

Habermas, legitimacy and deliberation. Let us bargain!

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1. Introduction

The theory of *Deliberative democracy*, that is, a democracy in which deliberation is the source of legitimate political decisions, is one of the most prominent democratic theories in modern political theory. It entails that political decisions are taken on the basis of fallible arguments and are subject to the force of the better argument. As such, deliberation should take place publicly and rationally in order to achieve legitimate outcomes. Theorists like Jürgen Habermas have placed this rationality and publicity at the center of deliberative theory.

However, opponents of deliberative democratic theory claim that a deliberative democracy does not produce legitimate political decisions, for its conditions of rationality and the force of the better argument preclude arguments that fall outside this rational *grammar* from entering the political arena. Yet, according to opponents of deliberative theory like Aletta Norval, claims that don't follow the grammar of deliberative political debate are no less valid. A system that doesn't take all valid claims into consideration, therefore, can't produce legitimate political decisions according to its own criteria. Moreover, some argue that even if opposing views can be formulated in the language that deliberative theory requires, the deliberative system is so synonymous with the capitalist economic system that there is no true possibility for them to be realized. As such, they claim that deliberative democratic theory does not sufficiently facilitate contestation and merely guarantees the status quo of the foundations of the economic and political system.

I wish to emphasize that I don't assume that Habermas' model is indeed a model that is used across the world. I will merely ask whether his framework for deliberative democracy yields illegitimate outcomes, as some of his opponents seem to claim.

In order to answer this question, I will firstly examine the foundations of Habermas' deliberative model and ask how, according to Habermas, political decisions become legitimate. Secondly, I will explore several critiques of the deliberative model outlined by Norval, ranging from critiques from within the deliberative democratic tradition to the external post-structuralist critique by Norval. Lastly, I will determine whether these critiques of Habermas are correct and if his model indeed produces illegitimate decisions.

I will argue that the deliberative model as developed by Habermas does not produce illegitimate outcomes in the three ways that Norval suggests. Firstly, the elitist argument fails because it either misconceives the reconstructive core of deliberative theory or it underestimates the ability of the public sphere to accommodate difference. Secondly, Norval's argument that the need for compromise-formation weakens the deliberative model such that it should be reconsidered as a whole, fails as well, because bargaining depends on that same discourse model in order to produce fair agreements. Compromise-formation is thus indirectly yet decisively subjected to the discourse principle. Moreover, Habermas considers bargaining to be an integral part of the process of reaching legitimate decisions, no mere addition. And lastly, the post-structuralist critique fails as well. For Habermas, an orientation towards consensus does not mean that agreement is the goal of discourse, as Norval claims. Discussion, not consensus, is what is central to deliberation. Furthermore, the principle of neutrality does not preclude differences from being discussed. It is not a normative principle, but rather a result from the reconstruction of actual practices of argumentation.

2. When do political decisions become legitimate according to Habermas?

In order to determine what makes political decisions legitimate according to Habermas, I will examine his deliberative model of decision-making in two steps. The first is his conceptualization of the *public sphere*, for which I will examine his book *The Structural Transformation of the Public Sphere*. In this section I will explicitly discuss the normative core of his public sphere theory, thus drawing on the work of Richard J. Bernstein in this area. The second is the actual discourse model of democracy, for which I will turn to Habermas' book *Between Facts and Norms* and his important paper *Three Normative Models of Democracy*. Lastly, I will briefly summarize what makes decisions legitimate.

2.1 The foundations of Habermas' public sphere theory

In his *The Structural Transformation of the Public Sphere*, Habermas provides a detailed socio-historical analysis of the emergence of a public sphere, which first came into being in Europe after the Renaissance. For Habermas, an important feature of a public sphere is the separation it marks between what is private, like specific norms in a household, and what is public, like the system that governs our society and that is open to public scrutiny.¹ Before the renaissance, the feudal society of the High Middle Ages did feature some form of *publicity* or *representation* in the sense that lordships were publicly represented by their incumbents. But Habermas argues this did not constitute a public sphere, since it did not establish a new realm separate from the private realm of the feudal class. Representation or publicity by a lord was inseparable of its own existence and therefore the power that such a position yielded did not involve a separation between what is private and what is public. It had more to do with embodiment: 'as long as the prince and the estates of his realm 'were' the country and not just its representatives, they could [only] represent it in a specific sense'.² Representation, then, was confined to matters of the private sense and was not the subject of a public realm.

The emergence of modern states, however, changed the public domain that was characterized by representative publicity. The authorities of the territorial ruler became most important and filled the space in publicity with the rather new 'public sphere in the modern sense of the term: the sphere of public authority'. This public authority acquired

¹ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Sixth Printing edition (Cambridge, MA: MIT Press, 1991), 1.

² Habermas, 7–8.

tangible presence in the form of armies and permanent administration. Those subjected to this public authority became the *public*.³ Habermas argues that the relation between the public and public authority was highly influenced by mercantilist policies. Whereas production used to take place in small businesses based on an occupation, this slowly moved to capitalist forms of production such as factories. Hence, trade became most valuable as it created employment at home. Trade policies were thus aimed at value for the public and that very public started to be critical of the policies it was effected by.⁴

Habermas notes that the *bourgeois* or property-owning and educated class was most prominent in the public sphere, because it was most affected by the policies of the public authority.⁵ The *proletariat* or non-property owning and less educated class, by contrast, was less affected by these policies, because it had little direct interest in the policies on trade. As the group of those involved in production became more prominent, the ability to be self-sufficient decreased. Local markets became more dependent on national markets and, as such, people started to live more and more like consumers who were affected by policies as well. For Habermas, the emergence of the consumer and its unprecedented dependence on policies for survival caused the public sphere to become truly *critical*. Public policies became such a factor in everyday life that it challenged the public to make use of its reason and voice criticism.⁶

The press at that time already featured trade news, relevant to the few. But as the policies of the public authority affected the public more and more, critical reasoning on these policies emerged. Habermas notes that at first, the authorities guided the reason of writers with rules on style and content, but soon the writers appropriated critical reasoning and used it against public authority, much to the frustration of some. It forced public authority to legitimate itself before public opinion.⁷

But how does this reasoning work? What has it got to do with legitimating political decisions?

