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The Discourse Theory of Law and Democracy

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THE DISCOURSE THEORY OF LAW AND DEMOCRACY

-- Introduction (Vol. I) --

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Contents

I.	<i>Jürgen Habermas' Discourse Theory of Democracy and Law: An Introduction</i>	1
I.1	<i>HUMAN RIGHTS AND POPULAR SOVEREIGNTY</i>	2
I.2	<i>DELIBERATIVE DEMOCRACY: PROCEDURE OR SUBSTANCE?</i>	8
I.3	<i>COMMUNICATIVE AND NEGATIVE FREEDOM</i>	11
II.	<i>Selected Texts</i>	18

I. JÜRGEN HABERMAS' DISCOURSE THEORY OF DEMOCRACY AND LAW: AN INTRODUCTION

The discourse theory of law and democracy differs from well-known theories of law – advocated, for instance, by the liberal or republican tradition – especially by the fact that it introduces a specific understanding of the rational discourse. Let us briefly remind ourselves of the core content of this element here: accordingly, only norms which can be accepted by all those concerned in rational discourse are valid.¹ However, the democratic constitutional state is no direct realisation of the discourse principle. Instead, it emanates from entangling the discursive principle with a legal form, one which already incorporates the subjective right of freedom to act. By intertwining the discursive principle and legal form with one another, a system of rights that consists of the fundamental individual rights to freedom of action (including the guarantee of access to the courts), to political and to social participation is generated. With the right to political participation, a deliberative-democratic procedure is institutionalised, which translates the initially abstract system of rights into individual concrete human and fundamental rights.

From the liberal camp especially, a number of objections have been raised

* Part I was written by Klaus Günther, and Part II by Camil Ungureanu.

¹ Jürgen Habermas, *Faktizität und Geltung*, p. 138/*Between Facts and Norms*, (herein after *BFN*), p. 107.

against this discourse-theoretical concept of democratic constitutional state rule, which will be defended in the following. This defence will, at the same time, work to introduce and to explain the concept itself. The focus will be on three objections: (1) The discourse theory of law cannot maintain the claim that human rights and the sovereignty of the people co-originate; instead, human rights are sub-ordinate to popular sovereignty. (2) The discourse theory of law cannot claim to provide good reasons for the assumption that decisions following a deliberative-democratic manner are to be seen as provisionally rational, as there is a gulf between reason and decision as well as between reason and procedure that cannot be bridged. (3) The discourse theory of law can neither justify nor sufficiently guarantee the distinctive law of the modern world, namely, the individual right to negative freedom. Thus, from a discourse-theoretical view, this right is only a necessary evil and, at best, a minimal functional pre-condition for democratic discourse itself.

I.1 Human Rights and Popular Sovereignty

The discourse-theoretical version of the principle of popular sovereignty embodies a problem that Kant and Rousseau were also confronted with – albeit, now, in a more aggravated form. If the sovereign people deliberate and decide about the validity of law in discursive procedures, should one consequently not also fear that it could override human rights? Since Jean Bodin, political sovereignty includes the authority of the legislative power, which is, itself, not subject to any restraints by a higher authority. From this absolute capability arises a tension with human rights, which are primarily meant to protect the individual against political power. The absolute “capability” of the sovereign legislator should be bound to a human rights “ought”. But if this, in turn, means that human rights take normative precedence over political legislation, then legislation would no longer be sovereign. In the discourse-theoretical version, this tension is aggravated because deliberative democracy is meant to be the sole source for the legitimacy of law. One might, therefore, pit the inherently existing legitimacy of human rights against a deliberative legislative process which generates legitimacy itself. This tension coagulates into constitutional conflicts wherever an institutionalised court exists in addition to a democratic legislature, which is empowered to review acts of legislation not only for their constitutional conformity but also with the fundamental and human rights that the very constitution guarantees.

The assertion that human rights operate as a barrier for the sovereign legislative power of the people is one of the central positions of liberalism. It has its roots in the fear, known since ancient times and so often confirmed by historical experience, that the majority can democratically overpower a minority. This is particularly correct if a legal community consists of structural majorities and minorities due to economic or cultural reasons. In such a case, the gulf between majority and minority would be insurmountable. Any democratic majority decision would only work to confirm and deepen this separation. The majority could agree on democratic laws, which would be in its own favour and would disadvantage the minority. In these cases, it is important that the members of the minority possess at least individual human rights, which the majority is not allowed to infringe or to erode.

The concept of human rights, as an insuperable barrier, and thus primarily as a restriction to democratic legislation, raises yet another problem. The well-known codifications of human rights possess a quality which Napoleon once acknowledged as the attribute of a good constitution: they must be short and dark. Their brevity renders human rights evident and establishes a close relationship with basic moral intuitions mainly rooted in negative historical experiences. Thus, preceding the American Declaration of Independence of 1776, the human rights declaration states that it only reflects “self-evident” truths (“we hold these truths to be self-evident...”). In the Preamble to the French “*Déclaration des droits de l’homme et du citoyen*” of 1789, these are “*principes simples et incontestables*”. The human right to freedom finds its evidence in the negative experience of arbitrary arrests without any legal guarantees (*habeas corpus*), state repression of non-tolerated religious confessions, and arbitrary state intervention in the private autonomy of economic activity – the human right to property in the negative experiences of arbitrary seizure and confiscation.

However, the price for this evidence, which rests in experienced injustice, is the notorious indeterminacy of human rights in view of their present and future application. This is especially due to their abstract nature in at least three respects: with regard to their addressees (against *whom* are the individual human rights directed?), with regard to their subject matter (which individual rights does the universal and equal right to freedom imply?) and with regard to their barriers (what is

the relationship of the general and equal right to freedom to other human rights?).² Given the wide range of conflicts and problems that arise in modern complex societies with their multiple forms of life, with functionally different social systems and their division of labour, it cannot be expected that the moral evidence of past negative experiences is sufficient to derive from human rights concrete and clear answer to current cases of conflict. Human rights are not given once and for all; instead, they require constant interpretation, concretisation and development.

One reaches the same conclusion once one recognises the fact that human rights never occur in an ideal pure form, but rather always in a concrete, codified and positive shape. As such, they are the result of a formal procedure, which is usually terminated by a majority decision. They exist either in human rights codifications, such as the United Nations Declaration of Human Rights of 1948, the two UN Human Rights Covenants of 1966 and the European Human Rights Convention of 1950, or they occur within national constitutions in the form of fundamental rights. As a result of a particular historical decision-making process, human rights are always linked to a particular community, its spatial experience and its horizon of expectation.³ These acts of positivisation are always restricted by limited knowledge and the scarcity of time. Even with the greatest effort, a legislator will never succeed in acquiring all the information necessary for a decision, or in appropriately taking into account all the available information in order to eliminate all uncertainty. Moreover, the knowledge horizon for foreseeing the future is always limited. So, every decision is taken under the condition of uncertainty. A legislator cannot wait to decide forever; positive law is necessary in order to respond to current conflicts - a postponement of the decision until the nonetheless unreachable point at which all the necessary knowledge is available would be a betrayal of justice in the same way that a swift decision would involve the risk of uncertainty.

However, this restriction is not only caused by the finitude and fallibility of our entire theoretical and practical knowledge. We need to be aware that we can

² Robert Alexy, "Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat", in: Stefan Gosepath & Georg Lohmann (eds), *Menschenrechte und Demokratie*, (Frankfurt aM: Suhrkamp 1998), pp. 244-64, at 253-54.

