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**EUropean (Legal) Culture Reconsidered**

**CPP RPS Volume 14 (2009)**

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## *EUropean (Legal) Culture Reconsidered*

### Introduction

All in all, the starting point of any considerations should be the clearest part of the whole. So, let us begin with two pretty obvious statements. The first one is that from an empirical point of view there are different legal laws; this means that national legal systems differ from one another. We can talk of Swiss law, German law, Polish law, American law and the like; we can also discuss two different types of legal law: common law or statute law. There is no doubt they are all diverse.

The second statement applies to a theoretical level (not just empirical):

Each theorist announces principles he thinks applicable to any legal system, yet each is actually best understood as describing a national legal system – English in the case of Hart, American in the case of Dworkin, German in the case of Habermas.<sup>1</sup>

The point is that theorists think of universal principles applicable to any legal system, but in reality they seem to be somehow local (grounded in certain national legal cultures).

Let us begin with Jürgen Habermas who can be deemed an „author of a major book on jurisprudence”<sup>2</sup> in a „postmetaphysical” world. In his previous *Theory of Communicative Action* he wrote of an objective world of statements as a (non-ontological) „basis” for any action which gives a possibility of a true validity claim in the case of any validity claims. But let us take note that to act – or even to describe the world – we need some kind of motivation to do so.<sup>3</sup> What we would like to say is that the possibility of existence (or the way of

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1 R.A. Posner, *The Problematics of Moral and Legal Theory*, Cambridge, Mass. – London, England: The Belknap Press of Harvard University Press, 1999, p. 92.

2 Ibidem, p. 98.

3 J. Rachels, „Naturalism,” in: *The Blackwell Guide to Ethical Theory*, ed. by H. LaFollette, 6<sup>th</sup> edition, Blackwell Publishing, 2005, p. 77.

existence) of an objective world is in some way secondary from the motivations of our action that make us (or do not make us) aware of things and push to change them (or not). Perhaps this is the reason why Richard A. Posner says: „so even if it would be good if political decision making were more deliberative, Habermas has no persuasive ideas for making it more deliberative”.<sup>4</sup> What is lacking here are deeply-motivating ideas.

The question we have just been faced with is the following: what kind of ideas can motivate us best? We see three possible kinds of them: (a) we are given a push to accomplish our current goals by virtue of simple wanting them; (b) we do what we have to do due to the demands of socially cast roles which we just simply carry out; (c) being more or less clearly aware of a picture of life one tries to do what he/she thinks he/she ought to do in order to fulfill this picture of life, to put it into practice and to make it happen.

The third answer seems to be the most profound one, as it does not only assume something more general than the „a-answer” and „b-answer”, than the straightforward aggregation of both of them. Actually, the „c-answer” can become a basis, an ultimate basis for trying to reach the „a-answer” and „b-answer”. Heidegger points out in *Being and Time* that one’s ownmost potentiality-for-Being assumes „Being-its-Self, it is the *Being* of its basis. This basis is never anything but the basis for an entity whose Being has to take over Being-a-basis”.<sup>5</sup> That concerns two moments that come together and are at play at the very same time. The first one is the „how” of existence, *how I would like to live it?* This entails the question, ‘what *in my opinion should the world be like?*’ The second moment connected with such taking a basis of own self can be enunciated as taking the most moral position of autonomy and responsibility for his/her own life. And because Being is always (as an existential feature) Co-being, both of the moments have an influence (determine) on an each other’s existence. For this reason Heidegger writes of the idea of existence that from its most inner part becomes through projection – an existential construction<sup>6</sup>. It is to be considered like „becoming yourself.”

Coming back to the main stream of our investigations we have to notice that for Habermas – in *Between Facts and Norms* – moral and political autonomy are not to be arranged in any kind of hierarchy, but on the contrary, as two original moments (*co-original*, as writes

<sup>4</sup> R.A. Posner, *The Problematics of Moral and Legal Theory*, op. cit., p. 106.

<sup>5</sup> M. Heidegger, *Being and Time*, transl. by J. Macquarrie, E. Robinson, Oxford Basil Blackwell, 1980, pp. 330–331, § 58.

<sup>6</sup> M. Heidegger, *Kant und das Problem der Metaphysik*, Frankfurt am Main: Vittorio Klostermann, 1991 (GA 3), pp. 232–233.

Habermas) to the same degree.<sup>7</sup> This means that someone's private life and the life one spends with others should be from the same moment considered autonomous – these two moments are in the same manner original for his/her existence.<sup>8</sup> They are, metaphorically speaking, like two wings, making us free as birds.

Habermas says „let us deliberate to make the law legitimated” and speaks about „constitutional patriotism”.<sup>9</sup> His narration is indeed free from any substantialized values, it really is „postmetaphysical”. Grasping the law as merely a medium of discourse (for its form) that gives rise to a principle of democracy,<sup>10</sup> Habermas does not „dissolve law into morality”.<sup>11</sup> In other words, he is committed to the idea of *democracy*<sup>12</sup> and is not interested enough in asking about the law itself, as John Rawls<sup>13</sup> says (and Posner<sup>14</sup> follows him). Actually, he does not postulates the problem of a just law (but only of a legitimated one), and – we can add – he does not question the justification of either the law or political institutions. This is regarded by Posner as the reason why the motivating power of the „major book” is rather slight,<sup>15</sup> why it does not meet the certain current requirements that have arisen in our current world. In Posner's view, Habermas overlooks, from his position *between facts and norms*, how profound and emotionally involving questions deliberative processes concern.

