

# THE DISCOURSE CONCEPT OF THE RULE OF LAW AND DEMOCRACY

ROBERT SHELLY\*

According to discourse theory, the rule of law provides the infrastructure for a discursive democracy. Conceived broadly, it constitutes a set of normative principles that govern the institutionalization of the forms of communication and discourse that are necessary to sustain the type of democracy that is both normatively and functionally suited to contemporary post-traditional, complex societies. Governing these principles are the system of rights and the principles of the constitutional state. The system of rights specifies how the general conditions for the legitimacy of law – the assent of all citizens in a discursive lawmaking process – can be satisfied. And this is through rights that secure for each person an equal chance to participate in a process of lawmaking. The principles of the constitutional state then guarantee equal chances of participation by designating the institutional mechanisms and procedures that are necessary to implement and fill out the system of rights. These principles bolster the discursiveness of the lawmaking process by way of ensuring that the forms of communication and rules of argumentation that feed into the relevant rational discourses are themselves guaranteed.

## I INTRODUCTION

This paper provides a brief outline of a theory of the rule of law that is called the ‘discourse concept of the rule law’, with a view to explaining its connection to contemporary conceptions and institutions of democracy. The end result will be to delineate the key aspects and elements of what can be called ‘the discourse concept of the rule of law and democracy’.

For those acquainted with the work of the contemporary German philosopher, Jürgen Habermas, denotations like ‘discourse theory’ will signal the taking of a position with respect to his theory. This is precisely what this paper seeks to do. The epithet ‘discourse theory’ will also ring familiar to those currently working within the framework of Michel Foucault’s thinking, though I do not propose to even touch on this iteration of the discourse paradigm here. Regarding Habermas’s theory, the position I seek to take vis à vis his approach is both affirmative and constructive. It is *affirmative* because I will not be questioning the fundamental presuppositions of

the theory of communicative action, upon which Habermas's immense 'theory of everything' is predicated. This is not to say I agree with the fundamentals in toto, nor every step of the way they have been concretised as he moves from the micro to the macro domain; from the constitution of intersubjectivity and social coordination to the social institutions, including law, by means of which these are transferred into the furthest capillaries of self and society. Nobody, not even his most sympathetic commentators do this.<sup>1</sup> But I agree with a sufficient number of steps along the path – including the most important ones – to avoid letting the innumerable Habermas polemics get in the way of clearly bringing out one particular aspect, namely Habermas's specific and original theory of the rule of law. To do so, is the *constructive* aspect of this paper: constructive in that, despite the volumes that Habermas has written on law, and the forest of secondary literature it has generated, nowhere amongst all this is his theory of the rule of law clearly explicated. To explicate it, therefore, is largely to construct or, at least, reconstruct it.<sup>2</sup> Once done, I would hope that readers of Habermas would be able to see the wood for the trees, and be able to discern his specific theory of the rule of law from his miscellaneous comments on law, or even his theory of law in general if, indeed, he has one.<sup>3</sup>

---

\* Robert Shelly, Lecturer, Faculty of Law, University of New South Wales.

<sup>1</sup> Indeed, even Habermas's closest associates such as Thomas McCarthy and Andeas Wellmer call themselves 'sympathetic critics', an epithet taken on by many younger colleagues and students of Habermas, Wellmer and McCarthy who now hold senior academic posts in philosophy, social theory and law in Germany and the United States. This latter category includes thinkers of the first rank, such as Klaus Offe (social theory), Axel Honneth (philosophy) and Robert Alexy (law), and other well known philosophers social and legal theorists such as Kenneth Baynes, James Bohman, and Maeve Cooke (philosophy), and Klaus Gunther (law).

<sup>2</sup> I use the term reconstruction in the everyday sense, as opposed to the *sui generis* philosophical sense that Habermas spells out most clearly in his essay J Habermas, 'Reconstruction and Interpretation in the Social Sciences' in his book *Moral Consciousness and Communicative Action*, trans. C Lenhardt and S Weber (1990) 21-42 [trans of *Moralbewußtsein und kommunikatives Handeln*, first published 1982].

<sup>3</sup> To date, no literature has really explored whether there is a fully developed theory or philosophy of law to be found in, or developed out of, Habermas's vast oeuvre. By 'philosophy of law', I mean, something along the lines of that offered by the likes of Hans Kelsen, Gustav Radbruch, and Robert Alexy, or Roscoe Pound, H. L. A. Hart or Ronald Dworkin in the German and Anglo-American traditions respectively. Certainly,

## II A THREE STAGE RECONSTRUCTION OF THE DISCOURSE CONCEPT OF THE RULE OF LAW

I want to approach the task by asking ‘what is the question to which the discourse concept of the rule of law is the answer’? Put most directly, the question is whither democracy? Specifically, how might be it institutionalised in a manner such that it does not fall prey to the inherently anti-democratic forces of money and formally-organised power reigned against it? The question is, how can democracy, which is dependent upon widely dispersed, and multidimensional forms of practical reasoning, survive, in more than just name only, in a world that seems to leave decreasing space for these forms of rationality: a world that Max Weber called the ‘iron cage’,<sup>4</sup> Theodor Adorno and Max Horkheimer called ‘totally administered society’,<sup>5</sup> and Michel Foucault, perhaps most depressingly labelled the ‘carceral archipelago’.<sup>6</sup> In this paper, I don’t want to explore the social theory that underscores this diagnosis of the times, but rather reflect on one of the most systematic responses to addressing it in a manner more constructively than that of Weber, Adorno and Foucault. This response is to be found in Habermas’s