The reason for Habermas' careful investigation of the emergence of the bourgeois public sphere is that he proceeds to draw normative rules from the social structure of the public sphere. For him, the functioning of the bourgeois public sphere indicates how a political public sphere *ought* to function. In order to examine the rules of the public

³ Habermas, 18.

⁴ Habermas, 18–19.

⁵ Habermas, 23.

⁶ Habermas, 23–24.

⁷ Habermas, 25.

sphere, he distinguishes between matters belonging to the private realm and those belonging to the sphere of public authority. In between, the public sphere is situated as the sphere in which private persons discuss public matters. He theorizes it as follows:

Private Realm	Public sphere constituted by private people	Sphere of Public Authority
Civil society (realm of commodity exchange and social labor) Conjugal family's internal space	Political public sphere Literary public sphere (clubs, press)	State (realm of the "police") Court (courtly-noble society) ⁸

For Habermas, the literary public sphere that featured discussions on things like philosophy, literature and art, transformed into a political public sphere, in which public *raisonnement* or reasoning came to regulate civil society as a struggle between public opinion and public authority. The way in which arguments were resolved in the literary public sphere was copied in the political public sphere. Habermas claims public reasoning is always based on experiences and convictions in the familiarly sphere. As such, political public reasoning acquired a private as well as a polemic character.⁹

The emergence of a bourgeois public sphere directed against public authority in the eighteenth century followed a shift in the philosophical discussion on absolute sovereignty that took place in the two preceding centuries. The discussion on public authority used to revolve around literature in defense of absolute powers. It then shifted to the question of whether the *will* of monarchs legitimates decrees, or whether the *law itself* should legitimate their decrees. Of course, this discussion still took place within the context of absolute powers. The new bourgeois polemic added one crucial element to this discussion: a rigorous concept of law that not merely guarantees justice in the sense of a right obtained over time, but rather guarantees *legality* by establishing general and abstract norms.¹⁰

For Habermas, the notion of universal norms is essential. He argues that although Hobbes and Locke implied the existence of universal norms, it was not until

⁸ Habermas, 30.

⁹ Habermas, 51–52.

¹⁰ Habermas, 52–53.

Montesquieu that they were defined as central to life. He quotes Montesquieu in writing that 'The laws ... are the necessary relations arising from the nature of things'. We might say that, for Habermas, this is the source of rationality as a key factor in the public sphere, because laws came to be seen as 'rational rules of a certain universality and permanence'. The law, with its general, abstract and permanent norms, 'inherits a rationality in which what is right converges with what is just'. This reverses Hobbes's *auctoritas non veritas facit legem* into *veritas non auctoritas facit legem* (the latter meaning *truth not authority makes law*). Exercising power in this sense merely pertains executing these norms, rather than ruling by decree.¹¹

Moreover, Habermas argues that this claim of rationality in the public sphere was used as an antidote to the state secrets that monarchs relied on. This highlights another crucial element in Habermas: the concept of *publicity*.¹² That is to say, a monarch (or any carrier of public authority, for that matter) should allow open access to its motives and decisions, such that the people can critically reason about them and can form a rational public opinion on which law can be based. The new political consciousness came to demand publicity as well as laws that were general and abstract, such that the use of public authority could be evaluated. Publicity as a principle then not only includes openness on behalf of the public authority, but a demand for publicly defending one's opinion as well.

As for the exact rules governing critical reasoning, Habermas signals a fundamental relation between the literary public sphere and the emerging political public sphere. In the former, rules about the parity of all that enter into the literary public sphere are self-evident. This universally valid law of parity enables the participants in a debate to hold their own beliefs and to utter them concretely. Or, to use Habermas' terminology, the *objectivity* of the universally valid law of parity enables the *subjectivity* of participants in discussions. Habermas notes that the results of public debate conducted under such abstract, objective rules lay claim to rationality, because the very concept of *public opinion* depends on critical public reasoning that brings together what is just and what is right. It is here that Habermas mentions *the force of the better argument* as that which determines what becomes the public opinion.¹³ For him, the notion that the public started to explain and discover itself according to its own

¹¹ Habermas, 53.

¹² Habermas, 53.

¹³ Habermas, 54.

private sphere rules, gave the concept of public opinion its 'strict meaning of an opinion purified through critical discussion in the public sphere to constitute a true opinion'.¹⁴ Since public opinion now also wanted to establish laws governing the social sphere (and no longer merely the literary sphere), laws thus not only became general and abstract, but *rational* as well.¹⁵

Habermas argues that the move towards formal and material norms for the law was a product of an already existing practice in the literary public sphere. In this sphere, participants already conducted *self-interpretation*, that is, independently reasoning on the institutions within the literary public sphere. For Habermas, demanding formal and material norms for the law reflects the extension of self-interpretation from the literary to the political realm. The coming together of private individuals to discuss their subjectivity as humans among others (Habermas calls this the role of *homme* in the literary public sphere) does have a different character than property-owning individuals who discuss the regulation of their private sphere (as *bourgeois* in the political public sphere). But Habermas claims that both forms of the public sphere were soon deemed identical.

At this stage, where public reasoning and publicity is used against absolutist rule for the first time, the human values of love, freedom and cultivation that dominated the literary public sphere, became central to the political public sphere as well. For this sphere was dominated by the bourgeois property owning class, which sought to claim control of their private sphere, yet that was also the educated class. They might have had two different roles as *homme* and *bourgeois*, but in the search for a public opinion on broader issues than literary ones their roles soon became indivisible. Habermas indeed claims that 'the humanity of the literary public sphere served to increase the effectiveness of the public sphere in the political realm' and that the fictitious identification of the *bourgeois*- and *homme*-roles of the individual enabled the bourgeois public sphere to fully develop, because at that time their interests of political emancipation (bourgeois) and human emancipation (all, property-owning or not) converged.¹⁶ In other words: the public sphere could function as long as this fictional identification of interests persisted.

¹⁴ Habermas, 95.

¹⁵ Habermas, 54–55.

¹⁶ Habermas, 56.