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7 J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, transl. by W. Rehg, Cambridge, Mass.: The MIT Press, 1998, pp. 106–107.

8 Ibidem, p. 105: „... I start with the assumption that at the postmetaphysical level of justification, legal and moral rules are *simultaneously* differentiated from traditional ethical life and appear *side by side* as two different but mutually complementary kinds of action norms. In accordance with this, the concept of practical reason must be understood so abstractly, that it can assume a specifically different meaning depending on which kind of norm is at issue: the meaning of a moral principle, on the one hand, and that of the principle of democracy, on the other.”

9 N. MacCormick, *Questioning Sovereignty*, New York: Oxford University Press, 2001, p. 144; see also J. Habermas, *The Postnational Constellation*, transl. by M. Pensky, Cambridge, Mass.: The MIT Press, 2001, pp. 73–74.

10 J. Habermas, *Between Facts and Norms*, op. cit., p. 121: „The key idea is that the principle of democracy derives from the interpretation of the discourse principle and the legal form.”; R.A. Posner, *The Problematics of Moral and Legal Theory*, op. cit., p. 102: „The laws secure the conditions for epistemic democracy by conferring essential rights, and epistemic democracy in turn secures the legitimacy of the laws.”, p. 102.

11 R.A. Posner, *The Problematics of Moral and Legal Theory*, op. cit., p. 101.

12 Ibidem, p. 103.

13 J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1996, pp. 427–433; the problem noted by Rawls is „the outcomes of a legitimate procedure are legitimate whatever they are. This gives us purely procedural democratic legitimacy and distinguishes it from justice, even granting that justice is not specified procedurally. Legitimacy allows an undetermined range of injustice that justice might not permit.”, p. 428.

14 R.A. Posner, *The Problematics of Moral and Legal Theory*, op. cit., p. 104.

15 Posner boldly claims, that „Ironically given its universalistic outlook, Habermas's theory (like Hart's, like Dworkin's) speaks far more directly to his national, namely the German, situation, than to the situation of other countries. Americans do not need to be instructed in the values of diversity, the unavailability of 'metaphysical' groundings for political principles, the importance of democracy, or the preconditions for legitimate political institutions. These things are features of our form of life, the taken-for-granted background of discussion and debate.”; ibidem, pp. 106–107.

In such an outlined problematic area we personally see two basic questions settled on two different theoretical levels. The first one is to be put in the context of the European Union and concerns (our) identity, the identity of Europeans. And the second one: Shouldn't one asking questions of a „just law”, and the connections between law and morality, at first (or at the same time) face the problems of institutions and then of law and the legal system(s)? In this article we would like to examine the first one carefully.

### *1. PROBLEM OF A EUROPEAN IDENTITY IN GENERAL*

Posner is convinced that a universalistic project worked on in *Theory of Communicative Action* and applied in *Between Facts and Norms* arose from „Habermas's personal history”.<sup>16</sup>

From ... early experiences Habermas acquired a lifelong un-German distance for the idea of German nationhood. ... He derides ‘the longing of many intellectuals for a lost German identity’ as ‘kitsch’ ... . For inspiration he reaches back to Kant, who preceded the creation of the German nation and built his moral and political philosophy on universalistic rather than ethnic foundations.<sup>17</sup>

Private and national history made a special hallmark on the German philosopher's writing – he was not interested in searching for „middle-terms” theory, taking for granted the precarious, totalizing power of such theories, and from the very beginning looked for possibility of offering a universalistic democratic<sup>18</sup> project.

Leaving for a moment questions of motivational degree of universalistic terms at all, we are interested in the problem of an identity in the context of a European Union. Whether it is possible to reach it or whether it is already a fact (and perhaps even with a long-lasting tradition)? Maybe talking of such a thing is just as „kitsch”. We should be looking for more general and worldly-binding ideas such as a „global citizenship” and the like?

The law can function best when it is alive, i.e. legitimated. To make the law alive (not just obeyed for sanctions) there must appear the will of legitimization that is the active civil

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<sup>16</sup> Ibidem, p. 98.

<sup>17</sup> Ibidem, p. 99.

<sup>18</sup> That the case of democracy is one of the most important constitutional problematics is explicitly elaborated by Neil MacCormick in a context of accession to the Maastricht Treaty by German Republic; N. MacCormick, *Questioning Sovereignty*, op. cit., pp. 99–100.

attitude sustaining deliberative processes. „[There is] evidence that democratic institutions of freedom disintegrate without the initiatives of a population *accustomed* to freedom. Their spontaneity cannot be compelled simply through law ... .”<sup>19</sup> For this purpose, creating a special culture and ethos seem to be needed; ones that show making the legitimated law valuable. But this is still not enough. For many hundreds of years we have been used to making our national laws limited in their effects to the territory of each state. Moreover, „the doctrine of national sovereignty ensured that the interstate arena was seen as marked by anarchy, not in the sense of disorder, but in the sense of absence of an authoritative system of governance. This notion of accountability was wholly compatible with protection of borders and nationally based difference.”<sup>20</sup> Hence, there appears quite a serious difficulty: is it possible to think in terms of legitimated law with regard to something that is not a state? This leads us to the problem of the possibility of democracy in the European Union and of a European *demos* (people).