---

Habermas’s own tome, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (1996) [trans of *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, first published 1992), while it deals with many aspects of law, as well as things well beyond it, does not fit the bill. Nor does anything in the secondary literature. In this ever-growing field, other than brief general pieces on the book as a whole, or articles on particular aspects of it, only two long articles by Hugh Baxter attempt to fully assemble and critically analyse Habermas’s comments on law as they appear both before and in *Between Facts and Norms*: see Hugh Baxter, ‘System and Lifeworld in Habermas’s Theory of Law’ (2002) 23(2) *Cardozo Law Review* 473-615; Hugh Baxter, ‘Habermas’s Discourse Theory of Law and Democracy’ (2002) 50 *Buffalo Law Review* 205-340. There is no doubting the value of Baxter’s pieces for anyone seeking an orientation to Habermas generally, or his views on law, in particular. Yet, they do not, nor do they seek to, present a synthesis of his general theory of law, nor his theory of the rule of law.

- 4 M. Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. T. Parsons (1976) 181 [trans of *Die protestantische Ethik und der Geist des Kapitalismus*, first published in 1904/5].
- 5 T. Adorno, *Einleitung zum Der Postivismusstreit in der deutschen Soziologie* (1969) in *Soziologische Schriften I* 340.
- 6 M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (1977) 297 [trans. of *Surveiller et punir: Naissance de la prison*, first published 1975].

writings from the mid-1980s to the present, in particular, in his book *Between Facts and Norms* and the follow-up articles to it in which, I argue, he develops a concept of the rule of law that is geared specifically to addressing the extent to which the idea of rule *by* the people, in contrast to the rule *over* the people, or the paternalism of government *for* the people, can be operationalised. That is to say, he develops a notion of the rule of law that, in his terms, is ‘internally related’ to democracy<sup>7</sup> by bringing out the conceptual and empirical connections between rule *by* the people and the rule *of* law.

As a preliminary matter it will be useful to flag the underlying normative insight of the rule of law, and indicate how this is transformed under the premises of discourse theory. All theories of the rule of law since Aristotle counterpoise the notion of the rule of law to the rule of flesh and blood people,<sup>8</sup> noting that while the former is impersonal and, therefore, impartial, the later is inevitably partial, in the sense of being governed by the needs, interests and values of people in particular circumstances. Impartiality is at core a moral idea, one which many philosophers, especially those in the Kantian tradition, see as the underlying principle of justice.<sup>9</sup> What discourse theory does, is to pick up the idea of impartial justice that underpins the classical notion of the rule of law and transform it into the communicative framework of a modern deliberative democracy. It does so in three stages. First, it ties impartiality conceptually to democracy. Second, it ties impartiality conceptually to deliberation. And, third, it transposes the idea of democratic deliberation in the previous steps into the idea of the rule of law as a set of legally constituted and guaranteed communicative preconditions and processes. In other words, it conceives deliberative democracy in terms of a discourse theory of the rule of law.

In relation to the first stage, the connection between impartiality and democracy is drawn juristically. Here the rule of law as opposed to rule by particular individuals or groups is taken to be synonymous

---

<sup>7</sup> Elliptically summarised in his article ‘The Internal Relation between the Rule of Law and Democracy’ (1995) 3(1) *European Journal of Philosophy* 12-20.

<sup>8</sup> The rule of law and not the rule of men.

<sup>9</sup> See, eg, ‘Discourse Ethics: Notes on a Program of Philosophical Justification’ in J Habermas, above n 2, 63-6.

with democracy as a system of self-legislation;<sup>10</sup> a system in which those subject to the law as its addressees must also be able to see themselves as being authors of the law.<sup>11</sup> Impartiality and impersonality are encompassed by the notion that since everyone rules no one in particular rules. As Rousseau, the originator of this idea, expresses it, 'each individual, while uniting himself with the others obeys no one but himself'.<sup>12</sup>

The second stage then ties the impartial character of democracy to the discursive features of the self-legislation of citizens. For citizens can only be authors of the laws that bind them if they can all freely agree among themselves about the liberties they wish to give to, and restrictions they seek to impose on, each other. Alternatively, if the agreement of all those affected is too strong a criterion, then at least, all must be able to participate, freely and equally, in such decisions.<sup>13</sup> In either case, deliberation involves the idea of discursively structured communications between free and equal citizens concerning the laws by which they wish to govern themselves. In Habermas's terminology, it involves the idea of discursive collective opinion and will formation.<sup>14</sup>

Discursive collective opinion and will formation is a daunting, Germanic-sounding locution, but really refers to accessible phenomena. Discursive collective *opinion* formation denotes processes through which citizens form their views concerning matters of collective significance on the basis of rational deliberation. While discursive collective *will* formation refers to processes through

---

<sup>10</sup> Habermas is clearly drawing on Kant here. For the idea that Kant unfolds the concept of justice in juridical categories, including, self-legislation, see Gillian Rose, *Dialectic of Nihilism: Post-Structuralism and Law* (1984) chs 1, 2.

<sup>11</sup> J Habermas, above n 3, 120.

<sup>12</sup> J. J. Rousseau, *The Social Contract* in *The Social Contract and Discourses*, revised trans. G. D. H. Cole (1973) Book 1, ch 6. (trans. of *Du contrat Social* originally published in 1761)

<sup>13</sup> Whether discursivity presupposes that the people must *agree* with the decision, as opposed to having the free and equal opportunity to merely *participate* in its making, is an open question. Habermas favours the former, whereas Bohman (who I agree with in this regard) favours the latter: see James Bohman, *Public Deliberation: Pluralism, Complexity and Democracy* (1996) 182-7.