³ Albrecht Wellmer, "Menschenrechte und Demokratie", in: Stefan Gosepath & Georg Lohmann (eds), *Philosophie der Menschenrechte*, (Frankfurt aM: Suhrkamp 1998), pp. 265-291 = "Democracy, Human Rights, and the Problem of a Worldwide Civil Society", reprinted in Vol. II of this collection.

frequently fail - and learn from these failures. In contrast to the world of physical laws and objective regularities, our practical-social world is characterised by the fact that we can fundamentally change this world ourselves. This can be seen when people use a prediction about their future actions for a change in their current action plans - and thus are able to falsify the prediction of their actions themselves.⁴ While the physical knowledge meets a given objective world, it is the people themselves who produce the cases for applying moral and practical knowledge. To put it into a grossly oversimplified example: the social conflicts and co-ordination problems of an agrarian society are of a different nature than that of a capitalist industrial society, while the laws of gravitation continue unchanged.⁵ The moral-practical world is genuinely historically-constituted, and the future *for humans is principally open*, in as far as they have to shape and change their future themselves. If people were able to predict their own future in the same way as natural laws determine natural events, then they could refrain from regulating their conduct through social norms and limit themselves to natural law-like reciprocal actions, instead. This is one of the reasons why people are *free* concerning their future actions, albeit within the frame of the laws of nature. Under the same circumstances, they could act differently to the way in which they have actually acted, if only they had decided otherwise in the first place. It is primarily this circumstance that explains why even the best attempts to justify human rights discursively and under almost ideal conditions can only lead to decisions of a provisional character.⁶ Thus, justified moral-practical norms depend upon such an applicative discourse, while such a double-layer does not exist for natural laws.⁷

At the same time, the validity claim of human rights transcends not only any particular historical community, but also its particular self-image, which emerges out of its actual situation and its own view of its past and its future. As the historical

⁴ This peculiar human ability falsifies any philosophy of history, as Popper has shown. See Karl R. Popper, *Das Elend des Historizismus* (Tübingen: MohrSiebeck 1974)/*The poverty of historicism*, (London: Routledge & Kegan, 1961).

⁵ We can, of course, be mistaken in our theoretical understanding of nature and therefore fail; however, this failure is of a different nature than the insight that a moral-practical norm is unjust.

⁶ Klaus Günther, "Ein normativer Begriff der Kohärenz für eine Theorie der juristischen Argumentation", in: (1989) 20 *Rechtstheorie*, pp. 163 *et seq.*, & 182; Jürgen Habermas, *Erläuterungen zur Diskursethik*, (Frankfurt aM: Suhrkamp 1991), pp. 138-140; "Richtigkeit versus Wahrheit", in: Jürgen Habermas, *Wahrheit und Rechtfertigung*, (Frankfurt aM: Suhrkamp, 1999), pp. 271 *et seq.*, & 281-82. #

⁷ See Klaus Günther, *Der Sinn für Angemessenheit*, (Frankfurt am Main, pub house, 1988). *The Sense of Appropriateness. Application Discourses in Morality and Law*, (Albany: Albany State University of NY Press, 1993).

trajectory of human rights up to the present shows that the scope of the rights-bearers has gradually been extended (a prominent example being the extension of rights initially conceptualised exclusively for men to women). To this extent, human rights act as a “door-opener” for those people who have been excluded and treated unfairly. Furthermore, the previous history of human rights indicates that they gradually include more and more cases of discrimination and demand justification for any existing practice of discrimination.

Thus, human rights are in need of concretisation also due to their abstract nature and indeterminacy. In a positivised form, they are always bound to a particular realm of experience and horizon of expectation within a historically localised community. At the same time, their validity claim transcends any inevitable temporal, factual and social provincialism, as can be seen from their inherent dynamic. If these observations are true, then the liberalist argument that human rights should restrict the sovereignty of the democratic legislator turns, at least in one aspect, out to be problematical. The question of which authority with what kind of reasons should be empowered to decide as to whether a legislator implements human rights *properly* and interprets them *appropriately* remains open.

This point can be answered from two different sides, from that of human rights and from that of democracy. As universal rights, human rights have a self-referential structure. If they apply to *all* people, *i.e.*, to all individuals, then not one *single* person who grants these rights to all others and decides upon their substance can exist. In contrast to other positive subjective rights that are granted and potentially revocable by an authority, human rights have a strictly horizontal origin. Human rights can only be mutually granted and acknowledged by *all* people.⁸ And only the people themselves can decide upon the substance and the scope of their human rights. The *self-empowerment* of the people to their own *self-determination* is in the very spirit of human rights, and, in particular, concerns the interpretation and the exploitation of the latter.⁹ Human rights are, however, limited by the aforementioned

⁸ Klaus Günther, “Vernunftrecht - Nach dem versäumten Augenblick seiner Verwirklichung”, in: (1992) 25 *Kritische Justiz*, pp. 178 *et seq.*, & p. 188.

⁹ Historically, it was less the substance of individual human rights, but rather the general empowerment of the people to make human rights that caused counter-reactions from conservatives and the Christian churches, as they feared the hubris of a god-like position and thus a repetition of the fall of mankind.

restraints and *caveats*, applicable to all moral-practical human knowledge. However, it would be possible - and, it was in this manner that Thomas Hobbes conceptualised the *Leviathan* - that the strict horizontality of human rights is limited to their beginning. People mutually acknowledge their human rights once, and leave their further concretisation and interpretation to a legislative or judicial authority. Accordingly, they then return to a vertical relationship with this body, which interprets, positivises and further develops the originally abstract human rights in the face of new cases of application. But then autonomy is also lost. The alternative is to include the strict horizontality in the further process of the concretisation of human rights itself. In the last instance, people then decide for themselves about the concretisation:

“The irreversible link between human rights and popular sovereignty is therefore that only the rights-bearer themselves can decide on the very substance of their rights.”¹⁰

The dependence of democracy on human rights is, in turn, less obvious. Both historically and even today, there have been forms of democracy that deny any relationship with human rights and thus either constrain democracy through human rights or *vice versa* sacrifice the human rights of minorities to a populist majority democracy. The first instance stems from a liberalist conception of democracy, according to which it is no more than an aggregation of individual preferences, which exposes human rights to changing majority decisions and hence requires that the human rights of the respective minority have to be protected against such majorities. In the second case, democracy represents no more than the homogeneous *ethos* of a particular community, which discriminates or excludes minorities by its majority decisions. However, both cases fall short of the *telos* of democracy. Democracy is neither a procedure for the mere summation of individual preferences, nor a body for the expression and enforcement of a collective *ethos*.

Here, it is only the discourse-theoretical version of democracy that allows deliberative democracy a productive linkage with human rights. Only the commitment

¹⁰ Ingeborg Maus, “Menschenrechte als Ermächtigungsnormen internationaler Politik, oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie”, in: Hauke Brunkhorst *et al.* (eds), *Recht auf Menschenrechte*, (Frankfurt aM: Suhrkamp, 1999), pp. 276-292, at 287 (our translation).

to human rights renders the legal institutionalisation of democracy possible in the first place, albeit in a manner that allows for both the openness and the inclusiveness of the democratic process. Only under the condition of human rights, does each person possess the same “weight”; each individual has the same right to give his or her opinion with a “yes” or a “no”. *Vice versa*, every individual has the same right to demand that any political decision be justified to him or to her.¹¹ Only human rights guarantee the voluntary nature of political participation and the inclusiveness of the process. Habermas expresses this in the principle “D”, according to which the only valid norms are those which all the people affected by them can agree to as participants in a rational discourse.¹² The discursive nature of deliberative democracy subordinates the individual preferences of individual citizens also to a process of mutual revision, as no individual interest can be binding on all others without being examined in the light of argument and counter-argument by all others. In contrast, the procedure of merely accumulating individual preferences suffers from the well-known problem of measuring intensity and subjective emphasis. Wellmer summarises the relationship between human rights and democracy in this way:

“While they *bind* the democratic discourse on the one hand, they must also first be repeatedly produced by it through means of re-interpretation and re-implementation; there can be no authority above or outside of this discourse, which could ultimately decide what the correct interpretation and concretisation of these fundamental rights is.”¹³

I.2 Deliberative Democracy: Procedure or Substance?