MacCormick proposes

a possible answer to this. We need not overstress the requirements of culture or common ethnicity or language as essentially constitutive of a *demos* in the sense required for the concept of democratic government. I should like to suggest – he says – the possibility of our conceiving such a thing as a ‘civic’ *demos*, that is, one identified by the relationship of individuals to common institutions of a civic rather than an ethnic or ethnic-cultural kind. People can have a civic identity constituted perhaps by what Habermas has dubbed ‘constitutional patriotism’, *Verfassungspatriotismus*. This is a common loyalty to a common constitutional order, regardless of differences of language, ethnic background, and the rest.<sup>21</sup>

And further, following Habermas on this point, under the banner of „constitutional patriotism” MacCormick writes about „a European civic demos”. But the aim of his elaborations is quite opposite to Habermas’s (grasped by Posner), as he tries to modernize an understanding of the concept of nationalism by connecting it with liberal assumptions.

Here, there are two problems which are fundamental for our considerations:

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19 J. Habermas, *Between Facts and Norms*, op. cit., pp. 130–131.

20 E. Eriksen, J. Fossum, „Post-national integration,” in: *Democracy in the European Union. Integration through deliberation?*, ed. by E.O. Eriksen, J.E. Fossum, London and New York: Routledge, 2000, p. 3.

21 N. MacCormick, *Questioning Sovereignty*, op. cit., p. 144.

1. Are the ideas of „constitutional patriotism” and the „civic demos” attached to it sufficiently convincing? Don’t we need to give rise to a special European culture at least grounded in western formal values (à la Max Weber)?

2. Is the idea of a modernized nationalism, introduced by MacCormick in the context of postsovereign European states, the idea of a special kind of nationalism indeed, or has it transformed itself into something quite new, that has not had a proper name so far?

Why are these two questions so important? Because those, who undertake the task of unifying European law aptly emphasize the problem of a European Legal Culture. „A determinant condition for the achievement of legal uniformity [in European Union] is the existence of a *common legal culture*”<sup>22</sup> which would bridge the gap between various legal cultures across the EU.<sup>23</sup> That is because a legal culture, „which is comprised of legal concepts, general principles and juridical method”<sup>24</sup> (and is situated between „*surface level of law*, which consist of legal provisions, case law and comparable material”<sup>25</sup> and „*a deep structure of law*, which is more static and reflects each historical period”<sup>26</sup>) can reach a common feature only if it is supported by – if not grounded in – „shared rationality and morality”.<sup>27</sup> And these spring from a shared picture of life, life *we* are to live on our own and together with others.

To manage current problems which have emerged on the basis of the processes of unifying the law of UE member states’ (e.g. a transposition of concepts as a result of a literal translation from one system to another, the same legal term having divergent meanings in different legal languages;<sup>28</sup> the influence/affect of the European Union legal framework on local – national – legal concepts;<sup>29</sup> „the incidence of the EC legal patchwork on the Member States’ legal systems [which] is deemed to have destroyed the coherence of domestic private law, which has been traditionally characterized by its solid systematic structure or even codification”,<sup>30</sup> multilingualism generating „the largest translation and interpretation services

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22 A.M. López-Rodríguez, „Towards a European Civil Code without a Common European Legal Culture? The Link between Law, Language and Culture,” *Brooklyn Journal of International Law*, vol. 29, no. 3, 2004, p. 1208.

23 Ibidem, p. 1207.

24 Ibidem, p. 1206.

25 Ibidem, p. 1206.

26 Ibidem, p. 1206.

27 Ibidem, p. 1209.

28 Ibidem, pp. 1200–1202.

29 Ibidem, pp. 1202–1203;

30 Ibidem, pp. 1204–1206; see also Mark Van Hoecke, „European legal Cultures in a Context of Globalization,” in: *Law and Legal Cultures in the 21<sup>st</sup> Century. Diversity and Unity*, ed. by T. Gizbert-Studnicki, J. Stelmach, Warszawa: Oficyna Wolters Kluwer Business, 2007, p. 81: „In Europe, Europeanisation and globalization have made it increasingly difficult to identify and to demarcate legal systems. Rules introduced

in the world. Furthermore, multilingualism causes a considerable delay in the legislative procedure since texts have to be translated into different official languages. Most importantly, the quality of the final product is impaired by the fact that there is rarely an equivalent word in two different languages”;<sup>31</sup> and more) we need a deeper *communitarization* than has so far been achieved,<sup>32</sup> a communitarization that is supported by a common legal culture as well as by culture in a wider sense.

Aulis Aarnio holds that „The identity of the modern human is not an answer to anything; it is a problem in itself”<sup>33</sup> and following Samuel P. Huntington asks „Who are we?” meaning „Who are we, Europeans?”<sup>34</sup> He seeks the answer in the past.

The answer to that question cannot be found in the future, possibly not even in the present, which is in many different ways impenetrable. It plays a large part in the search for identity, coloured with self-comprehension, which take places on the solid building blocks of history, in my case the history of Europe.<sup>35</sup>

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in domestic law on the basis of a European Directive are technically part of the domestic legal system, but belong to a broader European legal system when it comes to the power of changing or authoritatively interpreting the rule”.