<sup>14</sup> See R Shelly, 'Institutionalising Deliberative Democracy' (2001) 26(1) *Alternative Law Journal* 37.

which citizens decide what to do on the basis of the opinions reached through employment of the various forms of practical reason.<sup>15</sup> In the notion of discursive or deliberative democracy – which I take to be the same thing – the idea of impersonal justice as *impartiality*, that underpins the classical notion of the rule of law, receives a double amplification. As noted, impersonality is actualised in democratic law-making, and buttressed by the deliberative character of the processes of opinion and will formation that underpin it. In the discourse concept of the rule of law, these two moments – democracy and deliberation – become inseparable. Democracy per se – that is to say, formal, as opposed to deliberative democracy – is not enough since it only constitutes one among many forms in and by which law can rule. This rule *by* law is only converted into the rule *of* law by being rendered discursive. This is achieved by legally guaranteeing the multifarious and polycentric forms of communication and discourse that underpin a broadly-conceived legislative process. It is achieved by legally institutionalising the conditions that guarantee the deliberative character of law making.

Discourse theory, therefore conceives the rule of law as being a multi-dimensional process of discursive ‘*legal self-constitution*’.<sup>16</sup> This is just a technical way of saying that it falls to law to guarantee the processes that underpin its own making, and guarantee them in a such a way that they satisfy the normative intuition that internally connects the rule of law and democracy, namely, justice. The explication of these processes as well as the manner in which they are rendered discursive, constitutes the third, and most complex, stage in the reconstruction of the discourse concept of the rule of law. It also constitutes the place where the discourse concept of the rule of law emerges from the chrysalis of the traditional idea of the rule of law: where, in other words, it takes the communicative or discourse-theoretical turn. This ‘turn’ is depicted by Habermas as a ‘communicative arrangement’<sup>17</sup> that must ensure two things: *first*

---

<sup>15</sup> See section IV below for a discussion of the forms of practical reason.

<sup>16</sup> J Habermas, ‘Constitutional Democracy: A Paradoxical Union of Contradictory Principles’ (2001) 29(1) *Political Theory* 773.

<sup>17</sup> J Habermas, above n 3, 104.

that the forms of communication, which enable all relevant questions, themes and contributions underlying discursive law-making, can be freely and equally deployed by all participants in this process. And *second*, in order to ensure that all relevant forms of communication are freely and equally expressed and processed these forms themselves must be guaranteed in some way.<sup>18</sup>

Now, of course, discourses cannot themselves guarantee that they take place, nor that they take place in a truly discursive fashion. They are merely *internally constituted*;<sup>19</sup> which is to say that they rely purely on the rationality of the parties for their binding force. For this reason certain discourses must be *externally constituted* so as to ensure that the communicative conditions that make discourses discursive are, in fact, met. In the context of discursive lawmaking, it falls to law itself to ensure that these communicative conditions are met. Since the forms of discourse that need to be guaranteed are the forms of communication that guarantee the legitimacy (discursiveness) of law, then it falls to law to guarantee that its own normative presuppositions are met. That is to say, law must guarantee – or as Habermas puts it *institutionalise* – the conditions for its own production, application and execution. To do this the law must embody and be governed by two inter-related structural principles; first, the ‘system of rights’ and second, the ‘principles of the constitutional state’.<sup>20</sup> In discourse theory, these principles become the placeholders for the many and varied formal and substantive criteria that constitute the indicia of the traditional theories of the rule of law.<sup>21</sup> The latter theories, by and large, take the rule of law to exist when the laws of a legal system either have particular formal properties,<sup>22</sup> or satisfy certain substantive

---

<sup>18</sup> Ibid 111.

<sup>19</sup> Ibid 110.

<sup>20</sup> As dealt with in chapters 3 and 4 respectively of J Habermas, *Between Facts and Norms*, above n 3; and sections III and IV below.

<sup>21</sup> For an authoritative discussion of these formal and substantive criteria, see P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law*, 467-87.

<sup>22</sup> Such as Roberto Unger’s criteria of publicness, positivity, generality and autonomy in *Law and Modern Society* (1976) 48-58.

normative criteria,<sup>23</sup> or do more or less both these things.<sup>24</sup> The discourse concept of the rule of law, in contrast, locates the normative content of the rule of law, neither in the form of law, nor in its substance, but in the *procedural conditions* that underpin the processes of legislation, administration and adjudication.<sup>25</sup> In my reconstruction, the system of rights and the principles of the constitutional state are the general theoretical terms that Habermas uses to capture this complex web of normatively loaded procedural conditions. They are, in short, the kernel of the discourse concept of the rule of law.

*Between Facts and Norms* devotes one long and meandering chapter to each set of principles, but nowhere sets them out in a form in which they can be readily apprehended and digested.<sup>26</sup> In an attempt to synthesise these chapters into a few sentences they can be expressed as follows. The system of rights specifies how the general conditions for the legitimacy of law – the assent of all citizens in a discursive lawmaking process – can be satisfied. In this respect rights secure for each person an equal chance to participate in a process of lawmaking.<sup>27</sup> The principles of the constitutional state then guarantee equal chances of participation by designating the institutional mechanisms and procedures that are necessary to implement and fill out the system of rights. These principles bolster the discursiveness of the lawmaking process by way of ensuring that

---

23 Such as justice, as articulated by John Rawls in *A Theory of Justice* (1972) 235-43.

24 At least, this is how I read the criteria for the existence of the rule of law elaborated by Martin Krygier's article entitled 'The Rule of Law' in N J Smelser and P B Baltes (eds), *The Encyclopedia of the Social and Behavioural Sciences* (2001) vol 20, 13403-8.