If the interpretation and concretisation of human rights is a matter of the democratic process, the legitimacy of the results depends upon the very nature of this process. Can deliberative-democratic procedures warrant sufficiently legitimate validity? Is there not enough historical experience for a substantial insight to oppose a result

¹¹ For the right to free statement, see Klaus Günther, “Die Freiheit der Stellungnahme als politisches Grundrecht – eine Skizze”, in P. Koller, C. Varga and O. Weinberger (eds), *Theoretische Grundlagen der Rechtspolitik*. (2002) 54 Beiheft zum Archiv für Rechts- und Sozialphilosophie, 58-72; on the right to justification see Rainer Forst, *Das Recht auf Rechtfertigung*, Frankfurt aM: Suhrkamp, 2007.

¹² Jürgen Habermas, *Faktizität und Geltung*, p. 138; *BFN*, p. 107.

¹³ Albrecht Wellmer, “Hannah Arendt über die Revolution”, in: Hauke Brunkhorst *et al.* (eds), *Recht auf Menschenrechte*, (Frankfurt aM: Suhrkamp, 1999), pp. 125-156, at 146 (our translation); *ibid.*, ‘Bedingungen einer demokratischen Kultur’, in: *ibid.*, *Endspiele: Die unversöhnliche Moderne*, (Frankfurt aM: Suhrkamp, 1993), pp. 54-80, at 60 *et seq.*

gained through procedure? Are there any truths beyond discourse that should not be revised, even if the discourse is as rational as possible?

Behind these questions loom at least two objections to the discourse theory of law:¹⁴ the tension between discursive *rationality* and *decision* (a), and the tension between rational *discourse* and rational *reason* (b).

(a) Procedures end with a more or less arbitrary decision. But should “rightness” depend on a decision? If so, there would be a gap between what has actually found agreement and what deserves agreement. What deserves consent would then be independent upon what has found consent at the end of a procedure. This objection, however, neglects the particular discursive qualities of the proceedings, as the decision about consent is preceded by public criticism with the mutual exchange of arguments. These discursive features justify the rational nature of the procedure. A decision that draws upon it is neither arbitrary nor accidental, but rationally motivated. Only then is the will to consent determined by rational insight, and not by arbitrariness or coincidence. The/This consent would also not be the result of a mere summation of individual preferences. Rather, the procedure allows the binding of the will by the insight into *better reasons* – we assume this ability for every promise made in everyday life. Therefore, the rationally motivated agreement is more than the articulation of arbitrariness, but the result of a mutual interpenetration of will and reason. Thus, this consent is no longer something that has to be differentiated from reason, but can itself be measured (and criticised) against the yardstick of reason, as it claims to be reasonable.

(b) the second objection is of greater significance. If the rationally motivated consent is, in contrast to an arbitrary one, characterised by the fact that it is based upon insight into *better reasons*, then it remains to be asked whether the quality of these reasons as better reasons stems from the procedure or from an authority outside of the procedure. In the latter case, we should just leave the procedure and discover a truth independent of procedure, which determines the quality of the *better* reason. Better reasons can,

¹⁴ Here, I refer to an oral discussion between Jürgen Habermas and Ronald Dworkin in 1994 at the Centre for Interdisciplinary Research in Bielefeld; excerpts are documented in: Ronald Dworkin, Jürgen Habermas & Klaus Günther, “Regiert das Recht die Politik?”, in: Ulrich Boehm (ed), *Philosophie heute*, (Frankfurt/New York: Campus, 1997), pp. 150-173. See, also, Habermas’ reply to the objections by Bernhard Peters, in: Habermas, *Die Einbeziehung des Anderen*, Frankfurt aM: Suhrkamp, 1996), pp. 342 *et seq.*

perhaps, be discovered faster within argumentative procedures, but this would only be an instrumental pre-requisite for the discovery of reasons, not for their quality or validity; whether something was a better reason would not be determined by the fact that it was the result of a procedure. On the other hand, better reasons would be simply be substitutable by procedure. It would suffice for something to be the result of a procedure for it to be assigned the quality of a better reason.

Procedures cannot replace reasons. Both, however, do not stand in a disjunctive relationship. In most practical conflicts of law and morality, there are hardly ever any “knock down arguments”, *i.e.*, absolute truths which are directly agreed upon by all; instead, there are, at best, decisive reasons. On the other hand, we have the demand for the normative rightness of a moral truth or justice. Our normative judgement expresses more than just a personal opinion or an attempt to manipulate others. This claim is built into our normative practice. Without this claim, we could not live; but, at the same time, we also know that we do not possess convincing reasons with which we could meet this standard in each individual case. In the face of this dilemma, how can, at least, good and/or better, if not *the best*, reasons be produced? The solution lies in a kind of temporalisation, dynamisation or proceduralisation of the relationship between reason and claim. The claim exerts a kind of pull on the permanent generation of better reasons. This pull can develop best in discourse. It urges the parties not to rely upon the assumption that they have found the whole truth in the reasons that they have already accepted. Instead, they must continue to be exposed to unlimited public criticism. Only then can bad reasons be corrected and turned into good or even better reasons through the process of continued revision. In this way, the demand for truth or justice is not satisfied, but we can presume that the reasons that provisionally stand the test of public criticism are more reliable and reasonable than those which fail. In this sense, discourse is a kind of “bridge” which mediates between the claim to truth, which always transcends our current practice, and our limited capabilities for justification and insight.

A democratic constitutional state with its deliberative procedures of public opinion and will-formation is now exactly the procedure that temporalises and dynamises the relationship between substance and procedure in the above-described

manner. It allows societal learning processes through the basic openness of the political discourse, *i.e.*, the constant review and revisability of political decisions.¹⁵

I.3 Communicative and negative freedom

Another problem, arising out of the alleged co-originality of human rights and popular sovereignty, is the risk that the negative liberty of the individual could be relativised in view of the people's right to political participation, which constitutes popular sovereignty. Negative freedom is usually defined as the freedom of action of the individual. Above all, this includes the freedom to act as the individual sees fit - in a very basic sense, this encompasses the absence of external obstacles that oppose the realisation of the respective will.¹⁶ "Will" refers to what Kant defined as "arbitrariness", *i.e.*, the capability to form intentions at all, regardless of the motives from which they emerge. In a positive sense, negative freedom defines the ability to form one's own interests and to pursue it by the means which seem appropriate according to one's own judgment. In a broader sense, negative freedom includes the freedom to decide for oneself about one's own life, about important values and how to reach them – as John Stuart Mill stated:

"The only freedom which deserves the name is that of pursuing our own good in our own way".¹⁷

In contrast, positive freedom refers to will-formation itself, in other words, to the way in which the respective will constitutes itself.¹⁸ Thus, according to Rousseau, only that will is free the only will that is free is the one that matches the general will (*volonté générale*).

