der Hüter der Wirtschaftsgesellschaft* or in English “the guardian/protector of the constitution” became the symbol of the constitutional debate between Carl Schmitt and Hans Kelsen in the first half of the 20th century. See in this work Chapter 3, Section 3.3.1, ‘Guardian of the Constitution’.  

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With the over-emphasis on private autonomy, liberalism does not adequately address the factual lack of freedom and equality’.\textsuperscript{211}

Through the critique of the republican constitutional model, Habermas also criticizes the external tension in the law, focusing on the tension between the state and society. According to the liberal model, democracy can create a bridge between the state apparatus and the social sphere, allowing the exchange of reason between them. The law in the liberal model serves as a regulator of the balance between power and interest. Additionally, the constitutional normative provisions, especially its system of human rights, are responsible for the penetration of the social interests into the state structure. This way, state becomes motivated to act in the social interest through a political debate among the political parties. However, for Habermas, this is still a state-orientated politics, where it is possible to derive politics only from the state apparatus. ‘It is oriented toward the input of a rational political will-formation but also toward the output of government activities that are successful on balance’.\textsuperscript{212} The discourse theory approach to democracy needs to find the way to stimulate spreading of politics independently from the state apparatus.

2.8.2 External tension in law

The dual model of society, which was explained in the first part of the chapter, brings the dual model of the law. Therefore, we can observe the uncoupling of the social model in the legal theory as internal and external tension between facticity and validity. When talking about the two levels of development and how differentiation of the system needs to correspond to the levels of rationalization in the lifeworld, Habermas deals mostly with the internal tension. As explained earlier, the internal tension is a tension in the process of reaching mutual understanding in social processes of communication and deliberation, and also a tension between strategic action and the action oriented towards understanding. The external tension can be observed as a pressure between a constitution and its legitimacy, between the already incorporated legal core and current social facticity. In the short section that follows, the external tension will be clarified with the

\textsuperscript{211} Madung, \textit{Politik und Gewalt}, p. 125.
\textsuperscript{212} Habermas, \textit{BFN}, p. 298.
goal of showing how Habermas in his earlier writings has excluded the institutional dimension of law, focusing mainly on solving the problem of its internal pressure. How can a constitution claim to enjoy a democratic legitimacy, how can it be considered a creation of the people if the ways of changing and interpreting it are in most of the cases in the hands of those occupying the positions of power? The participation of an ordinary citizen in the constitutional changes in democracies is weak at best, which seriously undermines the democratic character of the constitutional law and its correspondence to the given social reality.

The question of establishing and maintaining the legitimate power of law is transferred to democracy through the discourse theory. Regarded to this, Habermas’s focus is put on the certain connections between the historical and sociological discourse that can bring upon the discussion and consent on the relation between the current norm and reality. According to Habermas, by removing the external tension, we will not solve the problem of a legal-democratic strain between facticity and validity, because the solution must come from the internal level. That is why instead of incorporating a new level of analysis about democracy, Habermas returns to the discursive theory that allows the theory of communicative action to penetrate into the new model of democracy. In what follows, I will deconstruct Habermas’s model of deliberative democracy through the critiques and complements coming from other authors who are for and against the deliberative democracy. Additionally, the last argument will consider Habermas’s writings on the cosmopolitan law that I will examine following his writings on the future of the European Union.

2.8.3 Normative structure of deliberative democracy

According to Parkinson, the normative nature of deliberative democracy is based on two principles:

it insists on reasoning between people as the guiding political procedure, rather than bargaining between competing interests or the aggregation of private preferences; and the essential political act (...) is a public act, as opposed to the purely private act of voting.²¹³

²¹³ Parkinson, Deliberating in the real world. Problems of legitimacy in deliberative democracy, p. 3.
Therefore, deliberative democracy is considered not only as a market of private interests where individuals are given conditions to act in the network of intersubjectivity, but it also represents a forum where the public agreements are being created.