25 R Shelly, 'Habermas and the Normative Foundations of a Radical Politics' (1993) 35 *Thesis Eleven* 67.

26 As already noted, chapter 3 is devoted to the system of rights and chapter 4 to the principles of the constitutional state. Together these chapters run to 111 pages.

27 One of Habermas's most condensed formulations of this idea runs, 'on the premise that rational political and opinion and will formation is at all possible, the principle of democracy only tells us how this can be institutionalized, namely through a system of rights that secures for each person an equal participation in a process of legislation whose communicative presuppositions are guaranteed to begin with': Habermas, above n 3, 110.



the forms of communication and rules of argumentation that feed into the relevant rational discourses are themselves guaranteed.

### III PRINCIPLES OF INSTITUTIONALISATION 1: THE SYSTEM OF RIGHTS

The system of rights constitutes the normative core of the communicatively conceived concept of the rule of law. In the first instance, these rights are neither specific judicially enforceable ‘rights’, nor merely the general, pre-political moral imperatives of natural rights theories. Rather, from the very outset, they constitute a *sui generis* admixture of the two since they take the shape of abstract, unsaturated *categories of rights*<sup>28</sup> that need to be given content by temporally and spatially situated legislatures in the broad sense (which, as we will see operate at the level of the state as well as civil society). As such, they are more akin to fundamental principles of justice, *à la* Kant or Rawls, than actual institutions:<sup>29</sup> principles which delineate the procedures through which the normative imperatives of justice take the shape of law. In short, the system of rights does not depict legal institutions, but the principles of legal institutionalisation that enable a community to govern itself fairly and democratically – a community governed by the rule of law.

This interconnection between the legal and the moral – between the political and pre-political dimensions of the rule of law – is most clearly apprehended when one understands that the system of rights merely states ‘the conditions under which the forms of communication necessary for the genesis of legitimate law *can* be legally institutionalised’.<sup>30</sup> That is, it sets out the conditions which

---

28 Ibid 125.

29 For example, Kant’s ‘universal principle of justice’ as set out in the first part of his *Metaphysics of Morals* is ‘only those actions or social arrangements are right (or lawfully just) that allow for the maximum of freedom for everybody alike’: I Kant, *Metaphysics of Morals*, trans. M. Gregor (1991) 230 (German edition page numbers in margin of text) [trans. of *Metaphysik der Sitten*, first published in 1797].

30 Habermas, above n 3, 104. ‘Can’ here refers to the fact that these forms of communication *are* only institutionalised when positive law per se enters the picture; namely, in chapter 4. For this, state power is required, but once state power enters the picture one needs the ‘rule of law’ in the classic Diceyan sense.

the discourses underpinning discursive lawmaking must satisfy in order to be legally fixed in place. Since what is being fixed in place are various forms of discourse, and that which is doing the fixing (or institutionalising) is positive law, then the relevant rights must be arrived at by somehow cabling together law and discourse. That is to say, the system of rights is derived by way of intertwining the normative characteristics of discursive communication with the functional characteristics that attach to the very form of law, such that the relevant discourses are always binding and resultant laws are always rationally justifiable.<sup>31</sup> Indeed, this is precisely what the idea of ‘self-legislation in the medium’ of law means.

Given the focus of this paper, it is not necessary that I exposit and analyse these rights in detail, nor wrestle with the thorny issues connected with their derivation, the sense in which they form a system, or the reason they need to form a system at all.<sup>32</sup> For my purposes, it will suffice to hone in on the two central categories of rights; those to maximum equal individual liberty, and equal political participation. Each category taken by itself is hardly remarkable, and nor is Habermas’s elaboration of the rights in each category taken by itself earth shattering.<sup>33</sup> What is new, and I think

---

<sup>31</sup> Ibid 121-2. Habermas understands ‘this interpenetration as a *logical genesis of rights*, which one can reconstruct in a stepwise fashion. One begins by applying the discourse principle to the general right to liberties - a right constitutive of the legal form as such - and ends by legally institutionalising the conditions for a discursive exercise of political autonomy... The logical genesis of these rights comprises a circular process in which the legal code (*Kode des Rechts*) and the mechanism for producing legitimate law - the democratic principle - are co-originally constituted’. For an analysis of how this derivation involves a complex combination of functional and normative arguments, see J Mahoney, ‘Rights without dignity? Some critical reflections on Habermas’s procedural model of law and democracy’ (2001) 27(3) *Philosophy and Social Criticism* 21-40, especially 25-9.

<sup>32</sup> To date, none of these issues has been dealt with in the secondary literature. The fullest general expositions of the system of rights can be found in I Maus, ‘Liberties and Popular Sovereignty: On Jürgen Habermas’s Reconstruction of the System of Rights’ (1996) 17 *Cardozo Law Review* 825-82; Baxter, ‘Habermas’s Discourse Theory of Law’, above n 3, 243-61.