As a *right* of every individual, as a *subjective* right, negative freedom exists only under one condition: an individual has only a right to negative freedom as long as he or she does not violate the *equal* right of all others to their negative freedom. In this form, the right to negative freedom or freedom of arbitrariness is, at least since the time of the Enlightenment, one of the most prominent human rights: it is represented in the American Declaration of Independence of 1776 as the inalienable

¹⁵ Rainer Forst, *Kontexte der Gerechtigkeit*, Frankfurt aM: Suhrkamp, 1996, p. 195.

¹⁶ Thomas Hobbes, *Leviathan*, (Cambridge-New York: Cambridge UP 1974), Chap. 14. David Hume, *A Treatise of Human Nature*, (Oxford: Clarendon Üpress 2007), Part I, Sec. 8.

¹⁷ John Stuart Mill, *On Liberty* (New Haven-London: Yale UP 2003).

¹⁸ See Isaiah Berlin, *For Essay on Liberty* (London: Oxford UP 1969).#

right of every individual to seek his or her fortune (“the pursuit of happiness”), in the French Declaration of Human Rights of 1789, it is included as the right to do everything that does not harm others (*Déclaration sect. IV: “La liberté pouvoir consiste à faire tout ce qui ne nuit pas à autrui.”*). Historically, this primarily meant the right to choose and practice one’s own religious beliefs, to form one’s own opinions and to express them publicly, as well as the right to economic freedom. The latter aspect has primarily rendered the right to negative freedom an integral part of modern society. It refers to the ability of the individual to act according to his or her own interests, to the right to education and to pursue subjective preferences regardless of their objective value and regardless of the preferences of others. It becomes the right of every individual to act in a manner best suited to his or her individual needs under the given circumstances. In terms of economic goods, this means that everyone can maximise his or her benefits under the prevailing conditions of a given income and market prices. This model of the *homo oeconomicus* is a central element in modern market economies and is guaranteed by the right to negative freedom – especially in the form of the freedoms of contract and property.¹⁹

Is this right under threat of being relativised and reduced if the political autonomy of the citizen determines what the scope of this freedom is? In fact, the discourse theory of law claims that both human rights – and thus the right to negative freedom – and popular sovereignty are co-original, and that the right to negative freedom becomes a constitutive element of democracy by its legal form. Thus, the circular logical process, which generates the system of rights, starts with the right of every individual to the largest degree of the same freedoms to individual action.²⁰ But is this right, at least with regard to the democratic right of participation and especially the related obligation to communicate, not relativised again? In the following, I develop a response to this scepticism in three steps:

- (a) The condition that negative freedom is always only possible as the *equal* right of *every individual* has already been mentioned above. The right to negative freedom is neither conceivable as the singular right of a single individual, nor as an

¹⁹ Here, I refer to the summary in Horst Eidenmüller, *Effizienz als Rechtsprinzip - Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts*, 2. Aufl. (Tübingen: Mohr/Siebeck, 1998), as well as to the critical reconstruction by Jens Beckert, *Beyond the Market: The Social Foundations of Economic Efficiency*, (Princeton: Princeton UPUniversity Press, 2002).

²⁰ *Faktizität und Geltung*, p.155/BFN, p. 121.

unlimited right of everyone. If one merely had, compared to all others, the right to do what he or she wants to do, then all the others would only have the duty not to obstruct that person; the right to freedom would then be synonymous with the right of an individual to enslave all others. If, however, everyone possessed a mutually unlimited right to freedom, it would destroy itself, as Thomas Hobbes demonstrated in his thought experiment of the natural state. As a right, it can always only be *the equal right* of all, under the two conditions of commonality and reciprocity. A person can always claim just so much negative freedom for himself or herself, as he or she is at the same time ready to grant to all others. What kind of negative rights is distributed, and to what degree, cannot be decided paternalistically for all others by a rights-bearer. In establishing a right, as well as in its application and enforcement, each right-bearer is always judge of his or her own case, *i.e.*, he or she cannot avoid unfair distribution or reaping the benefits from this decision. Individual rights can only exist as a “general law”, as Kant, in general, defined the principle of law.

If the right to negative freedom depends upon a general law, then the additional question arises of how this law is to be constituted and how it is to be concretised in relation to individual freedoms. A discourse-theoretical interpretation of the law generally allows two things. First, it expresses the egalitarian-distributive nature of rights: “only with the help of the discourse principle, does it become obvious that *everyone* is entitled “*to the greatest possible measure of equal individual liberties.*”²¹ On the other hand, it makes it obvious that the general law, which enables private autonomy in the first place, has to stem from the political autonomy of those concerned themselves. Only the deliberative democratic process has the advantage that each individual, affected by a distribution of rights, should have the right to participate in the establishing of the distributive rule. Hence, it is not only but *also* in the best self-interest of every individual to participate, at least once, in a discourse about the distribution of subjective freedoms, and thereby become involved in the conditions of inter-subjective communication. Thus, deliberative democracy is itself an enabling condition for the right to negative freedom.

(b) The second dependence concerns the fact that subjective freedoms are a necessary condition for democracy to operate deliberatively, and thus fulfils the requirement of

²¹ Jürgen Habermas, *Faktizität und Geltung*, p. 157/*BFN*, p.122 (italics in original).

rational discourse. This includes the willingness to provide reasons and the ability to demand reasons, but, above all, also the willingness and ability to acknowledge arguments and to base one's own consent with a standard upon this very insight.²² Therein lies the freedom, which is the general pre-requisite for rationality, *i.e.*, for the intellectual process of voting rational decisions from their alternatives as well as the weighing up of reasons. Furthermore, an agreement that is based upon reasons is itself bound to freedom, without which the "unforced force of the better argument" cannot be conceived of at all. The rationale force of the better argument is of a different type than the necessary force of a threat of violence. While the latter *bends* my will, the former encourages my will to determine itself by reasons and thus enables it to be free.

(c) However because of this dependence of the discourse of negative freedom, Wellmer insists on a continuing *tension* that *cannot be remedied*. Negative freedoms are in his view in a certain sense even rights *against* the claims of a communal rationality.. It also indicates the conditions under which the individuals have a right, in the sense of a communal notion of rationality, not to be fully rational, and even to act selfish, crazy, eccentric, irresponsible, provocative, obsessive, self-destructive, monomaniacally, *etc.* Only under this condition can "their communal rationality become their own achievement, their own work and their communal freedom can be a manifestation of their individual freedom".²³ This tension can be sharpened to the point that the right to negative freedom also means evading/that we evade/the evasion of those commitments involved in the participation in a discourse, exiting a discourse or not even entering one: "private autonomy stretches to the point, where a legal subject does *not* have to give a full explanation or does not have to provide publicly acceptable reasons for its planned actions. Subjective freedoms entitle to exit from communicative action and to refuse illocutionary obligations; they constitute a privacy that liberates from the burden of mutually granted and expected freedom."²⁴ From this tension, Wellmer draws the conclusion that the right to negative freedom

²² For this internal relationship between rationality and freedom, see Albrecht Wellmer, Albrecht Wellmer, "Freiheitsmodelle in der modernen Welt", in: *id.*, *Endspiele: Die unversöhnliche Moderne*, (Frankfurt aM: Suhrkamp, 1993), pp. 15-53 "Models of Freedom in the Modern World", (1989/90) *Philosophical Forum*, 272-252.