Besides the normative structure that he develops in his recent writings about deliberative democracy, the main task of Habermas’s theory of democracy is to offer a concept that can solve the problem of legitimation. According to this author, for society to function in a stable and long-term way, people need to believe in the norms and political decision of their country. Without legitimization of laws and politics, the colonization power of the steering media of money and administration can overtake the authoritative power over the state apparatus. Therefore, the main task of his democratic proposal is to establish demos that can be fully bound to the normative system and positive law, since it is also their creator. On the level of positive law, this would mean a full “co-originality” of public and private autonomy, because citizens could exercise their freedom only by participating in public autonomy as lawmakers. Their private autonomy and the full meaning of the individual freedom must be bound to people’s exercising of public autonomy.

In order to come to this point, Habermas has three pillars of his theoretical melting pot: (a) the discursive theory of law allows the constitutional democracy to be built on the premise of legitimate law (by guaranteeing private autonomy); (b) the communication theory of society serves to implement the systems theory model of democracy and social integration, where the communicatively established political system will be one among other subsystems, and (c) a specific concept of law that allows him to connect the empirical and normative analysis of his philosophy. Related to the last pillar, Habermas searches for a specific legal communication that can function as ‘a medium through which the structures of recognition built into communicative action are transferred from the level of simple interactions to the abstract level of organized relationship’.\(^{214}\) In other words, rights that define one’s individual freedom must also include rights of political participation.

It has been shown above that the new concept of deliberative democracy wants to “decentralize” politics, get it outside of the national state by recognizing the potential of universal politics that can approach to the in-

\(^{214}\) Habermas, BFN, p.437.
individuals as the parts of humanity. For this to happen, the concept of state and nation need to merge into the “nation-state”, where the equality between them is not only promised in the positive law, but is the actual part and consequence of the rational discourse. This new concept of democratic state, according to Habermas, managed to solve ‘two problems at once: it made possible a new mode of legitimation based on a new, more abstract form of social integration’.  

Therefore, a deliberative concept of democracy first needs a new public sphere based on the modern, more abstract social integration. We can freely say that on this road Habermas needs a new citizen, one who is ready to engage seriously and rationally in the public communication, and in turn, be ready to assent to the power of a more rational argument. The readiness to obey the norms despite not being originally proposed by the given individual needs more than just a rational argument. At this point, what Habermas needs is a strong social solidarity that, unlike the traditional modern state that is derived from the concept of nation, finds its roots in the constitutional patriotism. According to him, the traditional democracy is lacking the democratic process itself, ‘the communicative practice that is performed collectively, and where, finally, the true understanding of constitution is open for discussion’. In this formula we can focus on two points: the communicative practice, and the true understanding of constitution. The former has already been deconstructed by following its origins in the theory of communicative action, all the way to its discursive form in the discursive theory of law. The latter is what the citizens of the post-secularized “nation-state” have to do. They need to reflect upon the constitutional provisions not only abstractly, but also concretely ‘from the historical context of their own national history’. This abstract and legally mediated solidarity becomes possible only when the principles of justice created by the legal communication, manage to enter into the complex network of value orientations in a culture. This idea in the context of the nationalities of the ex-Yugoslavian countries that have found or are still searching their place in the European Union, can be considered only after they reach the politics of forgiveness. Only after the reconciliation of their

216 Habermas and Ratzinger, *Dijalektika sekularizacije* [original title: *Dialektik der Säkularisierung*], p. 21.
217 Habermas and Ratzinger, *Dijalektika sekularizacije*, p. 22.
still antagonistic relations, the legally derived solidarity can promise a next level of integration.

The concepts of constitution and legal communication are crucial in order to understand Habermas’s thesis of the new cosmopolitan political order. Even though it will take him some time to clearly define the cosmopolitan potential of his theory, he had already referred to this possibility in his earlier work, acknowledging that ‘[t]he web of legal communication is even capable of embracing complex societies as a whole’. What we can conclude from his more recent writings, is that the so-called post-national system must be political, it must have a certain institutional framework, and it is certainly transnational. Therefore, the last point of this chapter will reflect upon Habermas’s thinking about the future of the EU, where the main shortcomings of his theory are found.