But did this convergence persist? Habermas clearly claims it didn't. He argues that the conditions that enabled the bourgeois public sphere to emerge were shattered in the second half of the nineteenth century. The public sphere functioned well as long as 'the *homme* was simultaneously an owner of private property who as *citoyen* was to protect the stability of the property'. (*explain small difference between bourgeois and citoyen in footnote*) In that case, Habermas argues, 'what the public itself believed to be and to be doing was ideology and simultaneously more than mere ideology'.¹⁷ For him, the ideological part lay in the assumption of the identification of the *citoyen* and the *homme*.¹⁸ But the fact that 'the dominant class nevertheless developed political institutions which credibly embodied as their objective meaning the idea of their own abolition' proved to Habermas that it was more than just ideology.¹⁹

Yet Habermas argues that two important conditions of the bourgeois public sphere soon degenerated. The first is how a public opinion is formed. For Habermas, a public opinion or *opinion publique*, as he calls it, is formed through the process of discussing opinions, which he sees as 'basically suspicious reputations among the multitude'. The process of critical discussion in the public sphere is what purifies uncertain opinions into a true opinion.²⁰ In other words: a lack of such rational critical debate means that we cannot speak of a true (public) opinion.

The second important condition of the bourgeois public sphere is publicity, for which Habermas draws on Kant. It requires openness on the actions of public authority and its motives, such that the public is able to publicly reason on them. The public needs to have access to what is happening, irrespective of whether they own property or whether they are just autonomous individuals. Much like the concept of public opinion, publicity is a normative idea. Both need to be working in order for the public sphere to function. If not, the legitimacy of the public authority and its decisions is at stake.

But for Habermas, both conditions are no longer satisfied. He signals a *structural transformation* of the public sphere. Public opinion and the critical debate that should lead to it degenerate when manipulation and special interests gain the upper hand over true critical debate. In similar fashion, publicity degenerates when it becomes "staged

¹⁷ Habermas, 87–88.

¹⁸ Richard J. Bernstein, "The Normative Core of the Public Sphere," *Political Theory* 40, no. 6 (2012): 769.

¹⁹ Habermas, *The Structural Transformation of the Public Sphere*, 86.

²⁰ Habermas, 89–90; 93.

²¹ Bernstein, "The Normative Core of the Public Sphere," 769.

display". Habermas argues that arguments have become mere 'symbols to which again one cannot respond by arguing but only by identifying with them'.²²

Nonetheless, Habermas claims it is possible to revive the public sphere. He argues that welfare states are still bound by law to publicity. As such, some form of public opinion formation is possible, at least as a means of guarding against domination by the public authority. Welfare states are still able to 'cling to the mandate of a political public sphere' to the degree with which they are able to 'preserve the continuity with the liberal constitutional state'²³, even though staged and manipulative publicity are commonplace.

Hence, when Habermas describes the structural transformation of the public sphere, he does not give up hope of its revival. In order to further examine the legitimacy of political decisions, we must now look at his more concrete and recent *discourse* model of democracy.

2.2 Legitimacy and the discourse model

As we have seen in the previous paragraph, Habermas signals significant problems for the functioning of the public sphere. Because of the way in which the public sphere has structurally changed towards a domain of staged display rather than critical reasoning, the legitimacy of political decisions and the system of decision-making is at stake. Yet in his book *Between Facts and Norms*, Habermas defends the importance of the public sphere and attempts to prove the normative value of publicity and critical reasoning by tracing how the public sphere enables laws to become legitimate.

For Habermas, an empiricist approach to legitimacy reduces the rules of legitimation to how social power works, because it merely observes politics from the outside. Habermas demands more. He argues that we should examine legitimacy from a conceptual perspective. Otherwise, 'the conditions for the acceptability of law and political authority are transformed into conditions of actual acceptance, while conditions of legitimacy become conditions for the stability of a generally held belief in the government's legitimacy'.²⁴

²² Habermas, *The Structural Transformation of the Public Sphere*, 206.

²³ Habermas, 232. See also Bernstein, "The Normative Core of the Public Sphere," 770.

²⁴ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Studies in Contemporary German Social Thought (Cambridge, MA: MIT Press, 1996), 289.

In examining the concept of legitimacy, Habermas assumes that 'the conceptual relation between political power and law' becomes evident because of 'the conceptually unavoidable pragmatic presuppositions of legitimate lawmaking' and 'the institutionalization of a corresponding practice of self-governance by citizens'.²⁵ This is quite a difficult assumption, so we will proceed to trace where these presuppositions of legitimate lawmaking and the institutionalization of self-governance appear in the discourse model, in order to clarify the assumption.

In his paper *Three Normative Models of Democracy*, Habermas elaborates on how to situate his model of deliberative democracy in democratic theory. In order to do so, he starts by addressing the tensions between liberal and republican conceptions of democracy. He argues that the liberal or Lockean democratic theory sees politics as a mediator between the society that is organized as a 'market-structured network of private individuals' and the administrative power.²⁶ Society "programs" its administration according to how its interests are bundled in the market. The republican view adds a third dimension to this process. On this view, politics is involved in the formation of society itself. It is conceived as the medium in which citizens 'become aware of their dependence on one another' and unite towards a common good. For Habermas, this conception of politics (normatively) adds *solidarity* to the liberal 'sources of social integration', that of politics as a mediator between the sources of administrative power and personal interests.²⁷ He claims the republican view considers an autonomous dimension of solidarity to be a precondition for self-determination, and hence for will-formation and legitimate decision-making, because it protects the public sphere from being dominated by government or market forces. For republicans, these forces feature strategic instead of communicative communication and a legitimate democratic model therefore requires an autonomous, communicative 'base in civil society'.²⁸

For Habermas, these views reflect two different conceptions of the position of citizens. On the liberal view, citizens have negative rights that protect them from coercion, as long as they operate within the law. This is enforced by the presupposed state. Political rights enable them to vote and speak freely. Through elections and the subsequent process of government formation, these private interests are aggregated

²⁵ Habermas, 289.

²⁶ Jürgen Habermas, "Three Normative Models of Democracy," *Constellations* 1, no. 1 (1994): 1.

²⁷ Habermas, 1.