<sup>33</sup> As set out in Habermas, above n 3, 122-3, the five categories are: (i) basic rights to the greatest possible measure of equal individual liberties; (ii) basic rights that recognise one’s legal status as a member of a community, ie citizenship; (iii) rights to legal protection and the enforcement of rights; (iv) rights to participate in processes of political opinion and will formation, and (v) basic rights to the provision of adequate

important, is the way Habermas articulates the relationship between the private liberties and public freedoms. For, in a manner self-consciously reminiscent of Hegel, the dialectic between liberal and republican-communitarian versions of constitutionalism is not resolved by privileging liberty over freedom or vice versa. Rather, the two positions are sublated, as it were, into a higher synthesis that at the level of theory – and I believe practice as well – enables the two forms of autonomy to coexist in a manner such that they do not undermine each other.<sup>34</sup> In fact, far from being locked in a zero-sum game, as has so often been the case in both political theories as well as actual constitutions, private and public rights – human rights and popular sovereignty – become mutually reinforcing. More precisely, they are equiprimordial, or co-original in the sense that they are taken to reciprocally constitute each other.<sup>35</sup>

The internal relation between private and public autonomy, as encapsulated in civil and political rights – *Grundrechte* and *Volkssouveränität* – can be put as follows. Public or political autonomy presupposes citizens who have sufficient personal space (ie liberty) in their private lives so as to be materially and culturally able to participate in public discourse. That is, political autonomy presupposes that the subjects of the laws have the requisite material and communicative room to move in order to be able to participate in the law making process. Thus public autonomy presupposes private autonomy.<sup>36</sup> While simultaneously, private autonomy presupposes political autonomy because to be autonomous in the

---

living conditions so one can make use of the other rights. Thus we get civil, political and social rights.

34 Cf R Alexy, 'Basic Rights and Democracy in Jürgen Habermas's Procedural Paradigm of Law' (1994) 7(2) *Ratio Juris* 227-38.

35 Habermas, above n 3, 104, 127-8.

36 There is another more complex way of depicting this relation that depends on the actual structure of the logical genesis of rights as elaborated by Habermas: *ibid* 121, 128. 'One begins by applying the discourse principle to the general right to liberties – a right constitutive of the legal [code] as such – and ends by legally institutionalising the conditions for a discursive exercise of political autonomy... To be sure, the establishment of the legal code as such already implies liberty rights that beget the status of legal persons and guarantee their integrity. But as soon as the legal medium [RS i.e. private autonomy] is used to institutionalise the exercise of political autonomy, these rights become *necessary enabling conditions*: as such, they cannot restrict the legislator's sovereignty, even though they are not at her disposition. Enabling conditions do not impose any limitations on what they constitute'.

private sense, you must also be the one who circumscribes the ambit of your own autonomy. For private autonomy can never be absolute. It does not mean that you can do whatever you want to do, but rather your liberty to do what you want to do must be compatible with everyone else's liberty to do what they want to do. But if you are not the one who determines the conditions under which this compatibility is taken to exist you will not be autonomous, but heteronymous, in the sense of being dependent upon others. In this way, the private autonomy of addressees of the law is dependent upon these same people collectively circumscribing the ambit of their liberty in their capacity as authors of the law. *QED*, the two types of autonomy, and rights in which they take shape, mutually presuppose one another.

This conclusion is hardly surprising when one recalls the connection between impartiality and self-legislation at the heart of the discourse-theoretical interpretation of the rule of law. Here a comparison between moral and legal self-legislation is instructive. At the level of morality, conceived in Kantian terms as the self-legislation of individuals, 'each person obeys just those norms that he or she considers binding according to his or her own impartial judgment'.<sup>37</sup> In contrast, at the level of legal self-legislation – the self-determination of citizens – the unitary concept of moral autonomy must split itself into the 'dual form of private and public autonomy'.<sup>38</sup> Private autonomy protects citizens in their capacity as addressees of the law, while public autonomy enables them to be its authors. The unity of subject and object that must persist if democratic law is to be grasped in terms of *self*-legislation can only be sustained if both moments of the self, public and private, together with the forms of mutual recognition upon which they depend, are given equal weight. This means that if the rule of law is to be conceived in terms of a deliberative-democratic process of self-legislation, then not only must the forms of communication that sustain public and private rights be institutionalised, but this must be done in a balanced manner.

---

<sup>37</sup> Ibid 450.

<sup>38</sup> Ibid.

Given this understanding of the need for a balanced institutionalisation of public and private autonomy, many of the problems said to confront the rule of law under the conditions of both the welfare state and present-day neoliberal forms of globalisation can be cast in a new and, and I believe, constructive light. In relation to the welfare state, for it, the problem with the classical liberal view – a view which located its normative content in the formal-semantic features of the law conceived as positivity, publicness, generality and autonomy – was that it undermined the private autonomy it was premised on upholding. This is because the formal liberty and equality that these semantic characteristics were designed to institutionalise, were systematically undermined by the substantive inequalities arising from state sponsored capitalism. Thus the welfare state attempted to strengthen the autonomy of citizens by providing substantive compensations for the factual and structural deficits of formal law, via the provision of social rights. Of course, the fate of this attempt to increase liberty by increasing substantive equality has been well documented by the decline of social democracy across the developed world. Almost everyone, across the political spectrum from right to left agrees that it accomplished the same thing, by different means, which welfare law reform accused formal law of doing; that is, subverting the private autonomy it sought to protect. The result has seen a swing, less back to the formal equality and liberty of formal law, than towards a *neoliberal* contractualist, governmentality-based framework, which to my mind is producing the same results.

Following Habermas's approach it is easy to see why all these approaches – formal, substantive or contractualist – undermine the private autonomy they intend to protect. They are all caught up in what Habermas calls the 'dialectic of legal and factual equality' that arises from their one-sided focus on guaranteeing private autonomy without addressing the conditions of political freedom upon which it is internally dependent.<sup>39</sup> They all forget the democratic meaning of the rule of law, and the fact that there can be no liberty without freedom conceived as self-determination or self-legislation.