2.9 European pathologies

In 2007, citizens of the member states of the European Union were put in front of a new idea – the Constitution of the Union. This idea appeared in the unprepared union that will suffer a deeper crisis in the years that follow. The economic crisis that hit the whole western world, starting from the collapse of the bank system of the United States of America in 2006, led to fiscal and market problems in the Union, leaving some state-members close to bankruptcy. The recovery of these countries was rather slow, and when another wave of debt crisis hit after 2010, the crisis management was largely imposed by the ruling Troika – the European Central Bank, the European Council, and the International Monetary Fund. That is why even before the articulated political crisis in the Union, we can say that the consequences of the first crisis of the global banking system was only a herald of a more profound, essential systematic and political crisis, with a democratic deficit as its consequence. In the discussion about this crisis, many authors, including Habermas, were placing the significant emphasis on German solidarity. The so-called “German question” is an important argument in the critique of power in the EU decision policy, but on the other hand, it is still the main integrative engine of the Union that after the economic crisis in 2016 had its first disintegration act. The question that ap-

218 Habermas, BFN, p. 437.
peared a decade ago is: can there be the Union without the German political and economic solidarity?

In the text ‘Why Europe needs constitution?’ besides the evident political benefits that the Union can achieve in the global affairs with a firm foreign and defense policy, oddly enough, Habermas puts his interest in ‘the containment of a potentially dangerous Germany’. As a German citizen born in 1929, he had the opportunity to live through the WWII, and this has always influenced his opinion about the role of Germany in the Union. The solidarity of Germany for him was not based solely on the present situation, but it has always been a means of redemption for the past crimes that his country committed in Europe and, in some sense, a chance for a historical reconciliation. Therefore, Germany has a central and decisive role for overcoming the status quo and initiating the process of forming the constitutional assembly.

However, more important problem that the EU is facing with is the democratic deficit that is a reflection of the legitimacy problem of the EU institutions. Together with the growing gap between community decisions and people, and with the public participation happening mostly in the national politics, the political character of the Union is seriously put under the question. Moreover, due to the failure of adopting a common European constitution that was supposed to provide the concept of European citizens with its abstract meaning, the democratic crisis became the crisis of European identity or, rather the lack of it. In his recent writings, Habermas is trying to demonstrate that the countries of the EU are all sharing same values and have common interest to stay in the Union. Therefore, despite the lack of legitimacy and democratic deficit, Habermas rather talks about their “lack of trust” in the supranational institutions. Under this premise, ‘the lack of a ‘European people’ is not the insurmountable obstacle to joint political decision making it is sometimes alleged to be’. In other words, Europeans already have common interests and values, and in order to reach the overlapping consensus they need ‘a European-wide political communication’. This communication would be the product of the European public sphere that is seen as the extension, the “openness” of the national public spheres, rather than in creating a new sphere. In other words, the previous democratic deficit is not the fact anymore for this

220 Habermas, The lure of technocracy, p. 39.
221 Habermas, The lure of technocracy, p. 39.
philosopher, it is a thesis that ‘obscures a factor that we must take seriously the conviction that the normative achievements of the democratic state are worth preserving.’\textsuperscript{222} That is, to sacrifice demos in the name of democracy.

On the way towards “an ever-close Union”, the problem of sovereignty arise. Even though the Union represents a relatively new form of organization, it is formed by the traditional national states bound by Union’s treaties. In fact, Habermas ideas for the post-national ideas for the Union, at the end is not as post-national as in his theory, and it is more oriented towards the reformation, than creation. That can be seen best in his reform of the constituting power. Habermas argues that the solution for an ongoing crisis in the Union is “a double sovereignty”, with double constituting authority of the entire citizenry of Europe (European citizens) on the one hand, and of the different peoples of the participating nation-states (European peoples) on the other. This statement is supposed to correspond to his decentralized politics explained in \textit{BFN}:

\begin{quote}
[T]he discourse theory of democracy corresponds to the image of a decentralized society, albeit a society in which the political public sphere has been differentiated as an arena for the perception, identification, and treatment of problems affecting the whole society. (....) Strictly speaking, this power [communicatively generated power] springs from the interactions among legally institutionalized will-formation and culturally mobilized publics.\textsuperscript{223}
\end{quote}