²³ Albrecht Wellmer, *ibid.*

²⁴ Klaus Günther, Die Freiheit der Stellungnahme als politisches Grundrecht (note 11 above); Jürgen Habermas, *Faktizität und Geltung*, p. 153/BFN, p. 120.

cannot be justified discourse-theoretically, and hence that freedom and reason do not coincide in modernity.²⁵

This could, however, have problematic consequences for the thesis of co-originality. On the one hand, the right to negative freedom would only be of instrumental or functional value for the political autonomy of the citizen as far as he or she belongs to the legal constitutive conditions of a deliberative democracy. This questions Habermas' assertion that negative rights do not become absorbed into the instrumental function which they can have for the exercise of political rights.²⁶ Secondly, the right to negative freedom would be relative with regard to political participatory rights; at least, it ought only be approved to the extent with which it does not disturb the functioning of the democratic process; thus, they ought to be limited and kept to a minimum.²⁷ This, however, questions the "intrinsic value" of these rights claimed by Habermas.²⁸ At least, At the very least, it can be doubted as to whether negative freedoms can be justified discourse-theoretically when it comes to their implications turning against discourse.²⁹

On the other hand, however, it can be argued that the right to exit from the obligations of communicative rationality is, at the same time, one of its constitutive conditions. Only those who can principally/in principle? refuse reasons can also adopt them. In order to be effective at all, reasons are dependent/depend upon this process of adopting, which encompasses a moment of irrefutable individual freedom. While reasons may cause actions, they are not the same as natural causes, because their causal effect has to be mediated by this process of individual appropriation. The phenomenon of individual ascription, stressed by Wellmer, also takes up this point. In as far as people inhabit the realm of reasons at all, this quality of people is part of it. In this respect, the relationship between discursive rationality and negative freedom is closer than the above-mentioned doubts suggest.

²⁵ Albrecht Wellmer, "Freiheitsmodelle" (note 22).

²⁶ Habermas, "Der demokratische Rechtsstaat", 139; *id.*, "Über den inneren Zusammenhang von Rechtsstaat und Demokratie, in *id.*, *Die Einbeziehung des Anderen*, Frankfurt aM: Suhrkamp, 1996, 293-308, at p. 300. ["On the Internal Relation between the Rule of Law and Democracy," *Inclusion of the Other*, ed. by C. Cronin and P. DeGreiff (Cambridge, MA: MIT Press, 1998, chap. 10)].

²⁷ Armin Engländer, *Diskurs als Rechtsquelle?*, (Tübingen: Mohr Siebeck, 2002), p. 103 & 107.

²⁸ Jürgen Habermas, "Der demokratische Rechtsstaat - Eine paradoxe Verbindung widersprüchlicher Prinzipien?", in: *idem.*, *Zeit der Übergänge*, (Frankfurt aM: Suhrkamp, 2001), p. 133-151.

²⁹ Before the backdrop of a theory of a rational self-interest, this opposition is forcefully stressed by Armin Engländer, (note 27).

The second objection which can be raised against those doubts is based upon the different contexts in which the right to negative freedom possesses its intrinsic value. Habermas himself has introduced the subjective right to negative freedom as a necessary element of the legal form, and claims that “the legal form is in no way a principle one could ‘justify’, either epistemically or normatively”.³⁰

Instead, it is only *functionally explained* by its complementary relationship with the rational morality of the modern world.³¹ The abstract rational morality, as exemplified by Kant’s categorical imperative, pays a price for the universal application of a formal moral principle. This price consists of the fact that morality remains cognitively indeterminate, *i.e.*, it no longer provides single concrete norms for action. Furthermore, it ignores the motivational conditions for its compliance, *i.e.*, it does not provide a bridge between moral reason and its realisation in individual action. Finally, rational morality cannot fulfil the organisational task of ensuring that moral requirements are enforced both generally and uniformly. Modern law can compensate for these deficiencies, but only at a complementary price: it does without moral insights as a pre-requisite for the compliance with norms – law is satisfied with the heteronomous motives for compliance. It restricts itself, accordingly, to ensuring the external compliance with norms by means of coercion. This, at the same time, opens a sphere of freedom for private-autonomous living arrangements. With the aspect of coercion, law stabilises expectations; thereby “the actor’s self-interested choice is released from the obligatory contexts of a shared background”.³² What is legally not prohibited is not allowed to be hindered by coercive law, even though it may be morally prohibited.

The right to negative freedom is the result of a lengthy and contentious historical process, in which the Christian religion gradually lost its significance as the integrating moment of morality, ethics and law. The medieval cosmos of the Christian occident encompasses law and the state, as well as individual living arrangements and the relationships among people. To the extent that this universe collapses and becomes secularised, morality falls back on those formal and procedural rules of abstract rational morality. Neither law nor morality provides orientation for the

³⁰ Jürgen Habermas, *Faktizität und Geltung*, p. 143/BFN, p. 112.

³¹ *Ibid.*

³² Jürgen Habermas, *Faktizität und Geltung*, p. 151/BFN, p. 119.

choices of both aims in life and ways of life. This task is devolved to the individual itself; he or she alone is responsible for his or her life and happiness. This change can be paradigmatically followed when inquiring into the semantic transformation of those forms of behaviour of self-interested rational calculation that are often branded as “greed”.³³

In consequence, all this leads to a de-moralisation of one’s own affairs/private sphere. What the good life is is no longer objectifiable – everyone chooses his or her own idea of the good life. This implies the pursuit of one’s own goals, of self-interests and of individual happiness, which results in an important aspect of negative freedom: the defence against paternalism by others, especially by the state or a particular political community. This point has its roots, on the one hand, in a cognitive component of the good life: the individual himself or herself knows best what is good for him or her, *i.e.*, for a successful, non-failing, life. On the other hand, there is also a moral reason for the de-moralisation of ethics. Questions about the individual choice of aims and ways of life do not touch the context of moral claims, as long as they do not overlap with the ethical identity of other persons and patronise them. Morality only comes into play once the equal rights of all others are affected. The area, in which I create my own life, without infringing the right of all others to create their lives in private autonomy, is not even impacted upon by a rational morality, which has become abstract. As Rainer Forst has shown, this means, *vice versa*, that morality is not allowed to intervene in this area, that the protection of the individual realm of private-autonomous living arrangements is morally demanded. Negative rights are, therefore, also rights to freedom, which cannot be restricted by reciprocal and generally justifiable norms - and that means that they are protected by them.³⁴ Thus, negative rights guarantee protection against a false moralisation of ethical identities. Subjective rights act as a *protective cover* for ethical conceptions of the good. Subjective rights provide the communally constituted, ethical self with a free realm for development and also the formal opportunity to review this identity.³⁵

³³ Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before its Triumph*, (Princeton, N.J : Princeton University Press, 1977).

³⁴ Rainer Forst, *Kontexte der Gerechtigkeit* (note 15), p. 133.

³⁵ Rainer Forst, *Kontexte der Gerechtigkeit*, p. 51.

The right to exit from communicative obligations makes sense especially in the context in which the ethical identity of each individual is concerned. Only when my ethical claims come in conflict with those of other persons – if I break into their protective cover, in order to impose my beliefs of the good life on them – the obligations begin for a moral discourse or deliberative-democratic legislation. However, due to the above-discussed reasons, I still have the subjective right to refuse these obligations. But I have to pay a price: as far as I want to withdraw from the obligations of discursive rationality and moral discourses permanently, I need to pay by a general social withdrawal; all that remains is the possibility of an exclusively instrumental and strategic interaction with others. In as far as I refuse to participate in democratic procedures, I can legally be forced to refrain from violating the equal rights of all others. The law then is perceived by myself alone as a coercive order, whose justification remains alien to me.