---

<sup>39</sup> Ibid 408-9, 414-27.

#### IV PRINCIPLES OF INSTITUTIONALISATION 2: THE PRINCIPLES OF THE CONSTITUTIONAL STATE

But a system of rights that fixes in place the liberty of private persons and the communicative freedom of citizens is, by itself, insufficient both functionally and normatively to convert the rule *by* law into the rule *of* law. For this to occur, the private and public rights that secure for each citizen an equal chance to participate in law making must be strengthened and extended by a set of procedures Habermas labels the principles of the democratic constitutional state. Given that the necessity for a second layer of institutionalisation arises out of both the functional and normative deficits of the system of rights, it will be simplest to deal these points *seriatim*.

The *functional* necessity of these principles arises from the fact that the system of rights derives from the cabling together of various forms of discursive communication with the medium of positive law. Law, as a *sui generis* category within the spectrum of social norms, has certain formal properties that enable it to fulfil its social function of stabilising behavioural expectations.<sup>40</sup> These formal characteristics, which Habermas derives from a sociological analysis of post-traditional societies, are as follows: law must equip social actors with rights, positivise these rights, and render them enforceable.<sup>41</sup> Each of these characteristics cannot be accomplished without the executive political power of an organisation that makes collectively binding decisions, namely, the modern state.<sup>42</sup> However the functional relational between law and politics cuts both ways since, under modern conditions, political power is not externally juxtaposed to law but is itself established in the form of law in the first place.<sup>43</sup> Law, in providing the language of organised political power, therefore brings its own ability to stabilise behavioural

---

<sup>40</sup> Ibid 122, 133, 143, 429.

<sup>41</sup> Ibid 110-18.

<sup>42</sup> Ibid 134, Habermas argues that ‘the state becomes necessary as a sanctioning, organising, and executive power because rights must be enforced, because the legal community has need of both a collective self-maintenance and an organised judiciary, and because political will-formation issues in programs that must be implemented’.

<sup>43</sup> Ibid 134.

expectations to aid of politics in the fulfilment of the latter's specific function, the realisation of collective goals.<sup>44</sup> Indeed, as the state grows, law by no means exhausts itself in behavioural norms and increasingly functions as a 'system of constitutive rules that not only guarantee the private and public autonomy of citizens but generate government institutions, procedures and official powers'.<sup>45</sup>

For present purposes the precise way in which Habermas explicates the 'co-original constitution of binding law and political power'<sup>46</sup> – in which the codes of law and politics mutually depend on the other for the performance of their own functions – interests me less than the consequences this has for understanding the rule of law. And these are that once state power enters the picture, the process of juridification must extend from guaranteeing liberty and political participation to disciplining the political power presupposed with the form of law.<sup>47</sup> This yields nothing less than the classical conception of the rule of law or 'government by law' (*Rechtsstaat*)<sup>48</sup> understood as the constitutional regulation of administrative power by the provision of actionable civil rights against the state. From the functional perspective, the juridification of political power, by way of a recursive application of the legal form to the government, employs public law rights for the protection of the formal equality and liberty of citizens.<sup>49</sup>

Although as all non-functionalist conceptions of the rule of law emphasise, the mere fact that governmental power is clothed in law does not *eo ipso* make it acceptable, nor even always effective. From the *normative* perspective, the rule *by* law only becomes the rule *of* law if the political power (*Gewalt*) that renders law enforceable against its subjects can be traced back to the communicative power

---

44 Ibid 133-44.

45 Ibid 144.

46 Ibid 141.

47 Ibid 132, 457.

48 Ibid 133.

49 Ibid 134-5. Significantly, the protection from state interference provided by administrative law provides 'structurally homologous' protection to that of private rights against private infringements such as contract and tort. See also at 28, 33, 130, 461.

(*Macht*) employed by these same subjects in their role as authors.<sup>50</sup> This being the case, the principles of the constitutional state extend beyond providing a framework for authorising state action, and thereby preventing arbitrary interventions into public functions and private life. They branch out over a wider social domain so as to enable the emergence of the communicative power that constitutes discursive collective opinion and will formation, as well as translate this rationally binding force into organised politics and administration.<sup>51</sup> This broader conception of the rule of law requires that that the formally organised institutions of the state, which are oriented to the logic of power, be tied to the lawmaking deliberative power and kept insulated from ‘illegitimate interventions of social power (i.e. of the factual strength of privileged interests to assert themselves)’.<sup>52</sup> In sociological terms, this interpretation of the rule of law illuminates ‘the political side of balancing the three major forces of macrosocial integration: money, administrative power and solidarity’.<sup>53</sup>

---

<sup>50</sup> Ibid 147-50: Habermas borrows the *Macht / Gewalt* distinction from Hannah Arendt.

<sup>51</sup> Ibid 176.

<sup>52</sup> Ibid 150.

<sup>53</sup> Ibid 150.



As to Habermas's actual list of principles, these, just like the categories of the rights he derived, [seem to] involve a fairly extensive yet traditional list.<sup>54</sup> It includes the usual suspects such as

---

<sup>54</sup> Ibid 168-76. The principles can be delineated in greater detail as follows:

- (a) The *principle of popular sovereignty*. This takes place via a discursively structured opinion-and-will-formation. It owes its legitimation to the 'rational treatment of political questions' based on 'the institutionalisation of interlinked forms of communication that, ideally speaking, ensure that all relevant questions, issues and contributions are brought up and processed in discourses and negotiation on the basis of the best available information and arguments. This legal institutionalisation of specific procedures and conditions of communication... enjoins the pragmatic, ethical and moral use of practical reason, or... the fair balance of interests' (at 170). This 'special interpretation of the principle of popular sovereignty' (at 169) then leads to the following sub-principles.