Furthermore, a reconstruction of the notion of sovereignty might represent arguments that can attract the member-states of the Union. In the case when the dialectics of modern states are preserved in the Hegelian way, the permanent achievements are possible, and the concept of state does not have to subordinated to the forces of history (that, as we have seen, ends in its modern articulation), the “living justice” is possible.\textsuperscript{224} Using this logic, Habermas presents his project for the Union as a project towards the cosmopolitan world. However, the institution of the national state continues to exist. This is justified in the next argument: ‘The national states are more than the incorporation of the national culture worth of preserving; they guarantee the level of justice and liberty that citizens, with the reason, want to maintain’.\textsuperscript{225} Therefore, what citizens seek to protect is essen-

\textsuperscript{222} Habermas, \textit{The lure of technocracy}, p. 39.
\textsuperscript{223} Habermas, \textit{BFN}, p. 301.
\textsuperscript{224} See Habermas, \textit{Sobre a constituição da Europa}, p. 78.
\textsuperscript{225} Habermas, \textit{Sobre a constituição da Europa}, p. 78.
tially similar to the “national culture” of all citizens. Particular differences or political antagonisms are thus not influential enough to be part of the democratic material that the citizens of one state would transfer to the integration on the level of the Union. Likewise, the subjective consensus becomes bound to the universal rationalism in deliberative democracy, in accordance with the normative tenets of protected human rights.

2.9.1 The European Constitution

For this “tough experiment” to happen, the first thing that is necessary is the European Constitution, and with two constituents, the eager European constitution would have its legitimacy chances. Therefore, the European Constitution doesn’t firstly require a construction of the “European demos” to formally protect the interests and rights of people. On the contrary, the political overlapping consensus is succeeding the statut. On the practical level, before deciding about the content of the Union’s Constitution, there will be two parallel processes – discussion and adoption of the proposed text of the constitution in each of the national states, and the same process on the European level, in the European Council. Then, it would be proceeded to the EU voting. This is the only way that both constituting powers can have the chance to legitimize the constitution, while democratic rules are complied. After the power is constituted via constitution, the problems between “double sovereignty” would be directed to ‘the level of the constituted polity in procedures that require agreements between two legislative bodies with equal rights – such as the European Parliament and the Council.’

Supposing that we manage to surpass this step, and reach the institutional level of the current federalized supranational union, that would look as follows: it would consist of a strong parliament with the capacity to take legislative initiatives and whose approval would be necessary for all political questions; the Council would be reformed into the Council of Ministers, and finally, the Congress would be between the Parliament and the Council answering to both equally. Bearing in mind that the citizens (or their representatives), ‘insisted that the democratic-constitutional sub-

stance of “their” states should remain intact in the future Union’.\(^{227}\) That is why, besides corresponding to the normative criteria, the new Union will also be supra-national democracy ‘which will have one government, but it will not be an alliance of states’.\(^{228}\) From this and previous statements, we can only assume that in the “Euro-Union” there would not be only two sovereigns, but also a larger administrative apparatus, where everything would be doubled. What is even more troubling with this “experiment” is that it would have two parallel realms of democratic deliberation supposedly working for the same purpose – providing the EU politics a stronger legitimacy ground.

These changes are grounded in the differentiation between “higher-level” and “lower-level” sovereignty that is possible only if the former, that Haberanas also calls “shared” sovereignty, ‘sacrifices part of its sovereignty in order to conserve the revolutionary constitutional achievements of the past’.\(^{229}\) Therefore, one might conclude, if the sacrifice for Hegel was in the name of the state, in Habermas’s case it is in the name of the law.

Therefore, the change in the EU must begin with the Council, the cornerstone of the legal and political changes in the Union. The fact that the Council is composed of the leaders in their own national states, makes this transition even more challenging because politicians are not the same as philosophers. Nevertheless, the joint decision among them is possible because of the political points and future benefits. The constituting decision is essential for having stronger European Parliament that will be not only the carrier of the future institutionalized political character of the Union, but also the realm where the deliberative model of democracy can be organized under the communicative reason.

Besides his early, very strong skepticism about the political process carried by the political parties in democratic parliaments,\(^ {230}\) Habermas based the new union on this institution. His critique of a non-sufficiently empowered European Parliament is very strong, and it corresponds to the

\(^{227}\) Habermas, ‘Democracy in Europe: Why the development of the European Union into a transnational democracy is necessary and how it is possible’, p. 11.