²⁸ Habermas, 2.

into a political will that impacts the government. On the republican view, however, citizens have *positive liberties* that enable them to develop into ‘politically autonomous authors of a community of free and equal persons’.²⁹ Citizens develop their autonomy through self-determination and interaction with others, as opposed to the liberal view, which regards autonomy to come about through the exercise of private rights. They themselves are the authors and indeed the founders of public authority. The purpose of the state, then, is not merely to guarantee *rights*, but to guarantee the *liberty* of free debate on what norms citizens deem to be in the interest of all.

For Habermas, these different conceptions of the citizen signal a different concept of law as well. For liberals, rights serve to determine objectively who is entitled to what. For republicans, however, rights do stem from an objective *legal framework*, but they reflect the merely subjective ‘prevailing political will’.³⁰

In conclusion, Habermas argues that the liberal tradition of opinion- and will-formation can be characterized as a *competition* between political actors who contend in order to gain the voter’s approval. A Schumpeterian market-politics, we might say. In the republican view, market-like forces do not affect opinion-formation. Rather, for politics ‘the paradigm is not the market but dialogue’. It concerns values instead of mere preferences.³¹

Habermas leaves no doubt that he favors the republican over the liberal model. He argues that the former rightly conceptualizes politics as the process in which citizens institutionalize the public use of their reason and, hence, *constitute* democracy. The liberal model, by contrast, favors a competition for the *presupposed* power. Since this competition follows the rules of a market economy, Habermas claims its outcome ‘is determined by the rational choice of optimal strategies’. For him, this entails that the liberal model does not facilitate a rational discussion on what the good life is and which incorporates the pluralist views citizens have. Therefore it ‘loses all reference to the normative core of a public use of reason’. The republican view trusts this use of reason, whereas the liberal view is skeptical of it. But his preference for the republican tradition notwithstanding, Habermas claims it has gone in the wrong direction by giving ‘public

²⁹ Habermas, 2.

³⁰ Habermas, 2–3.

³¹ Habermas, 3.

communication a communitarian reading', moving 'towards an *ethical constriction of political discourse*'.³²

What Habermas means by a communitarian reading is the notion that politics is about finding out what a citizenry shares and which decisions would best fit it culturally. Or, as we might say in modern terms, communitarian politics is about identity. He argues this approach is too idealistic in its normativity, for it would mean that the legitimacy of political decision-making depends on the degree of public orientation towards the common good. Habermas notes that even Rousseau, who argued that a pre-existing general will is the source of legitimacy, found this problematic, which is why he divided the citizen in a private and a public man. The private man, on this view, can't be 'ethically overburdened'. It is in his capacity as a public man that a pre-given consensus on the common good is found. Habermas counters that:

'a discourse-theoretic approach insists on the fact that democratic will-formation does not draw its legitimating force from a previous convergence of settled ethical convictions, but from both the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation, and from the procedures that secure fair bargaining processes. Discourse theory breaks with a purely ethical conception of civic autonomy'.³³

Habermas admits that discourses concerning the traditions citizens wish to uphold or in what kind of society they want to live, are very relevant in politics. But, he argues, 'these questions are subordinate to moral questions and connected with pragmatic questions'.³⁴ He draws on Kant in holding that moral questions are above all question of *justice*. And these questions are to be solved in terms of what would be an answer acceptable to all. This contrasts with the communitarian approach that centers on ethical questions, since these are always connected to a particular conception of the good life. Habermas claims such a discourse is restrictive. For him, laws in a state can only be legitimate if they are compatible with moral values 'that claim universal validity going beyond the legal community'.³⁵

³² Habermas, 4.

³³ Habermas, 4.

³⁴ Habermas, 5.

³⁵ Habermas, 5.

Another argument against the communitarian, restrictive discourse for Habermas is that it negates the fact that most political processes are compromises. If a society is pluralistic – and many societies are – there will be conflicting interests or values that will not be resolved by consensus. They require bargaining. For Habermas, bargaining is inevitable and legitimate if the *rules* of the process are acceptable to all conflicting parties. In that case, bargaining can even involve strategic communication, again as long as the *rules* are established in practical, neutral discourse. As such, we should understand the validity claim of laws under deliberative decision-making as the claim to (1) ‘compromise competing interests in a manner compatible with the common good’ and to (2) ‘bring universalistic principles of justice into the horizon of the specific form of life of a particular community’.³⁶

This proceduralist view, as Habermas calls it, has implications on how he views the concept of society as well. As we saw, in the liberal framework interests compete and justice is provided by rights. In the republican framework, the ethical-political discourse oriented at cultural self-understanding provides fair decisions. But in the discourse model *procedures* of deliberation provide fair or reasonable laws by ‘weaving together pragmatic considerations, compromises, discourses of self-understanding and justice’. The *structure* of such communications is the source of the normative content of the discourse model. It is about the *process* of using reason devoid of liberal universal rights and the republican notion of an ethical substance of the citizenry.³⁷

This process is highly influenced by the status of the individual in discourse theory. As we saw, in the liberal model individuals are dependent on market-like forces, whereas the republican model conceives of the population as a collective. The discourse model features “*higher-level intersubjectivity*”. *Higher-level* in this sense means that discourse transcends the level of shared, unquestioned ethical backgrounds, which does not allow for objective, rational debate. The term *intersubjectivity* reflects the interaction between subjects (citizens), which for Habermas is required in order for every subject to reach a balanced opinion. As Habermas puts it, ‘within and outside the parliamentary complex, these subjectless forms of communication constitute arenas in which a more or less rational opinion- and will-formation can take place’.³⁸

³⁶ Habermas, 5.

³⁷ Habermas, 6.

³⁸ Habermas, 8.