The *parliamentary principle* (at 170), which in turn encompasses a number of sub-sub-principles such as: principles governing the *mode of election*, the *status of representatives*, the *mode of decision* (including the *principle of majority rule* (at 170-1, 179) and the *organisation of work* (eg, committees). All of these 'procedural questions must be regulated in the light of the discourse principle in such a way that the necessary communicative presuppositions of the pragmatic, ethical and moral discourses...and the conditions for fair bargaining... can be sufficiently fulfilled' (at 171).

'Furthermore the logic of discourse yields the *principle of political pluralism*' (at 171). This leads to the following sub-sub-principles: the *principle of the guaranteed autonomy of public spheres* and the *principle of competition between different political parties*. These principles 'demand a discursive structuring of public networks and arenas in which anonymous circuits of communication are detached from the concrete level of simple interactions' (at 171). This is connected with informal opinion-formation in autonomous public spheres, and the arenas in which it takes place must be 'constitutionally protected in view of the space they are supposed to make available for free-floating opinions...' (at 171).

- (b) The *principle of comprehensive legal protection for individuals* (at 171-2) which involves the actionability of claims and the guarantee of legal remedies. This involves the *principle of the institutional separation of powers*, which for 'normative and systematic' reasons grounded in the distinction between justification and application discourses and the 'different logics of argumentation' (at 172, 183-93) requires a differentiated legal institutionalisation of legislative, administrative and adjudicative procedures (at 172). Another reason for separate branches, and the *principle of the independence of the judiciary*, is that the judiciary relies on executive power to enforce its decisions and thus it must be prevented from programming itself. This leads to the *principle of binding the judiciary to existing law* (viz the judiciary does not legislate) (at 172). (This, as well as some of the above points, are elaborated in more detail in Habermas's discourse theoretical formulation of the classical scheme for the separation of powers)
- (c) The *principle of the legality of the administration*. The 'use of administrative power is bound to democratically enacted law in such a way that administrative power regenerates itself solely from the communicative power that citizens

the parliamentary principle, and principles of popular sovereignty, political pluralism, independence of the judiciary, comprehensive legal protection of individuals and the legality of the administration. In line with his broader conception of the rule of law, these principles also extend to guaranteeing the autonomy of public spheres, the social autonomy of citizens, the separation of state and society and a discourse-theoretically reinterpreted institutional separation of powers.<sup>55</sup> The application of these latter principles in

---

engender in common' (at 173). Administrative power forms a resource for the institutionalisation of discourses for the making and applying of law and is, in this sense, an *enabling condition*. This principle is another way of stating the *principle of prohibiting arbitrariness in domestic affairs*, which in turn is connected with the notion of rights against the state, administrative courts etc (at 173-4). For the 'rights that citizens reciprocally accord each other only in the horizontal dimension of citizen-citizen interactions must now, once an executive branch has been formed, also extend to the vertical dimension of citizen-state relationships' (at 174). This is the area of administrative law.

- (d) The *principle of separation of state and society*. 'The principle refers the *legal guarantee of social autonomy* that also grants each person, as an enfranchised citizen, equal opportunity to make use of his rights to political participation and communication' (at 174). In the bourgeois constitutional state the guarantee of social autonomy was construed narrowly, but, in discourse-theoretic terms, the principle 'requires a civil society, that is a network of voluntary associations and a political culture that are sufficiently detached from class structures' (at 175). The principle also attempts to prevent unchecked 'social power' from unconstitutionally influencing the state and administrative power (at 175). (This is dealt with in detail in Habermas, above n 3, ch 8, as well as ch 6, 263-4).

<sup>55</sup> As to the latter, see *ibid* 172, 183-93, 431, 438-42. Habermas distinguishes between the *institutional* and *functional separation of powers* (at 438). In the classical liberal schema, the former refers to the 'separation and interdependence of government branches' (at 263), whereas the latter refers to the different tasks or functions that each branch is supposed to perform. The institutional and functional separation of powers then neatly dovetail, in that the legislature is geared to making laws, the judiciary to applying laws and the executive to implementing (administering) laws. But, of course, the problem with this schema is that there is no necessary reason why the functions of legislation, adjudication and administration need to be exercised in the institutional complexes in which they contingently arose and developed. To insist on this dogmatically is to hypostatise the liberal understanding of the separation of powers (at 193). And what is more, geared as it is to the control of politico-administrative power, the liberal model is conceptually and practically unable to address the pressure that economic and social power exert on legal and governmental practices. This is becoming increasingly evident in contemporary conservative, neo-liberal democracies, where people are coming to learn from experience that these powers 'need to be tamed by the rule of law no less than does administrative power' (at 263). According to discourse theory, 'in speaking of the [RS institutions of] "legislature", "judiciary" and "administration" in overly concrete terms, one disguises the *logic of a functional separation of powers*, which, at a different level of abstraction, governs the availability

particular effectively fosters and protects processes of discursive lawmaking not just at the level of the state, but also *in* civil society, and *between* state and civil society. This is done by institutionalising the full spectrum of practical reasons that underpin lawmaking in polycentric, post-traditional societies.