II. SELECTED TEXTS

The present volume is comprised of mostly recent contributions on various aspects of Habermas' theory of law and democracy.³⁶ Part I ("Foundations") starts with the contributions of Thomas McCarthy and Richard Rorty, two of Habermas' long-term partners of dialogue. In his "Enlightenment and the Idea of Public Reason", McCarthy brilliantly reconstructs the main lines of Habermas' philosophical project. McCarthy traces Habermas' conception back to Kant's transcendental philosophy. As he underlines, Habermas continues the Kantian project with combined philosophical and socio-theoretical means. In contrast to Kant's transcendentalism, Habermas aims at a reconstructive approach to democracy and

³⁶ For other collections on Habermas, see Hauke Brunkhorst, Regina Kreide and Cristina Lafont (eds), *Habermas-Handbuch*, (Metzler Verlag, 2009); Mathieu Deflem, (ed), *Habermas, Modernity and Law*, (London: Sage, 1996), and Andrew Arato & Michel Rosenfeld, *Habermas on Law and Democracy: Critical Exchanges*, (Berkeley CA: University of California Press, 1998); Lewis Hahn (ed), *Perspectives on Habermas*, Chicago: ILL: Open Court, 2000); John B. Thompson & David Held, *Habermas. Critical Debates*, (London: Macmillan, 1982). From amongst the many recent introductions in Habermas' thought, see Gordon Finlayson, *Habermas. An Introduction*, (Oxford: Oxford University Press, 2007), and Andrew Edgar, *The Philosophy of Habermas*, (London: Acumen, 2005); Lasse Thomassen, *Habermas: A Guide for the Perplexed*, (Continuum Books, 2010). An excellent online research tool for all aspects of Habermas' work, see "Habermas Forum", at <http://www.habermasforum.dk/>, (editors Kristian Hansen and Thomas Gregersen).

law based upon two pillars, *i.e.* a universal pragmatics and a social theory of modernity.³⁷ Thereby, Habermas relocates Kant's ideas from the individual mind into the presuppositions of communicative exchanges which are to be analysed with the means of the theory of communicative action.³⁸ As McCarthy points out, deliberation – the core of public reason and democratic legitimacy - refers to a type of communication whereby the validity claims are thematised. McCarthy does not limit himself to presenting the foundations of Habermas' project; he also argues that the notions of deliberation and public reason remain problematic, given Habermas' difficulty to distinguish moral questions from ethical ones, the right from the good.

Whereas McCarthy is one of the best exegetes of Habermas, Rorty advances a fully-fledged alternative philosophical programme. In his texts "Universality and Truth" and "Response to Habermas", Rorty, too, acknowledges the Kantian inheritance of Habermas' project; however, in contrast to McCarthy, he does not aim to rework it, but to criticize it as pertaining to a *passé* metaphysics centred on "universality", "truth", and "idealizations." For Rorty, one should abandon the Western metaphysical tradition that goes from Plato to Kant and Habermas, and instead focus on "solidarity", "irony" and "hope". Rorty's argument, however, attempts to do away with a fundamental part of the common practices. It is difficult to imagine, how the political and legal practice would work without some notion of "truth", just as it is difficult to see why invoking "truth" would plunge one almost automatically in a "Platonic" or "Kantian" metaphysics. One may defend Habermas' intention while questioning the details of his theory: after all, what he aims at with the concept of idealizations is to re-construct common sense practices for which the claim to truth or rightness is fundamental.³⁹

³⁷ For Habermas' terminology, see Andrew Edgar, *Habermas. The Key Concepts*, (London: Routledge, 2006).

³⁸ For the relationship between Kant and Habermas see also, Kenneth Baynes' excellent work *The Normative Ground of Social Criticism: Kant, Rawls and Habermas*, (Albany: State University of New York Press, 1992). On Habermas' communicative action, see the brilliant study of Joseph Heath, *Communicative Action and Rational Choice*, (Cambridge MA/London: MIT Press, 2001). For a later collection, see Axel Honneth & Hans Joas (eds), *Communicative Action: Essays on Jürgen Habermas The Theory of Communicative Action*, (Cambridge MA: MIT Press, 1991). On the relation between Habermas and pragmatics, see Mitchell Aboulafia, *et al.*, (eds) *Habermas and Pragmatism*, (London: Routledge, 2001), and Maeve Cooke, *Language and Reason: A Study of Habermas' Pragmatics*, (Cambridge MA/London: MIT Press).

³⁹ This is not to dismiss the value of Rorty's challenge: whether Habermas' post-metaphysical claims

Finally, this part includes the contribution of one of the most outstanding American philosophers, namely, Robert Brandom's answer to Habermas' criticism of his theory of communicative practice.⁴⁰ Habermas expresses his admiration for Brandom's work *Making it explicit*,⁴¹ considering it the equivalent of John Rawls' *A Theory of Justice* in the philosophy of language, yet he criticises it for not taking the pragmatic dimension of speech acts sufficiently into account. From Habermas' perspective, Brandom's deontic scorekeeping approach to linguistic interaction tends to overlook the second person's point of view. In his reply, Brandom points out that his theory, which draws on Hegel, is not exclusively semantic, but incorporates what Habermas' theory of communicative action overlooks: a strong emphasis on practical knowledge which tends to be neglected by Habermas' rationalism of Kantian extraction.⁴²

Part II documents in more detail the various facets of Habermas' discourse theory as a central pillar of his view of democracy and law. Chapter 1 includes William Rehg's contribution ("Grasping the Force of the Better Argument: McMahon versus Discourse Ethics"), in which the author pursues the critical development of a Habermasian approach to the theory of argumentation.⁴³ In turn, Chapter 2 focuses on Habermas' discursive theory of argumentation in relation to morality and law. Habermas sees a tendency in modern natural-law theory to understand basic liberties in overly moral terms, merely as the legal expression of

are still dependent on a specifically Western metaphysical, which underplays historicity and contingency, remains an open question.

⁴⁰ For Habermas' criticism, see Jürgen Habermas, "From Kant to Hegel: On Robert Brandom's Pragmatic Philosophy of Language", in *European Journal of Philosophy*, 8, 3, (2000), pp. 322-355.

⁴¹ Robert B. Brandom, *Making it explicit. Reasoning, Representing and Discursive Commitment*, (Harvard University Press, 1998); On the debate between Habermas and Brandom, see Steven Henley, "From the Second to the Third Person and Back Again : Habermas and Brandom on Discursive Practice", *Journal of Philosophical Research*, 30 (2005), pp. 169-188; Kevin Scharpf, "Communication and Content: Circumstances and Consequences of the Habermas-Brandom Debate", *International Journal of Philosophical Studies*, 11, 1 (2003), pp. 43-61; James Swindal, "Can a Discursive Pragmatism Guarantee Objectivity?: Habermas and Brandom on the Correctness of Norms", *Philosophy & Social Criticism*, 33, (2007), pp. 113-126.

⁴² On Brandom's importance to practical knowledge, see Ronald Loeffler, "Normative Phenomenalism: On Robert Brandom's Practice-Based Explanation of Meaning", *European Journal of Philosophy*, 13, 1, (2005), pp. 32-69; On Brandom's appropriation of Hegel, see Robert Pippin, "Brandom's Hegel", *European Journal of Philosophy*, 13, 3, (2005), pp. 381-408.