But how does this opinion- and will-formation exactly work? For Habermas, it all begins with informal opinion-formation that over time generates “influence”. This influence can become “communicative power” through elections. Through legislation it can then become “administrative power”. Habermas admits that, like in the liberal model, the state and the public are distinct. Yet he claims that, unlike in the liberal model, ‘civil society provides the social basis of autonomous public spheres’ such that opinion-formation in the discourse model remains free from the market.³⁹ For him, this means a fundamental shift in the balance between three “resources” in society: ‘money, administrative power and solidarity, from which modern societies meet their needs for integration’. This shift has significant normative implications. He argues the binding force of solidarity can no longer rely on communicative action alone and ‘should develop through widely expanded public spheres as well as through legally institutionalized procedures of democratic deliberation and decision making’. Only then can it hold be strong enough to counter ‘the two other mechanisms of social integration – money and administrative power’.⁴⁰

This conceptualization of discourse theory leads Habermas to consider its implications for legitimation. We already saw how the liberal model features a Schumpeterian competition for power, in which periodical voting/will-formation legitimates the use of political power. In the republican model, democratic will-formation actually constitutes public authority. But in the discourse model, ‘the procedures and communicative presuppositions of democratic opinion- and will-formation function as the most important sluices for the discursive rationalization of the decisions of an administration constrained by law and statute’.⁴¹ Hence, *rationalization* is the legitimating force. The public sphere as an ongoing process of monitoring and programming adjusts the deployment of administrative power.

³⁹ Habermas, 8.

⁴⁰ Habermas, 8.

⁴¹ Habermas, 9.

3. What is Norval's critique of the legitimacy of political decisions in Habermas' model?

In the next section, we will examine critiques of the deliberative model by Habermas. In doing so, our focus will be on what critics claim it is in Habermas that undermines the legitimacy of political decisions.⁴² After this, we will consider alternative models of democracy as proposed by Aletta Norval.

3.1 Critiques of legitimacy in the discourse model of democracy

In their critiques of the legitimacy of political decisions according to Habermas, political theorists have focused on concepts like universalization and generalizable interests that are central to discourse theory. Habermas considers universalizability, or the requirement that a moral judgment should draw on universally acceptable rules, to be a condition for the validity of a norm that follows from deliberation. Post-structuralists, however, argue that power relations determine the outcome of deliberation, such that a norm that emerges from deliberation is not necessarily true for all. Claiming it is true neglects the plurality of citizens.

The possibility of generalizable interests is another matter of discussion. Habermas holds that through deliberation we can determine common interests. Again, post-structuralists might argue that the inherent difference between people makes a generalization of interests impossible without it severely harming the interests of minorities. As such, the legitimacy of the outcome of deliberation is disputed.

Following Norval, I will distinguish between three strands of critique of the Habermasian model of discourse theory. The first strand is initially part of the tradition of deliberative democratic theory, but has developed criticism of the idea of deliberative democracy because it claims the conditions of deliberation amount to *elitism*. The second strand subscribes to positions within the tradition of deliberative democratic theory, but criticizes its claim to universality and attempts to strengthen the theory through their criticism. The third and so-called post-structuralist strand criticizes the

⁴² Our examination will be guided by Aletta Norval's outline of some of these critiques in *Aversive Democracy: Inheritance and Originality in the Democratic Tradition* and, if needed, draw on deeper examinations of the theorists mentioned.

model of deliberative democracy as a whole because of its focus on agreement, and attempts to theorize a democratic model with different fundamentals.⁴³

Let us begin with the first, so-called elitist argument. It asserts that theorists of deliberative democracy, in their attempt to deepen democracy, actually display anti-democratic tendencies. On this view, deliberation does not appeal to ordinary citizens. For example, features like rationality, selflessness and universalism do not speak to everyone, since not every citizen has the same capacity for adhering to such conditions of debate. Deliberative democracy may claim universality, but in fact it favors a particular style of argumentation.⁴⁴ Habermas would undoubtedly reply that this preference is for good reason: proper deliberation requires communicative action that is aimed at reaching understanding. Modes of argumentation that do not adhere to conditions like rationality, selflessness and universalism fall under strategic communication and do not contribute to public reasoning. The contrast here is already quite sharp: critics point at practical difficulties for a well-functioning public discourse, while Habermas emphasizes the normative importance of communicative action. But the elitist argument goes further. It claims that taking part in deliberation presumes economic requirements, should guarantee equal opportunity to voice persuasive arguments and requires equality in the capacity to draw supporters for an argument. Some add to this that the emphasis on universality in deliberative theory makes it blind to difference as an ingredient for debate.⁴⁵ The legitimacy of the outcome of deliberation, then, is disputed on grounds that deliberation does not enable every citizen to participate in debate. The focus on universalizability actually entails, these critics would argue, that not everyone is able to take part in deliberation and hence, the validity of an outcome that pretends to reflect common ground is actually questionable.

This leads Norval to discuss the emphasis on democratic agreement and generalizable interests in deliberative theory. Habermas, she notes, takes ‘the type of action aimed at reaching understanding to be fundamental’, ‘other forms of social action – for example, conflict, competition, strategic action in general – are *derivatives* of action oriented to reaching and understanding’.⁴⁶ Agreement, then, is the motivational premise of deliberative democracy. But what is it, Norval asks, that people can agree upon and

⁴³ Aletta J. Norval, *Aversive Democracy: Inheritance and Originality in the Democratic Tradition* (Cambridge: Cambridge University Press, 2007), 24.

⁴⁴ Norval, 25.

⁴⁵ Norval, 25–26.

⁴⁶ Norval, 26–27.

how does coming to an agreement take place? She argues that it cannot come about if people try to reach agreement by pursuing their own interest, for it would require an actual shared interest. She emphasizes that Habermas does not claim interests are a given. One of the functions of public reasoning is learning what is in one's best interest. In other words, as she cites Simone Chambers, deliberation is about finding out which interests we share that can help us to collectively recognize a norm. It is about finding *generalizable interests*.⁴⁷ Norval argues that generalizable interests are characterized by three elements. They concern overlapping, but not necessarily identical interests; the pursuit of interests is not only of a material kind, but also moral and, lastly, generalizable interests 'do not presuppose a set of universally true human needs that we attempt to discover through discourse'. Critical reasoning enables us to determine collective needs. And because they do not presuppose but rather determine universally true human needs, generalizable interests are open to revision.⁴⁸

The problem Norval signals here is that Habermas links generalizable interests to his universalization principle. For him, 'justifiable (universalizable) norms are those norms that incorporate generalizable interests'.⁴⁹ Hence, Norval claims, the validity of norms depends on 'whether they are acceptable in actual argumentation to all those who are potentially affected by them'. For this, Norval argues the process through which generalizable norms are reached is of great importance and, as we shall see, she questions whether Habermas' conception of this process is coherent.