\(^{228}\) Habermas, Bofinger, Nida-Rümelin, ‘Protiv fasadne demokratije’ [Einspruch gegen die Fassadendemokratie], in Peščanik, n.p.

\(^{229}\) Habermas, ‘Democracy in Europe: Why the development of the European Union into a transnational democracy is necessary and how it is possible’, p. 11.

\(^{230}\) See for example Habermas, The structural change in the public sphere, specifically pp. 196-222.
claim that the EU policy is more focused on providing the image of stability in order to answer the global economic challenges and the ones considering the defense of the peace on its borders, than in evolving into a democratic political union. Related to the last point, the EU relation to the politics of some Balkan countries, presents the willingness to tolerate their openly non-democratic politics, defining them as the so-called “stabilizing democracies”. Thus, the phrase “stability in the region” became a mantra of the EU external politics towards the European Western Balkans, while the “economic and political stability” serves as the most common statement for the “problematic” member states, such as Spain, Portugal, Greece, Italy or Poland. Moreover, after the United Kingdom leaving the Union, political accent is again focused in reassuring that the Union has never been this strong, moving away from the serious institutional reconstruction. Therefore, when the president of the European Commission opens the speech in the European Parliament with the words: ‘The European Parliament is ridiculous, totally ridiculous (…) [and that he] will never again attend the meeting of this kind’,\footnote{Jean-Claude Juncker’s speech in the European Parliament, held on 04/07/2017, as cited in BBC News, n.p.} it is at least very hard to imagine the political desire of the executive power to support the reformation that Habermas recommends.

In order to avoid the repeating of the violent European history, Habermas calls for the constitutional patriotism that can trigger solidarity among the people, until the majority of the cultures halt existing as political cultures. This kind of patriotism would allow decolonization of the lifeworld as the political culture that is separated from the particular culture. More importantly, it would lead to the communication between different lifeworlds. In the case of the EU, the constitutional patriotism could be enough for the decolonization, and its shared values and ideas would have the effect of a social glue. For the nation-states with their own national histories, a politics that seeks the coexistence of different ethnic communities, language groups, religious faiths, etc., under the condition of equal rights, entails a precarious and painful process. The majority culture, assuming itself to be identical with the national culture, must be free from its historical identification with a general political culture, while all citizens are capable of identifying themselves with the political culture of their own country. In other words: ‘To the degree that this decoupling of the po-
political culture from the majority culture succeeds, the solidarity of the citizens is shifted onto the more abstract foundation of a “constitutional patriotism”.\textsuperscript{232} Simply put, Habermas believes that the European Constitution as a product of the public deliberation between communicatively competent and rational participants, via the institution of inclusive and just modern law, could be solution to the crisis of legitimacy and democracy, capable of developing the specific supranational democracy that can provide the European decisions and institution with legitimacy due to its deliberative characteristics.

### 2.10 Conclusion to the chapter

From examining findings, it can be concluded that democracy and the discourse theory are plausible as ideas for the discussion about modernity. The aim of this chapter was to show that relation and, more importantly, to point out that in order to give the normative frame to his philosophy of language, Habermas entered the labyrinth of modern law and democracy, where the political power and particular interests cross their swords. He says that ‘the deliberatively filtered political communications that depend on lifeworld resources – on a liberal politic culture and an enlightened political socialization, above all on the initiatives of opinion-building associations’\textsuperscript{233} are the conditions for a deliberative model of democracy. This equalization of liberal and democratic concepts is masked in the politics of human rights, and in the cosmopolitan need for their legal institutionalization. Human rights offer a new moral content for reformed modernity where the national states continue to protect the liberties and freedom of their citizens, but openly engage in the project of universalization. However, ‘[i]t should be recognized that law, in the form of the universalist administration of the rights of man, is hence degraded – contrarily to what Habermas himself would like – to a questionable tool of moral propaganda, exposing the connection between propaganda and humanity’.\textsuperscript{234} The theological significance that humanity and human dignity get in Habermas’s politics of human rights bring within itself a latent danger of imperi-

\textsuperscript{232} Habermas, \textit{The postnational constellation: political essays}, p. 74.