31 A.M. López-Rodríguez, *Towards a European Civil Code without a Common European Legal Culture?*, op. cit., p. 1212; for this reason, and for the fact that „Truthfully, the principle of linguistic equality is a fiction, even at the EC level. With the exception of the European Parliament, the number of working languages in the EU institutions has been reduced to French, English and, to a lesser extent, German” (p. 1218) she sees a need „to adapt to the factual dominance of French, English and German in order to facilitate the development of a common legal discourse in Europe” (p. 1219). Something opposite is especially important for others, e.g. Neil MacCormick, for whom „All languages must be recognized as essential elements of the rich heritage of the UE, and all languages and cultures should have equal rights, as stated in the Universal Declaration of Linguistic Rights, signed in Barcelona in 1996. All official languages in the territory of the European Union must be given proper status at the European level,” N. MacCormick, *Who's afraid of a European Constitution?*, Imprint Academic, Societas, 2005, p. 79. On this problem see also Adeno Addis „Constitutionalizing Deliberative Democracy in Multilingual Societies,” *Berkeley Journal of International Law*, vol. 25:2, 2007, pp. 117–164, where the question of a language of discussion is presented as a fundamental one for taking up the problem of deliberative democracy at all.

32 A.M. López-Rodríguez, *Towards a European Civil Code without a Common European Legal Culture?*, op. cit., pp. 1197–1198: „... Due to growing numbers of EU acts, diverse areas of private law have been partially harmonized, in particular, company law, labor relations, industrial property, copyright law and contract law;” and further she writes: „Common law is silently permeating continental Europe through business life by means of legal constructions such as leasing agreements, franchises or trusts, which are not embodied in the European civil codes and do not even belong to the civil law tradition. Both legal traditions are indeed converging. However, whereas courts in civil law countries have developed sophisticated standards to be applied in matters of contracts and torts, in common law, contrarily, the number of statutes is increasing. The process of *communitarization* has already put an end to the existence of isolated, coherent legal cultures,” p. 1210.

33 A. Aarnio, „Who are we? On Social, Cultural and Legal Identity,” in: *Law and Legal Cultures in the 21st Century. Diversity and Unity*, ed. by T. Gizbert-Studnicki, J. Stelmach, Warszawa: Oficyna Wolters Kluwer Business, 2007, p. 134.

34 Ibidem, p. 146.

35 Ibidem, p. 146.

We are not in agreement with this statement of the great thinker Aulis Arnio. We will try to demonstrate in this article, that only the future can be our source of correct identity. Our standpoint is though Europe can now, „proceed with the *civilizational project* that was first initiated during the Enlightenment era”,<sup>36</sup> the very sense of it is before us, and the ground, and foundation of it is still in our hands as an undertaking.

## 2. Is the Idea of a Constitutional Patriotism Sufficient to Hold Together the Project of a (Common) European Union?

Habermas puts it clearly, that a special „move to a postmetaphysical concept of autonomous morality”,<sup>37</sup> was made just by Kant. This concept states that the moral perspective is based on three kinds of abstraction: „(1) abstraction from the motives required of those involved, (2) abstraction from the particular situation, and (3) abstraction from existing institutions and forms of life”.<sup>38</sup> However, the most significant is the shift contained in these abstractions: from questioning the good life to questioning the best justified reasons for a certain action. Actually, the change of moral perspective towards questions concerning the best legitimated norms of action is of a postmetaphysical burden.

The main idea of such an understanding of the postmetaphysical shift is that we no longer answer what sort of concepts and values forming different forms of life are better or more desirable either for individuals or for societies. On the contrary, in modern times, we let people choose them themselves and on this basis form pluralistic societies, where there is a pluralism of ultimate value orientations<sup>39</sup>. This pluralism is connected with the ethical question of good life and co-constitutes lifeworlds embracing historical and biographical forms of life which are to be understood as specific backgrounds, „the unproblematic

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<sup>36</sup> E. Eriksen, J. Fossum, „Post-national integration,” op. cit., p. 1.

<sup>37</sup> J. Habermas, „Lawrence Kohlberg and Neo-Aristotelianism,” in: *Justification and Application. Remarks on Discourse Ethics*, trans. by C.P. Cronin, Cambridge, Mass., and London, England: The MIT Press, 2001, p. 118.

<sup>38</sup> Ibidem, p. 118; compare: J. Habermas, „Moral development and ego Identity,” in: *Communication and the Evolution of Society*, trans. by Th. McCarthy, Boston: Beacon Press, 1979, pp. 83–87, where he writes about: reflexivity as understanding and applying reflexive norms / principles (abstraction from the particular situation), abstraction and differentiation as distinguishing between heteronomy and autonomy (abstraction from the motives required of those involved) and generalization (distinguishing between particular and general norms, individuality and ego in general).

<sup>39</sup> J. Habermas, „Lawrence Kohlberg and Neo-Aristotelianism,” op. cit., p. 122.

horizons” from which rational solving of moral problems derives its possibility.<sup>40</sup> While reflexive filtration of the best given reasons is possible and, what is more, happens with a means of abstraction constituting in this way the best as possible (from the formal point of view) normative systems (in a certain time), the reflexive forming lifeworlds (through questioning and answering the ideas of good life) is much less possible and effective in spite of the fact that it goes „hand in hand” with the first kind of processes. The reason is that, in Habermas’ opinion, these „ideas of the good life are not something we hold before us as an abstract ‘ought’. Rather they shape the identities of groups and individuals in such a way that they form an intrinsic part of culture or personality.”<sup>41</sup> Questioning the ideas of a good life converts in fact to two different phenomena: asking evaluative questions that are answerable only on the basis of each unquestionable lifeworld on one hand (Habermasian perspective), and it points to making the identities of groups and individuals more deliberately constituted, on the other.

The last issue concerning the concept of identity is of high importance in the light of contemporary Europeanization processes.