As we have seen in our discussion of Habermas, he attempts to trace the process of reaching generalizable norms by reconstructing political practices in order to identify "existing reason".⁵⁰ We might say that, on Habermas' view, such practices reveal how arguments are settled legitimately. Norval argues there are three types of discourse in Habermas, which are not necessarily linear. The first type features *pragmatic* discourses, in which experts outline programs and their consequences. 'Expert knowledge is fallible, not neutral and uncontested. Actors make decisions on the basis of hypothetically presupposed interests and value preferences'. Their recommendations are therefore relative to the values they presuppose. For Habermas, pragmatic discourse can justify rational choices between alternatives, but discussing values and interests

⁴⁷ Norval, 27.

⁴⁸ Norval, 27–28.

⁴⁹ Norval, 28.

⁵⁰ Norval, 28.

does not take place in this type of discourse. The second type features *ethical-political* discourses. Here, values are discussed, which requires a discourse that goes further than a contest of interests. In such discussions, self-understanding develops and participants 'become aware of deeper consonances of common forms of life'. For Habermas, this stage features an overlap between rational argumentation and historical value orientations of one's community. The third type features *moral* discourses, in which 'contested interests and value orientations are submitted to a universalization test within a constitutional framework of rights'. Habermas argues this requires a discourse in which participants ignore existing norms, in order to be able to develop 'an autonomous will or rational consensus'.⁵¹

However, as we saw earlier, Habermas admits that ethical-political and moral discourses are often not possible. When interests continue to conflict in these discourses, bargaining is needed to reach a compromise. The guidelines for reaching a compromise must still be valid according to discourse theory, in the sense that compromises should be fair, legitimate and should not come about by virtue of power relations. But whereas rational consensus requires participants to agree on arguments *in the same way*, compromise formations leave room for arriving at the same conclusion, albeit for different reasons.⁵²

Norval insists that this room for compromise formation has implications for democratic will formation. Habermas himself locates his theory of democratic process in between what he calls the liberal and the republican tradition. The democratic process in the former is directed at compromise between interests and is based on liberal rights, such as universal and equal suffrage. The process in the latter tradition is based on the ethical-political self-understanding of a community. It requires support of a consensus on the cultural background of citizens. Habermas claims his discourse model shows elements of both traditions, yet lacks a grounding in either human rights or the need for a shared ethics. For him, the structure of communication determines the rules for a discourse that is aimed at reaching understanding. This makes discourse theory normatively stronger than liberal theory, but less demanding than republican theory.⁵³

Norval, however, questions whether it is logically possible to add the possibility of compromise to rational consensus formation and still hold that rational consensus is

⁵¹ Norval, 28–29.

⁵² Norval, 30.

⁵³ Norval, 30–31.

better than compromise. The claim is thus that if the theory of rational consensus requires a supplement, the theory is weakened such that it should be reconsidered. But whereas Chambers and Lynn Sanders have proposed additions to deliberative theory, Norval claims they have not questioned whether these additions render the whole theory incoherent, nor have they examined ‘whether any revision in its status as norm is needed, whether a wider conception of argumentation also necessitates re-engagement with the relation between persuasion and deliberation, and between agreement and deliberation’.⁵⁴ In chapter 4, I will address whether Norval is right to claim that (1) compromise-formation is indeed a supplement to deliberative theory and (2) that such a supplement requires a reconsideration of the whole theory. But let us first explore Norval’s own reconsideration, for she argues that for an adequate assessment of these questions a turn to an alternative model of democracy is required. We will therefore now focus on post-structuralist critiques of Habermas.

The crucial point in Norval’s critique of Habermas seems to lie in the primacy he grants to rational consensus. To examine this primacy further, she shifts her focus to contemporary post-structuralists like Ernesto Laclau and Chantal Mouffe. She argues that whereas post-structuralists and deliberative theorists differ significantly, they both place ‘the political’ at the center of democratic theory; they both focus on how claims are constructed and articulated and they both examine the process of subject-formation. But they differ on three important aspects. Firstly, post-structuralists focus on disagreement and disruptive politics rather than on consensus as a goal. Secondly, they claim power relations are central to politics and thus question the possibility of free deliberation. Thirdly, they argue that ‘ethical and cultural questions’ should be contested rather than removed from debate.⁵⁵

For Norval, the most important feature of post-structuralist thought is its emphasis on what she calls the ‘impossibility of closure of any identity or structure’. She claims that on this view, disagreement is constitutive of modern politics rather than a mere feature of it, as in Habermas. Norval argues that many deliberative theorists would consider an emphasis on disagreement ‘irrational or subjectivist’, but she claims that disagreement is rather at ‘the core of the logic of the political’.⁵⁶ For her, mutual understanding is the very object of political debate rather than a presupposition – as it is

⁵⁴ Norval, 38.

⁵⁵ Norval, 38–39.

⁵⁶ Norval, 39–41.

for Habermas. Even understanding has to be constructed – it is not given. Norval draws on Rancière in this respect, for he claims that if an actor in debate appeals to, say, ‘we proletarians’, this group is not yet formed or existent:

a subject of enunciation creates an apparatus where a subject is named precisely to expose a particular wrong to create a community around a particular dispute. That is to say, there is politics precisely when one reveals as false the evidence that the community exists already and everyone is already included.⁵⁷

Norval claims that this proves that disagreement is constitutive of the political, because even the formation of interest groups is what is discussed in political deliberation. She argues that this entails that disagreement is not something that can simply ‘be overcome in favor of consensus’. ‘It marks the manner in which both argumentation and political subjectivity are understood’.⁵⁸ Norval adds that the problem of *epistemic authority* – who gains the authority to be heard in debate – is also more fundamental than critics sympathetic to deliberative democracy admit. For deliberative democracy presumes equality of participants, yet the process of gaining epistemic authority more often features domination than the balancing of relations.