\textsuperscript{233} Habermas, \textit{BFN}, p. 302.

\textsuperscript{234} Castrucci, ‘Jürgen Habermas and the political realism: A critique’, in \textit{Sociology and Anthropology}, p. 293.
alist politics based on the abstract ideas of human rights. Habermas is aware of this, and by insisting that human rights have an original juridical and not moral meaning, he wants to subdue those dangers with a normative imperative. However, the testimonies of millions of people, the newspaper headlines and the rising numbers of violent activities that are supposed to symbolize a death in the name of a better future, or a death in the name of humanity, are no different from the death in the name of nation.

According to discourse theory, the intersubjectivity can be recognized and finally realized in the law which will embrace the communicative reason. The rational potential of societies gets mobilized and possible with the theory of communicative action. The modern law steps in to fill the functional gaps in social evolution. In other words,

\[\text{the tension between validity and facticity, already built into informal everyday practice in virtue of the ideal content of the pragmatic presuppositions of communicative action, becomes more acute in the validity dimension of modern law.}^235\]

In addition, the rational capacities of individuals in the modern world need to become secularized from the religious domain, in the sense that they need to be put into the service of public debates and public sphere. It is interesting that while Habermas acknowledges Christianity in providing the Western philosophy with ideas such as responsibility, autonomy, historicism, human dignity etc., he at the end of the day defines the religious feelings as something pre-modern that at the moment of entering into the modern democratic world gets abolished by the imperative for a new reason. Although instead of the word “abolished” one needs to use the word “substituted”, the consequence remains the same: for Habermas there is a place for religion in the modern world as long as it produces the integral cognitive content, and is capable of communicating with the secular. In other words, ‘the liberal political culture can except from religious people to participate in the efforts of translating the relevant contributions from the religious language to the publically accessible language’.\(^236\)

The “publically accessible language” is what the intersubjective mind needs in order to step forward as the author of the new reason. Habermas who previously considered that ‘\[t\]he modern law didn’t contemplate the

\[\begin{align*}
235 & \text{Habermas, } BFN, \text{ p. 42.} \\
236 & \text{Habermas, ‘Glauben und Wissen’, as cited in Habermas and Ratzinger, } \text{Dialektika sekularizacije [original title: Dialektik der Säkularisierung], p. 32.}
\end{align*}\]
intersubjective nature of forming a common will, so it cannot be conceived as a formation of Individual will on a large scale"²³⁷ doesn’t exist anymore, and the new argument is completely opposite to the old one. It is in the medium of law where the consensus about the universal is already taking place in the politics of human rights. The never-ending possibility of rational consensus stems from the postulates of the theory of communicative action, formed in the discourse theory and finally brought into the cosmopolitan democracy. This chapter provides an insight into the beginning and end of Habermas’s system where everything is bound in the form of a circle, just as Hegel would recommend. However, in the last chapter, the points that I will return to, are revealing a certain connection between the political and violence, and the latent excluding power of Habermas’s theory in which the consensus always means exclusion already on the level of the ideal speech acts. Finally, the demonization of a new enemy who is becoming more and more dressed in the clothes of the traditional, substitutes the radical critique of violence. These points are vital in assuring the dynamics for the project of re-thinking Habermas’s ideas. Thus, in that chapter I will return to the history of the socialist federation of Yugoslavia, and thus further provoke his system, the system in which the idea of the intersubjective possibility of the socialist democracy has disappeared shortly after the Yugoslav group of Praxis. Moreover, the moments when Habermas returns to the arguments coming from the Yugoslav experience is where his theory of consensus shows perhaps the greatest incompetence.

However, in order to reach this level of discussion, in what follows, I will reflect upon the political and legal theory of Carl Schmitt. Habermas had few “dialogues” with this author, many times showing the need to respond to his critique of liberal concepts, because his theory was a clear opposition to the one advocated by Schmitt. More importantly, in order to really understand national questions of the ex-Yugoslavian countries and their existence in modernity, means to understand their particular existence, and in Schmitt’s political theory, there is room for this particularity, unlike in Habermas’s.

²³⁷ Habermas, Comentários à ética do discurso, p. 199.