⁴³ Amongst William Rehg's many contributions on Habermas's work, see most recently, *Cogent Science in Context: The Science Wars, Argumentation Theory, and Habermas*, MIT Press, 2009; On the question of discourse, see also Maeve Cooke, "The Point of Discourse", *Social & Legal Studies*, (2008), 17, pp. 97-103.

the mutual respect that persons ought to show one another as morally autonomous agents. In opposition, republican theory, by emphasising the importance of shared traditions, civic virtue, and agreement on the common good, is based on an appeal to substantive values and traditions in order to determine which course of action is good for it in a given social situation. However, as Peter Niesen and Alessandro Ferrara point out in their contributions, for Habermas, neither universal moral respect nor particular ethical identity can unilaterally account for the legitimacy of law in a given social situation, or account for the legitimacy of law in complex pluralistic societies.⁴⁴ In turn, Habermas advances, under the influence of Apel's pragmatic approach, a discourse theory of law and democracy, which is centred on the "discourse principle". According to the discourse principle, "[o]nly those norms are valid to which all affected persons agree as participants in rational discourses".⁴⁵ Starting, most systematically, with *Between Facts and Norms*, the discourse principle is no longer a moral principle, but pertains to the general logic of argumentation, which underlies Habermas' conception of morality and law. Ferrara and Niesen underline that, by anchoring the legitimacy of law in the discourse principle that is conceptually prior to the distinction between law and morality, Habermas hopes to avoid a moralistic interpretation of law and the consequent preference given to private autonomy in the form of human rights. However, it remains an open question whether the discourse principle, with its "clauses" of equality and inclusiveness is neutral or is based on hidden moral presuppositions.⁴⁶

Chapter 3 introduces the thorny question of the relationship between discourse theory and values. The chapter includes some of the most important contemporary philosophers, *i.e.*, Hilary Putnam, Charles Taylor and Karl-Otto Apel, all of whom have engaged in a long-term dialogue with Habermas. Although there are areas of disagreement between Apel and Habermas, for both there is a

⁴⁴ See also Eva Erman, "Conflict and Universal Moral Theory: From Reasonableness to Reason-Giving", *Political Theory* (2007), 35, (5), pp. 598-623; see also Peter Niesen and Benjamin Herborth (eds.) *Anarchie der kommunikativen Freiheit*, (Suhrkamp Verlag, 2007).

⁴⁵ Habermas, BFN, (supra, note 1), p. 121.

⁴⁶ See also Peter Niesen, "Legitimacy without Morality. Habermas on the Relationship between Morality and Law", in: René von Schomberg & Peter Niesen (eds), *Zwischen Recht und Moral. Neuere Ansätze der Rechts- und Demokratietheorie*, (Hamburg/Münster: LIT Verlag, 2002), pp. 16-60; James Gordon Finlayson, "What are 'Universalizable Interests'?", *Journal of Political Philosophy*, 8, (2008), pp. 456-469;

clear-cut categorical distinction between right and good. If this distinction fails, as their argument goes, our pluralistic societies risk to collapse into a “battle of gods and demons”. In turn, Taylor and Putnam consider the question of values in a more radical way. On the one hand, Taylor’s point of departure is a focus on “identities” and their “constitutive values.”⁴⁷ For Taylor, in order to build a good society, a “politics of recognition” which acknowledges the salience of specific values and public goods in the political life is necessary. On the other hand, Putnam resorts to Wittgenstein’s emphasis on practical knowledge so as to criticise Habermas’ categorical distinction between norms and values. For Putnam, Habermas depicts a misleading image of our moral practice: this practice is not guided by neutral norms which form a body of codified knowledge universally acceptable. Codified knowledge is important, but it cannot replace moral insight and practical knowledge. This knowledge is activated in particular contexts, and involves intuition, feelings, empathy, imagination, *etc.* In Habermas’ defence, one may point out that, especially in his recent writings, he does not have a transparent and explicit moral code in mind: reason is always embodied in specific contexts of practice.

Part III deals with various aspects of Habermas’ theory of democracy. The section starts with an issue that has been neglected until recently, namely, the historical contextualisation of Habermas’ view. In Chapter 1, Jan-Werner Müller and John McCormick fill part of this gap.⁴⁸ Müller centres his attention on the origins of “constitutional patriotism” – a phrase borrowed by Habermas from Dolf Sternberger. In turn, McCormick focuses on the context of Habermas’ reconstruction of West German post-war law and the *Sozialstaat* controversy. Despite its claim to universalism, Habermas’ constitutional patriotism is interpreted, by many, as a “negative nationalism” reactive to “local” German fears.

⁴⁷ For Taylor’ intervention with the occasion of Habermas 80th birthday, see Taylor, “Das Leuchetende Beispiel,” *Süddeutsche Zeitung*, 18/06/2009 at <http://www.sueddeutsche.de/kultur/928/472453/text/>

⁴⁸ For the history of Critical Theory and the beginnings of Habermas’ activity and, see Rolf Wieggerhaus’ unsurpassed work *The Frankfurt School: Its History, Theories, and Political Significance*, (Cambridge MA: Polity, 1994). For an exemplary contextualization of Habermas’ view, see Matthew Specter, “Habermas’s Political Thought 1984-1996: A Historical Interpretation,” *Modern Intellectual History*, (2009), 6 (1), pp. 91-119; Rolf Wieggerhaus, *Jürgen Habermas*, (Rowohlt, 2004); Charles Turner, “Jürgen Habermas: European or German?,” *European Journal of Political Theory*, (2004), 3, pp. 293-314.

Likewise, Habermas advances a model which problematises liberal individualism and welfare-state paternalism, and is rooted in debates that go back, as McCormick notes, to specific debates during the Weimar Republic. However, neither Müller nor McCormick espouses a radical historicist perspective: Habermas' constitutional patriotism and social model are not to be relegated to an antiquated historical context. The historical investigation is instructive as illuminates, supplements and points to the limits *and* the potential of Habermas' position in a new historical situation.

Chapters 2 and 3 further document two key elements of Habermas' view of democracy, *i.e.*, public sphere and civil society. Benhabib, one of the finest exegetes of Habermas' work, traces back Habermas' conception of the public sphere to his book *The Structural Transformation of the Public Sphere*.⁴⁹ The public sphere is seen as an intermediary between the public realm of the state and the private interests of individual members of the bourgeoisie, a conception that Habermas has preserved, by and large, to this day.⁵⁰ This conception is compared by Sheyla Benhabib⁵¹ with the liberal and the Arendtian models. Benhabib points out the advantages of Habermas' conception, as synthesizing the virtues of liberalism and republicanism, while avoiding their problems. One question, however, is whether Habermas does not conceive of the public sphere in a too rationalistic way. This is also part of Iris Marion Young's claim in her "Activist Challenges to Deliberative Democracy" (Chapter 3), which is dedicated to the issue of civil society. Young points out that acts of dissent and civil disobedience play a small, if not minimal, role in Habermas' political conception. Yet action can legitimately prevail over reason-exchanges in situations of dire injustice and asymmetric power relations.⁵²

⁴⁹ Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into A Category Of Bourgeois Society*. (Cambridge MA: Polity Press, [1962] 1989).

⁵⁰ See also Craig Calhoun (ed), *Habermas and the Public Sphere*, (Cambridge MA: MIT Press, 1991); Nancy Fraser "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in: Craig Calhoun (ed) *Habermas and the Public Sphere*, pp. 109-142 (note 22, supra); Pauline Johnson, *Jürgen Habermas: Rescuing the Public Sphere*, (Routledge, 2006); Luke Goode, *Jürgen Habermas: Democracy and the Public Sphere*, (Pluto Press, 2005); Nick Crossley and John Michael Roberts (eds), *New Perspectives on the Public Sphere*, (Blackwell, 2004).