Norval claims that proponents of deliberative theory will typically argue that its model ‘simply has to be made more inclusive’. But as we have seen, she claims that this rests on a misunderstanding of how the political works. Without more attention for the role of hegemony and power relations in the political, any attempt to overcome disagreement by focusing on generalized and ‘abstract redescriptions of disputes’, blurs the discussion on the very dispute *itself*. Rather, disagreements should be discussed ‘in the very language used to handle actual cases’.⁵⁹ For Norval, an approach to how claims emerge and what makes political decisions legitimate should thus account for the role of hegemony.

Following Laclau and Mouffe, Norval argues that a democratic order is one in which ‘the locus of power’ is an empty place that cannot be occupied, because all hierarchies and social relations are suspended with each election. For Norval, this

⁵⁷ Norval, 42–43.

⁵⁸ Norval, 43.

⁵⁹ Norval, 44.

suspension 'brings to the center stage the struggles to occupy the place of power'.⁶⁰ Accounting for hegemony in this way thus focuses on this struggle rather than on the foundationalist efforts to ground democratic practices in universally valid norms.

Laclau and Mouffe draw on Gramsci in the development of their account of hegemony. For him, it 'involves ethical, moral and political leadership'. But Laclau and Mouffe disagree with Gramsci on the relation of hegemony to Marxist class-domination. They claim that hegemony is a social relation in which 'the unity of a political force' is not determined by class, but by contingent articulations of identity and interests. Norval notes that this focus on contingency (the opposite of necessity) in the articulation of interests has led some to claim that the hegemonic approach is subjectivist and particularistic, i.e. that it offers no standards by which its processes can be evaluated. As we saw earlier, she seeks to avoid particularism. Hence, Norval insists this is not the case. She draws on Laclau, who argues that it is false to draw a dichotomy between universalism and particularism. Hence, she claims that:

Neither a pure logic of universality, nor one of self-enclosed particularity is a possibility here. The articulation of claims to self-determination clearly demonstrates this point, for any specific and particular claim to the right to self-determination must also, of necessity, invoke the universal right to self-determination⁶¹

Now, universal rights are not fixed. Rather, following Laclau, Norval claims that:

the universal has no necessary body and no necessary content; different groups, instead, compete between themselves to temporarily give to their particularisms a function of universal representation.⁶²

Norval claims this non-foundationalist account of hegemonic politics demands a new account of how claims become generalized and decisions become legitimate. As we saw, claims become universalized through contingent articulation and political struggle. This

⁶⁰ Norval, 45–46.

⁶¹ Norval, 47.

⁶² Norval, 47.

struggle resembles a Schumpeterian competition for power, but Norval argues that claims should transcend the particular interests of the group that articulates them.⁶³

This universality reflects more than just the existing power relations, Norval argues. She claims that 'the universalization of demands arising from a struggle for hegemony must transcend the specific demands and interests of a particular group'.⁶⁴ She draws this requirement from Gramsci, who claims that for a demand to become universalized, it should extend beyond the interests of the group articulating it. For Norval, universalization in the Gramscian sense even includes standards for the evaluation of political practices, which however cannot be specified without taking the context into account. But pushing through demands without considering the interests of other groups and without trying to combine them with the self-interest is merely imposing the demands of a group onto weaker groups. As Norval puts it following Gramsci, only when the working class 'takes into account the interests of other social classes and finds ways of combining them with its own interests' it can become hegemonic. Hence, Norval claims, universalization requires demands to be specific in the sense that they are based on the real experiences of groups, but also 'marked by something transcending that particularity' in order for them to be able to function as hegemonic by temporarily providing the 'horizon in which more generalized demands may become inscribed'.⁶⁵ As such, hegemonization features context-specific and transcendental elements.

With this, Norval claims to have found a model of the universalization of demands that is better equipped to bridge the gap between the theory and practice, i.e. better accounts for actual practices of decision-making. However, she concedes that her hegemonic approach does not yet succeed at connecting universalization and actual democratic agreement. She claims that in Habermas' model, democratic agreement is a core feature. But she argues that in the hegemonic approach, agreement can never be presupposed and should therefore be constructed. For Norval, there can be no 'internal relation between universalization and democratic agreement'.⁶⁶

Norval argues this constitutes a democratic deficit in the hegemonic approach to democracy. In order to solve this, she turns to Laclau's radicalization of the hegemonic

⁶³ Norval, 48.

⁶⁴ Norval, 48.

⁶⁵ Norval, 49.

⁶⁶ Norval, 50–51.

model of relations. As we saw earlier, Laclau conceives the universal as something that can be temporarily occupied by a hegemonic idea. For him, this idea takes the form of an *empty signifier*. That is, a term that is used in democratic argumentation and which, in the context of the argument, signifies a certain concept. The term ‘solidarity’, for example, can signify the duty or willingness to help disabled fellow citizens when articulated in the context of a welfare debate. When articulated in the context of helping an attacked nation, however, ‘solidarity’ means something else. Laclau’s claim here is that any articulation is contingent, that is, not necessarily (universally) true. It depends on the context. For him, this contingency is not a mere empirical observation of how argumentation takes place. Rather, it is inscribed in the nature of argumentation itself. It is an *ontological* feature. This goes against Habermas’ notion that through critical reasoning, we can reach a specific understanding that lays claim to rational necessity. The question for Laclau is where the ‘ambiguity’ of articulations is located. It could be located in the signifier (solidarity) or in the discourse in which it is articulated (welfare debate or military cooperation). Ambiguity could also spring from how discussions proceed (empirical) or from the nature of discussions itself (ontological). Laclau therefore argues that a hegemonic approach to democracy should take this contingency into account. It should consider the struggle over particular terms and between particular projects, as well as ‘acknowledge the ontological contingency to which all terms, projects and identities are exposed’.⁶⁷ The consequence of this contingency, for Laclau, is that everything is, in principle, open to rearticulation. Contra Habermas, it is principally impossible to obtain final closure, rather than merely difficult because of empirical human limitations.

Norval proceeds to ask what the penetration of contingency in political projects means for democracy and democratic agreement. She claims that Habermas’ ‘work on the possibility of democratic agreement is informed by the thesis of a movement towards post-conventional morality’.⁶⁸ She claims that this teleological logic, i.e. directed at a goal, is impossible if you follow Laclau’s analysis. It is precisely the focus on

⁶⁷ Norval, 52.