Political and institutional restructuring is vital, but cognitive aspects, attitudes and feelings have to be taken into account as well. Communication among decision-making bodies, representatives and general publics, has to be reinforced because millions of EU citizens need to forge some kind of common identity. This is an indispensable precondition to the elaboration of the social solidarity without which the Union will never be able to develop into a strong polity.<sup>42</sup>

We undertake the scrutiny of the degree of this importance, previously highlighting the values-case.

What kind of role do values cast for questioning the best reasons in the process of the legitimization of normative systems?

Sir Neil MacCormick in his famous analysis on Hart’s concept of law made in *H.L.A. Hart* points out that discussing any legal systems relates back to the values, which, from the

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40 J. Habermas, „Discourse Ethics,” in: *Moral Consciousness and Communicative Action*, trans. by Ch. Lenhardt, S. Weber Nichol森, Cambridge, Mass., and London, England: The MIT Press, 1999, pp. 104–109.

41 Ibidem, p. 108.

42 M. Heller, Á. Rényi, „EU enlargement, identity and the public sphere,” in: *The European Union and the Public Sphere. A communicative space in the making?*, ed. by J.E. Fossum, Ph. Schlessinger, London and New York: Routledge Studies on Democratizing Europe, 2007, p. 169.

internal point of view, are fundamental for accepting a certain set of rules which prevent some patterns of behaviour, making people adhere strictly to some moral (in this context: ethical) values.<sup>43</sup> He says that „rationality’, it appears, relates back to ideals and values”<sup>44</sup> and ”this suggests that values are whatever human beings hold to as the underpinning reasons behind more immediate reasons for acting, for approving action, and for certain ways of acting and states of affairs to others.”<sup>45</sup> It means that values, which seem, at first glance, to be „immune from deliberative or quasi-legislative change”<sup>46</sup> are the deep-reasons for our acting/not acting and somehow stimulate the ground and flexibility for the reflexive legitimization of normative systems.<sup>47</sup>

Ideals, standards or values presume the possibility of viewing one’s life as making sense or not, the possibility which at the same time forms the picture of life one would like to conduct. They are – dependent on the level of influence – the most motivating factors in individuals’ lives. „To think about the world, certainly to think of it beyond one’s perceptual field, is to have some kind of picture or narrative account of it.”<sup>48</sup> That is the reason why MacCormick talks of the primacy of „ought” over „is”<sup>49</sup> and sees positive law only as a source of „the possibility of making enforceable arrangements”<sup>50</sup> but not the capability of any action which relates in fact to a picture of the world one has. The crucial point of MacCormick’s analysis reveals that in fact to be able to take part in the legitimization processes seriously, to want the legal system to regulate something in a precise way, to know what is wanted, everyone must have some kind of picture of the world or of what on a normative basis is to be regulated.

This picture of the world comprises normative elements and gives the possibility of making one’s live meaningful and also brings us back to the topic identity problem. Hence, questioning ideals and values which are parts of our individual or collective identities has led us to the question the picture of the world we would like to live in. Accordingly, elaborating reasons and methods of the best conducted processes of the legitimization of legal norms

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43 MacCormick’s reading of Hart’s theory was found, of course, a little controversial also for Hart himself but this is of no importance at the moment as we are not interested in finding the best interpretation of his theory but in finding an interesting and fruitful attempt to address this problematic point.

44 N. MacCormick, *H.L.A. Hart*, second edition, Stanford, Calif.: Stanford University Press, 2008, p. 64.

45 Ibidem, p. 65.

46 Ibidem, p. 71.

47 Of course, these values (and reflective moral attitude they entail) are not a part of a normative system itself for MacCormick.

48 N. MacCormick, *Questioning Sovereignty*, op. cit., p. 2.

49 N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, Dordrecht, Holland: D. Reidel Publishing Company, 1986, p. 103.

50 N. MacCormick, *H.L.A. Hart*, op. cit., p. 108.

without introducing any picture of the world that encompassed certain common ideals and values seems to be, from the MacCormickian perspective, pointless and of little usefulness for a serious attempt at constructing any community, especially, the European one, since the motivating power is lacking in all of it.

Unfortunately, there remains the problem of the possibility of achieving a common identity, the possibility of a reflective influence on the different identities that will not disturb the peculiarity of them.

### 3. What Kind of Values Play a Special and Unique Role for a European Identity?

Let us once more go back to Habermas. He scrutinizes Lawrence Kohlberg's six stage scale of moral development and highlights two things. The first one is that Kohlberg's post-conventional stage of moral consciousness concerns one's ability to make reflections on her/his particular forms of life which for others (being at lower stages of the scale) can be treated as an unquestionably valid background for making judgments and decisions. In other words, Kohlberg's proposal of understanding universalist morality – in a very formal mode – although focused on justice issues, somehow managed to capture the form which decontextualizes lifeworlds and no longer let people „appeal to the naïve validity of the context of the lifeworld”.<sup>51</sup> This means that persons on the highest two stages are capable of reflecting the massive context of their lifeworlds. Moreover, as Georg Lind, an advocate of Kohlberg theory, asserts that, morality can be learned, and therefore can be reflectively developed.<sup>52</sup>

The second thing is Habermas' insight into the sixth stage. In his opinion it is incomplete, for Kohlberg makes no distinction between monologically tested principles and principles which are accomplishments of reciprocal discourse procedures.<sup>53</sup> That is why Habermas claims the

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<sup>51</sup> J. Habermas, *Discourse Ethics*, op. cit., p. 109.

<sup>52</sup> G. Lind, *Moral ist lehrbar*, München: Oldenbourg Schulbuchverlag GmbH, 2003.