⁵¹ See her landmark study *Critique, Norm and Utopia. A Study of the Foundations of Critical Theory*, New York, 1986 and, *inter alia*, "Liberal Dialogue versus Critical Theory of Discourse Legitimation", in: Nancy Rosenblum (ed), *Liberalism and the Moral Life*, (Cambridge MA: MIT Press, 1989), pp. 143-156.

⁵² On this theme, see also Lasse Thomassen, "Within the Limits of Deliberative Reason Alone: Habermas, Civil Disobedience and Constitutional Democracy", *European Journal of Political*

Chapter 5 focuses on Habermas' concept of deliberation.⁵³ Joshua Cohen, one of the most perceptive critics of Habermas' work,⁵⁴ analyses critically the specificities of his conception in relationship to the liberal tradition. Throughout his career, Habermas has been concerned with the workings of democratic government and the accountability and response of the government to its people. This interest is present in his earliest work, such as the study of the political attitudes of students in West Germany in the late 1950s. In his more recent work, Habermas has explicitly returned to the problems of the democratic organisation of government in relation to the complexity and pluralism of late capitalist societies (for example, in *Between Facts and Norms*). Crucially, from a Habermasian perspective, law and policy-making should not be supported through the eliciting of a mere aggregate of subjective preferences (as a simple voting system allows). As Rainer Forst emphasizes in his contribution, the acceptance or rejection of a law goes beyond mere preference, and must appeal to a rational justification. It is precisely this appeal to the transformative capacity of public reason that forms the crux of the concept of deliberation in contrast to that of aggregation or negotiation. If so, Cohen is justified in pointing out the commonality between deliberative democracy and a school of liberalism which focuses on the possibility of transforming preferences through dialogue and public reason. To what extent this ideal has been proven in practice, is a matter of continuing debate. Lynn Sanders' "Against deliberation"⁵⁵ is an excellent example of a sceptical stance; however, it is noteworthy that political theorists such as and James Fishkin is one of the most outstanding authors who have been attempting to enhance the ideal of deliberative democracy through innovative micro-experiments.⁵⁶

Theory, (2007), 6, (2), pp. 200-218.

⁵³ The literature on deliberation is copious. See, for instance, Kevin Olson's recent contribution, *Reflexive Democracy*, (MIT Press, 2006).

⁵⁴ See also, Jean Cohen, "Deliberation and Democratic Legitimacy", in: Alan Hamlin & Philippe Pettit (eds), *The Good Polity: Normative Analysis of the State*, (Oxford: Oxford University Press, 1989), pp. 17-34.

⁵⁵ See Lynn Sanders, "Against Deliberation", (1997) 25 *Political Theory*, pp. 347-376.

⁵⁶ Amongst James Fishkin's impressive works, see *Democracy and Deliberation: New Directions for Democratic Reform*, (New Haven CT: Yale University Press, 1991); James Fishkin, "Deliberative Polling[®]: Toward a Better-Informed Democracy", at: <http://cdd.stanford.edu/polls/docs/summary/>. It is also very useful to consult the Fishkin Center for Deliberative Politics at the University of Stanford.

Part IV mainly deals with aspects of Habermas' understanding of the legal system. Habermas argues that the internal relation between private and public autonomy requires a set of abstract rights that citizens are able to recognise if they want to regulate their lives together by means of legitimate positive law. Rights fall into five broad categories. The first three are the basic negative liberties, membership rights, and due-process rights, which together guarantee individual freedom of choice, and thus private autonomy. The fourth, rights of political participation, guarantees public autonomy. Finally, the fifth category of social-welfare and cultural rights becomes necessary in so far as the effective exercise of civil and political rights depends upon certain social, cultural and material conditions, for example, that citizens can meet their basic material and symbolic needs. The social rights are the focus of David Ingram's contribution which focuses on the potential tensions between individual freedom and social equality.⁵⁷ In turn, Albert Wellmer's analysis of Habermas' understanding of human rights emerges from an alternative critical-theoretical programme. Wellmer's project draws on the earlier tradition of the Frankfurt School, most notably on Theodor Adorno and even on French resources (especially Derrida). Despite their differences, Adorno and Derrida indeed share a "taste" for the paradoxes as well an "immigrant" sensibility towards the question of the other. In this sense, for Wellmer, human rights are not given and transparent; decision, risk and practical dilemma should not be defined away by a discourse theory. Chapter 2 documents the procedural aspects of Habermas' paradigm. As highlighted by Robert Alexy in his contribution, democratic politics and law are based on procedural and not substantial justice, which would not be possible in complex, modern societies characterised by a plurality of value frameworks.⁵⁸ The question of the relation between substance and procedure remains, however, one of the most divisive issues in legal and political philosophy.⁵⁹ Be it as it may, Habermas' procedures should not be taken as a universalising "algorithm" that automatically provides a solution to conflicts. In comparing Habermas with John Rawls, one can argue that Lafont tends to reduce Habermas' procedures to a given, explicit body of rules.

⁵⁷ Amongst David Ingram's contributions, see his earlier but still valuable *Habermas and the Dialectic of Reason*, (New Haven CT/London: Yale University Press, 1986).

⁵⁸ See also, Bernhardt Peters, *Die Intergration moderner Gesellschaften*, (Suhrkamp, 1993),

⁵⁹ For a detailed discussion, Günther, *supra*.

But it may be that Lafont gives a simplified view of Habermas: the requirements of procedural reason (inclusiveness, equality, *etc*) are not pre-determined; they are to be permanently interpreted in a game taking place in the public sphere and in civil society, *i.e.*, formal politics and law, as well as informal, diffuse processes of exchanging reasons. Finally, in Chapter 4, Christopher Zurn reconstructs critically Habermas' standpoint on judicial adjudication, and expands on the deliberative approach in significant ways.⁶⁰ Habermas deals with this issue in most detail in *Between Facts and Norms*. As Zurn points out, Habermas is concerned with the jurisprudential tension between, on the one hand, the need for judicial decisions to conform to existing statutes and precedents, and, on the other, the demand that decisions be right in the light of moral standards, social welfare, and so forth. In outlining his own viewpoint, Habermas critically a variety of approaches, from legal realism, legal hermeneutics, Critical Legal Studies, positivism, *etc*. Thereby, Habermas advances his proceduralist-deliberative understanding which focuses upon the dialogical aspect of judicial legal argumentation and the non-paternalistic understanding of the role of the Supreme Court in safeguarding the discursive quality of legislative decision-making.

The first volume documents the discourse theory of law and democracy without posing the problem of the legal-political legitimacy of the international and supranational arrangements. This will be the task of the second volume, which includes two major parts, one of which deals with the main critiques of Habermas from the point of view of major alternative theoretical frameworks (systems theory, liberalism, republicanism, feminism, deconstruction, *etc.*). Volume II deals with the different aspects of Habermas' post-1989 engagement with issues beyond the nation-state borders, such as the constitutionalisation of the internationalisation of law, terrorism and the dilemmas posed by genetic engineering, terrorism, humanitarian intervention, or the re-emergence of religion in the public sphere.

⁶⁰ See Christopher F. Zurn's remarkable book on this issue, *Deliberative Democracy and the Institutions of Judicial Review*, (Cambridge University Press, 2007).