It is certainly one of Habermas's important contributions to have identified precisely what constitutes the full spectrum of discourses that provide the normative infrastructure for a broadly conceived legislative process. The principles of the rule of law do not just institutionalise moral reasons (as per Immanuel Kant and modern Natural Law), ethical-political reasons (as per G. W. F. Hegel, Charles Taylor and much communitarianism) or pragmatic reasons (as per Thomas Hobbes and the Anglophone positivist tradition that stems from him). Rather, all three modes of practical reason, the moral, ethical and pragmatic, will be relevant depending on the particular problem and the aspect under which it can be solved.<sup>56</sup>

---

of various sorts of reasons and how these are dealt with. This logic requires the institutionalization of various discourses and corresponding forms of communication that... open up possibilities of access to the corresponding sorts of reasons' (at 438, 191-2). Thus discourse theory yields a 'functional separation of powers grounded in the logic of argumentation' (at 187). 'From this argumentation-theoretic perspective, the division of powers and responsibilities among authorities that respectively *make*, *apply* and *implement* laws follows from the distribution of the possibilities of access to different sorts of reasons and to the corresponding forms of communication that determine how these reasons are dealt with' (at 192). At a general level, the legislature is geared to moral discourse (at the level of justifying moral norms), ethical-political and pragmatic discourses, as well as discursively conducted bargaining and negotiation of compromises. Judicial discourse is geared, in principle, to application discourses. While discursively conducted administration is geared to pragmatic discourses (at 186-93). (Note, this distribution of discursive functions is slightly amended (at 438-42), especially those allocated to the judiciary and the executive).

<sup>56</sup> Ibid 151-7, 232-3. The key passage is at 151-2, where Habermas states, 'in contrast to morality, law does not regulate interaction contexts in general but serves as a medium for the self-organisation of *legal communities* that maintain themselves in *their social environment* under *particular historical conditions*. As a result, *concrete matters* and *teleological points of view* migrate into law. Whereas moral rules, aiming at what lies in the equal interest of all, express a universal will pure and simple, laws *also* give expression to the *particular wills of members of a particular legal community*. Moreover, whereas the morally autonomous remains in a sense virtual because it only states what could be rationally accepted by each, a legal community's political will... also expresses an *intersubjectively shared form of life*, *existing interest positions* and *pragmatically chosen ends*. Political issues are such that in the medium of law, the normative regulation of behaviour is also open for the evaluation and pursuit of

And for each type of practical discourse – moral, ethical, pragmatic, and even forms of fair negotiation – different kinds of reasons will count in determining validity. In each, the process of argumentation will be carried out in distinct forms of communication whose similar egalitarian surface structures belie the different conditions imposed on them by their respective rules of argumentation.<sup>57</sup>

It is here, in the fostering and protection of the various forms of communication that underpin lawmaking in all its forms – legislation, adjudication and administrative regulation – that we grasp the core of the discourse concept of the rule of law. It is here that we can appreciate its intimate connection to a conception of democracy that gives credence to the idea of government *by* the people. This is in contrast to most notions of the rule of law, which

---

collective goals. This expands the spectrum of reasons relevant for political will-formation: in addition to *moral* reasons, we find *ethical* and *pragmatic* ones’.

Habermas labels those factors that force nonmoral issues to be taken account of in the process of legislation as ‘the *volitional moment* in the lawmaking process’ (at 157). As the above passage indicates, this volitional moment ‘follows from the logic of nonmoral issues and the context-dependence of the nonmoral reasons entering into the political legislator’s opinion-and-will-formation’ (at 157). The logic of moral and non-moral issues is then elaborated, in terms of a theory of practical discourse (at 157-168, 233ff) and applied (at 176-84), where Habermas provides a differentiated answer to the ‘the basic question “What ought we to do?”... according to the *kind of material in need of regulation*. The meaning of “ought” remains unspecified as long as the *relevant problem* and the *aspect under which it can be solved* are undetermined’ (at 159). Habermas then specifies these aspects ‘along the lines of *pragmatic, ethical* and *moral issues*. The standpoint of *expediency, goodness* and *justice* each define a different use of practical reason. These correspond to different kind of discourse’ (at 159); see also J Habermas, *Justification and Application: Remarks on Discourse Ethics*, trans. C. P. Cronin (1993) 1-17 (trans of *Erläuterung zur Diskursethik*, first published 1991)

57 *Forms of communication* (or *discourse*) can be broken down into theoretical, practical and aesthetic-expressive discourse. Practical discourse can, in turn, be sub-divided into moral, ethical and pragmatic discourse. In Habermas, above n 3 (at 177), Habermas argues that bargaining is not really a form of discourse per se because there is ‘no internal form or logical pattern, of argumentation that corresponds to the external form of communication’. Procedures that ensure that ‘all relevant interests are given equal consideration and all parties are furnished with equal power’ do govern bargaining. In this sense, the discourse principle applies indirectly, but since they are operating strategically and not communicatively, bargaining isn’t a form of discursive will formation in the full sense.

*Forms of argument* relate to the logics that underlie the various forms of communication, such as the discourse principle, moral principle (and its related principles of justification [‘universalisation’] and application [‘appropriateness’]) and the principle of democracy.

have generally tended to coexist more comfortably with the paternalism of a government *for* the people, or the oppression of government *over* the people. I have suggested, though not proven, that the deliberative democratic version is not a utopian philosophical projection; an exercise in wishful thinking, as it were. But to examine the extent to which it is already operative in, or even applicable to, the contemporary scene raises a host of fresh methodical and substantive issues, a consideration of which would constitute a whole other paper.