<sup>53</sup> „At level III principles become the moral theme; for logical reasons complete reciprocity must be required. At this level the stages of moral consciousness are differentiated according to the degree to which action motives are symbolically structured. ... If needs are understood as culturally interpreted but ascribed to

necessity of stage seven, strictly involving the competence of achieving a consensus through discourse.

The point is – let us remind ourselves: as stated by Posner – the low motivational power of such a reasonable morality and still an access to evaluative questions and values only on the basis of an unquestionable, „unproblematic horizon of concrete historical form of life or the conduct of an individual life”,<sup>54</sup> the one we call authentic and recognize as part of the identity structures. But what we claim is that perhaps, in this context, the comprehension of ethical life should be redefined and formulated into some common ideals which motivate us much more and push forward the processes of the justification of public and political decisions? From this perspective we would like to point out two things:

A. The collective identity structure requires three fundamental elements:<sup>55</sup> it must work in the public sphere, i.e., notions and categories which build any collective identity are to work and function in public discourse. Then they become, through internalization processes, parts of individual identities and are shared among members of a certain group. And finally we find the third feature, which is the existence of patterns of behaviour corresponding with notions and categories of an internalized collective identity.

B. All kinds of identities are communicative constructions developed in at least two types of discourse: an organic determinist one or an opposed, universalistic one.<sup>56</sup> „[A universalistic discourse] postulates that individuals are equal and free. In this approach, the very fact of diversity in human life is a value, regardless of group membership. Individuals have the right to define their own identity. Classification does not depend on ascriptive but on achieved qualities and traits, and its principles are subject to choice.”<sup>57</sup>

If we summarize: that moral development which makes possible the reflective attitude toward someone's own lifeworld is learnable, that constructing a collective – and respectfully

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individuals as natural properties, the admissible universalistic norms of action have the character of general moral norms. Each individual is supposed to test monologically the generalizability of the norm in question. This corresponds to Kohlberg's stage 6 (conscience orientation). Only at the level of universal ethics of speech [*Sprachethik*] can need interpretations themselves – that is what each individual thinks he should understand and represent as his 'true' interests – also become the object of partial discourse. Kohlberg does not differentiate this stage from stage 6, although there is a qualitative difference: the principle of justification of norms is no longer the monologically applicable principle of generalizability but the communally followed *procedure* of redeeming normative validity claims discursively. ... Kohlberg's schema of stages is incomplete.”, J. Habermas, *Communication and the Evolution of Society*, op. cit., pp. 89–90.

<sup>54</sup> J. Habermas, *Discourse Ethics*, op. cit., p. 108.

<sup>55</sup> Here we follow Kwame Anthony Appiah, *The Ethics of Identity*, Princeton: Princeton University Press, 2005, pp. 66–69.

<sup>56</sup> M. Heller, Á. Rényi, „EU enlargement, identity and the public sphere,” op. cit., pp. 171–172.

<sup>57</sup> Ibidem, p. 171.

individual – identity happens mainly through the public sphere and public discourse. Also, building such an identity is achievable thanks to (if not only, but this is in fact not the point) mainly achieved qualities, then it appears that the case of our common European identity, the problem of the future of European identity lays in our hands. To answer the questions concerning the above-mentioned problems we must aim to elaborate a picture of the world that could be *ours via* public discourse. In order to do this, we have to prepare ourselves with a special tool that can be understood, from another point of view, as a good in itself, i.e. with a democratic education. And all of this should be led by the idea of discussing our commonly shared ideals, which would be able to give us, the Europeans, a future which would be worth working for.

To understand the stability and longevity of the EU, it is necessary to clarify what are the ‘virtues’ of the EU system that contribute to its stability. The contention that informs this position is that in a democratic setting there is *no stability without validity*. The normative visions, which have long been associated with the EU pertain to peace, freedom, democratic constitutionalism, and Europe as a common life world.<sup>58</sup>

We think here basically of ideas of human rights, deliberative democracy and active European citizenship.

#### 4. Is an Inclusive Nationalism – Nationalism Indeed?

##### In Search of a New Idea for Our Brand New Days

„For a European public sphere to exist, European identity has to be reinforced and European citizens have to take responsibility for common public matters without only observing the interests of their own local, regional or national community.”<sup>59</sup> Unfortunately, MacCormick explicitly states that there is a deficit of democracy in the EU which can be regarded as a very serious obstacle on the way to achieving the European civil perspective of a common public good that we should nurture. A common public good directly related to democratic ideals:

it is a certain sense both constituted and discovered in the process of a debate in which many voices can be heard and none can hope to have their position viewed with sympathy

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58 E. Eriksen, J. Fossum, „Post-national integration,” op. cit., p. 9.

59 M. Heller, Á. Rényi, „EU enlargement, identity and the public sphere,” op. cit., p. 185.

if they ignore differing positions of others. It is an emergent concept, not a target for pursuit by a *demos*, a political class, or a society.<sup>60</sup>

Common identity posited as a common good can be constructed if and only if we properly understand our current political, social and historical position and with the means (being at the same time virtues) of the real *European* public sphere, perhaps multi-levelled public discourse and of a well-minded education directed at the participation in public discourse learning and the transformation of preferences – we can try to build a Common Europe aimed at realizing the ideals of democracy, human rights and active citizenship. The problem we find the most profound is the absence of a solid normative framework that would integrate Europeans in more than just the simple realization of current interest-oriented goals. And because – from our deliberative perspective – „preferences can not be taken as given, they are shaped, tested and reshaped in the many discursive and legal settings that the complex European integration process provides”<sup>61</sup> we see the EU as a task that is ahead of us to undertake through public debate but framed by these above-mentioned ideas of deliberative democracy, human rights and active citizenship.

In this context Bernard Crick makes a very interesting remark on democratic education. He says:

For some have held, a still powerful cultural tendency and educational doctrine, that if an opinion is *sincerely* held, it should not be questioned (a belief that all prejudices are equal), nor should justifications be pressed for in respect of actions that are held to be *authentic* expressions of personality (going with an amiable belief that no feelings should be hurt by being questioned). Others regard reasons as unnecessary if actions can be certified as authentic or typical emanations of some group interest – ‘working class solidarity’, ‘middle class moderation’ or ‘ethnic community’, for instance. ... Sincerity, authenticity, spontaneity, typicality, etc. are values to be cultivated, but not as a cult or a one-crop moral economy; such values must grow alongside others.<sup>62</sup>

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60 N. MacCormick, *Who's afraid of a European Constitution?*, op. cit., p. 55.

61 E. Eriksen, J. Fossum, „Post-national integration,” op. cit., p. 14.

62 B. Crick, „The Presuppositions of Citizenship Education,” *Journal of Philosophy of Education*, vol. 33, no. 3, 1999, pp. 348–349.

The main idea is that reasoning should be taught as one of the most important formal democratic values because European integration „can also occur through *deliberation*, i.e. through the process of arguing”<sup>63</sup> that can in an important, and positively understood way, affect our initial and naïve picture of the world, lifeworlds and patterns of behaviour one can sustain. We see this positive effect in shaping the critical moral attitude, then taking the reflective and more general (from the EU’s perspective) attitude while considering problems, goals and politics vital for the EU community, and also in more peaceful problem-solving and in changing motivational structures in the sense of progress on Kohlberg-Lind’s scale.

In our opinion only education based on reasoning would give us the possibility to construct and build both a constitutional patriotism and a health inclusive nationalism. The first one would be understood through moral progress described by Kohlberg and Lind which assumes the growth of motivational power for action of threefold abstract reflection that Habermas developed from the Kantian postmetaphysical shift. The foundation of a European Community on the ideals of democracy and human rights entails such a generalization of our reasoning in the political sphere.

On the other hand, such a generalization is not thought a totality either of our lifeworlds or forms of answering the question of good life. That is the reason why the dimension of authenticity must be cultivated with regard to our general and common political values. Here arises the idea of an inclusive nationalism MacCormick wrote about, while the pure notion of „inclusive nationalism” appears misleading and unsatisfactory for us.

First and foremost we do agree with the thesis of „the tyranny of the concepts and normative principles associated with the notion of the state”.<sup>64</sup> In this context the notion of sovereignty was clearly and convincingly examined by MacCormick who showed that we have already lived in post-sovereign states<sup>65</sup> in the EU. So the correct way to conceptualize the EU has a little bit to do with the notion of the state – it has more to do with the common political framework: community based on commonly shared political values and public political culture is at stake. The complement to the general political framework of the EU should be a political construction of inclusive communities, self-governing and functioning on a more or less local level which may – but do not have to – include some national ideas.

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63 E. Eriksen, J. Fossum, „Post-national integration,” op. cit., p. 10.

64 Ibidem, p. 7.

Our article contributes to a normative theory of democracy. As has been shown above, we take a constructivist approach which means that our (preliminary) thoughts on the construction of an ideal theory of the European Union Polity are based on the hypothesis that it has to be founded primarily on three constructed ideals of a multicentered/diffused deliberative democracy regime, human rights and European citizenship. And so, we turn to the questions stated for example by Erik Fossum and Philip Schlesinger in their interesting considerations concerning the European Public sphere „Do democratic opinion- and will-formation processes have to rest on a set of ‘pre-political’ values to produce democratically legitimate decisions? Does democracy presuppose a we-feeling, a sense of brotherhood and sisterhood ...? Is a sense of common destiny required for people to consider each other as compatriots willing to trust each other and take collective obligations?”<sup>66</sup> – we answer these questions as follows: Yes, but these are so called pre-political values. They have to be leading ideals promoted by democratic education and deeply, firmly incorporated into a European public political culture.

From our point of view European citizenship is to be a political construction, free from any religious and metaphysical assumptions; it has to be „political not metaphysical”, in the sense that we just do not define it through such up-to-date obvious conceptual entanglements as national, regional, city, district or „our street community”/ grass-root community. It must be strongly highlighted that we do not see them as either old-fashioned or primitive and unnecessary. We just do not take them into account when discussing European citizenship for we deem, in fact, that the traditional national notion of citizenship (national oriented or ethnic-oriented) should be narrowed to a cultural dimension. On the other hand, following MacCormick, in our view, we see the historical necessity to „set these kinds of communities free”, to let them self-govern in the post-sovereign sense of the term, fostering in this way the democratic forces of every individual, the forces of participation in discursive self-governing. From such a position we have to reject calling an inclusive community a national one. Finally, we find the idea of settling the most basic forms of democratic participation on a local/regional level and setting an in-depth democratic ideal very important.

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65 N. MacCormick, *Questioning Sovereignty*, op. cit.

66 J.E. Fossum, Ph. Schlesinger, „The European Union and the public sphere. A communicative space in the making?” in: *The European Union and the public sphere. A communicative space in the making?*, ed. by J.E. Fossum, Ph. Schlesinger, London: Routledge, 2007, p. 6.

## Conclusions

It seems that looking for common moments in the past makes sense if we think we can bridge the gap between (legal) cultures - only or mainly – on the basis of a common tradition. But, although „legal cultures are generally based on a long tradition and even aim at keeping it unchanged for as long as possible, ... in law there are recent cultures that lack such a tradition. This, for example, is the case with European Union law and European Human Rights”.<sup>67</sup> In other words speaking, searching for a common – and to some extent unifying – base may be directed into the future and be understood as an „existential construction” answering the question „Who are we, the Europeans?” Maybe the truth is that „here the tension is rather between old and new ideas than between different traditions”.<sup>68</sup> From this point of view we would rather need to elaborate the idea of our shared culture and identity it by then delving into the past. Of course, elaboration and discussion always uses certain languages, notions rooted in certain traditions, but in this context looking to the future which may reveal (or even conjure up) our past in its most true and serious function of the basis of the possibilities of being, of existence in the social *milieu*.

If this is so, in Habermas’s theoretical proposal there is something unsaid, and a little unfinished. His project gives us insufficient motivating power for a (communicative) action because it does not explicitly say our (European) identity is at stake. On the other hand, MacCormick’s view seems to be a little premature: what „liberal inclusive nationalism” means may appear after (or at least in the same process of) the formation of a European identity debatable, putting it into a question in the process of a political construction.

Philosophers of law emphasize the necessity of a certain, broad-national-legal-order-minded education.<sup>69</sup> But we think such an education should be considered with regard to the above-mentioned idea and embrace matters relating to Europeanization and globalization processes, learning other cultures (national and regional), learning more than one foreign language, an exchange of students and perhaps pupils from secondary schools (including staying at somebody’s home for one/three/six months while going to the school abroad), and the like. Well-thought education should not be finished at school/university levels but continue at a

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<sup>67</sup> M. Van Hoecke, „European legal Cultures in a Context of Globalization,” p. 83.

<sup>68</sup> Ibidem, p. 95.

<sup>69</sup> Ibidem, pp. 98–99; A.M. López-Rodríguez, *Towards a European Civil Code without a Common European Legal Culture?*, op. cit., pp. 1216–1217.

horizontal level of public activity and in this way become entrenched and well-grounded (we think about projects of cooperation between cities, regions, state/public institutions and so on). First and foremost we must prepare ourselves to answer the question: Who are we, the Europeans? – do we really want legal, cultural and political changes or not.

An „existential construction”, we think following Heidegger, may and even must be thought to

take over Being-a-basis. ... Dasein [and Mitsein] is not itself the basis of its being, inasmuch as this basis first arises from its own projection; rather as Being-its-Self; it is the *Being* of its basis. This basis is never anything but the basis for an entity whose Being has to take over Being-a-basis.<sup>70</sup>

In this context, of taking over our (European) being own basis, we should above all ask: „Who are we, the Europeans?” and face the question as a possible, projected by us, basis of being ourselves.

From the empirical point of view there are different legal laws, different (more or less) legal and not only legal cultures – but those are only facts which are in operation. What it means and how it changes – depends on us and who we are.

Finally, we would like to highlight some important points. In this article we do not talk about the content of a system of legal law as such in relation to politics.<sup>71</sup> We just agree with MacCormick’s thesis that values and standards motivate people best to certain actions. That means they weigh in favour of the legitimate law-making of a certain form and content of law.<sup>72</sup> But the question of whether the content of legal law is (directly) related to values and morality (necessarily or just in fact) is a different one.

Posner is partially right in saying that theories of legal law are in part local, yet we do not see this as an argument against them. A system of legal law cannot just be inconsiderate towards the political community to which it is addressed. And while the notion of a political

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<sup>70</sup> M. Heidegger, *Being and Time*, op. cit., pp. 330–331, § 58.

<sup>71</sup> Mauro Zamboni calls it „a static aspect” of relations between legal law and politics; see M. Zamboni, *Law and Politics. A Dilemma for Contemporary Legal Theory*, Springer Verlag 2008, pp. 5–6.

<sup>72</sup> From Zamboni’s distinctions perspective we just say of open law-making and of mixed legal discipline.

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community refers to political values and standards which are shared and for this play an integrating role, a system of legal law must take them into account.

We are not deciding here whether these political values are universal or not. What matters here is that in the scope of the political community they are generally accepted. Here and now (in a certain time and place) a certain political community claims such values as universal and for this reason they can be observed there.

Even if the notion of law does not relate to a notion of political community (and Robert Alexy points out that there are two moments of the first one: „a real or factual and an ideal or critical dimension”<sup>73</sup>), then still factually made law reflects (and ought to reflect if it is thought to be legitimized) some value constellations accepted in the political community by discourse. In this sense a set of rules can reflect the pluralism of value constellations which are, let us repeat, „underpinning reasons behind more immediate reasons for acting, for approving action, and for preferring certain ways of acting and states of affairs to others”,<sup>74</sup> and from this perspective we can say they underpin the reasons for the acceptance of a certain set of legal rules. In the other words, legal law can reflect the pluralism of value constellations and there is not a possibility for it to do otherwise (because there were no reasons for accepting certain laws, or stronger, any law).

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<sup>73</sup> R. Alexy, *On the Concept and the Nature of Law*, Warszawa: Fundacja „Ius et Lex,” 2006, p. 41.

<sup>74</sup> N. MacCormick, *H.L.A. Hart*, op. cit., p. 65.

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