⁶⁸ Norval, 52. Post-conventional morality ‘identifies the ethical reasoning of moral actors who make decisions based on rights, values, duties, or principles that are (or could be) universalizable. This means that the principles are separable from the authorities or persons who hold them, they are open for debate and generally agreeable to individuals who seek to live in a fair and just society, and they withstand the test of comprehensiveness’. See https://link.springer.com/referenceworkentry/10.1007%2F978-0-387-79061-9_220.

hegemony and contingency that makes it impossible for Laclau, and indeed Norval, to conceive of democracy as developing in a fixed direction. But she argues this is where Laclau and Mouffe halt, not giving the required attention to 'the nature of decisions and argumentation, as well as the character of subjectivity in a democratic context'.⁶⁹

Norval's own conception of democracy seeks to do precisely this. She claims that the post-structuralist model of democracy is better suited to understand 'the actual processes of decision-making' and, moreover, uses a broader conception of argumentation than Habermas. Norval argues that Habermas' conception of deliberation as one form of argument is too narrow, for the restrictions that the deliberative model places on argumentation by means of ideal speech theory, do not give the appropriate attention to the rhetoric that is so central to convincing others. As we saw earlier, simply supplementing deliberative theory with bargaining for compromise, while maintaining the primacy of deliberation towards consensus, is problematic for Norval because she claims that if the deliberative model needs supplementation, it is incoherent. Rather, Norval claims that the role rhetoric in argumentation should be accounted for in the core of any democratic theory.⁷⁰

That is not to say that Norval agrees with the post-structuralist model of democracy by Laclau and Mouffe. She claims its emphasis on disagreement as a constitutive feature of the social and the political has left the institutionalization of democratic practices underdeveloped. Norval argues this is the case because post-structuralist theory has focused too much on the *theory* of disagreement as constitutive (i.e., on the *ontological* level), rather than on developing 'a deconstructive account of the [*actual*] relation between agreement and disagreement at an *ontic* level'.⁷¹ It is this weak point that Norval seeks to address through an emphasis on 'actual practices of the institution and maintenance of democratic forms'.⁷²

⁶⁹ Norval, 53.

⁷⁰ Norval, 54.

⁷¹ Norval, 54. [*actual*] and emphasis on *ontic* added by author.

⁷² Norval, 55.

4. Does Habermas' model produce illegitimate outcomes?

In order to assess the three lines of critique of Habermas' deliberative democratic model that Norval distinguishes, I will proceed to discuss each of them. In doing so, I will consider what Habermas' response would be; giving special attention to the third or postmodern line of critique that is so essential to Norval.

4.1 Elitism

The first argument against the deliberative model is the elitist argument. It roughly contains five elements: (1) rationality does not appeal to all citizens, (2) deliberation favors a particular style of argumentation, (3) participation in deliberation presumes economic requirements and (4) requires equal ability to voice persuasive arguments and (5) the emphasis on universality makes deliberation blind to difference.

The claim (1) that rationality does not appeal to all citizens certainly seems true. This is implied by Habermas in his conception of the emergence of a rational-critical *bourgeois* public sphere that was very much specific to the bourgeois classes and was indeed exclusive. The fact that Habermas argues that this public sphere *emerged* implies that the classes participating in them were drawn to rationality and discussion as a means of debate, whereas other classes were not. For Habermas, however, the question of whether rationality appeals to all citizens is irrelevant for the legitimacy of decisions. We must not forget that Habermas' model is strongly procedural. He argues that legitimate decisions can only come about if they are supported by arguments that all affected could accept. Hence, for Habermas, the process of rational-critical debate is a requirement of legitimate decision-making. Whether this appeals to all is not important to him. Having said that, the claim that rationality does not appeal to all citizens implies that there are other things that do appeal to this group and that should not be discarded. Feelings and emotions are the obvious candidates here. So what does Habermas think of their role? Again, we must remember here that political decisions become legitimate for Habermas if they are made through a process of giving reasons. For him, claims and beliefs only become rational and therefore a possible force in decision-making if they can be supported by reasons in front of others. If, for example, I strongly feel that every citizen should read newspaper *Trouw*, I have to be able to defend this claim with reasons, or else Habermas argues it will not (on the basis of his conception of rational-

critical debate in the emerging public sphere) and indeed should not (on the basis of the normative implications he draws from how arguments are settled) gain any force as a claim. If I feel that my country should have a very open or very closed immigration policy, I should likewise come up with reasons to support my claim such that others can understand and test them.

In other words, the question of whether everyone is drawn to rationality is irrelevant to Habermas. For him, having a discussion with someone creates the moral obligation to give reasons for your claims. If you don't, you will either be unsuccessful in persuading someone for your claims, or you will convince them not through reason but through coercion.

The question remains whether this is problematic. Are non-rational arguments illegitimately discarded from decision-making? This is related to the other arguments against the deliberative model, which I will now proceed to discuss. The claim (2) that deliberation favors a particular style of argumentation is an understatement for Habermas. Not only does it favor a particular style, Habermas claims that deliberation only produces legitimate outcomes when reasons are given unless bargaining is needed. But even then, agreement on the procedure of bargaining is required. That deliberation favors a particular style of argumentation is thus certainly true for Habermas, but he does not regard this as problematic because he claims that deliberation and in fact personal conversation or debate requires giving reasons in order to produce legitimate outcomes.

This brings us to the third element of the elitist argument, that (3) participation in deliberation presumes economic requirements. This argument can be understood in two ways. An economic requirement might be actual economic boundaries to participating in the public sphere and gaining influence. At the time of the bourgeois public sphere that Habermas describes, these requirements were certainly real. Over time, economic and indeed gender, racial or property requirements disappeared. But, and this is the other economic requirement, are there still economic boundaries to participating in deliberation? For example, is it problematic if someone cannot afford the time needed to participate in deliberation? Is equality of resources required for equal access to deliberation?

Norval mentions Nancy Fraser in this respect. Fraser argues that it is not enough to simply conclude that the public sphere is formally inclusive. We should further

examine the informal boundaries of participation. She reminds us of Habermas' claim that inequalities between participants in the bourgeois public sphere should be bracketed or negated. But is this really possible, Fraser asks?⁷³

Within the framework of Habermas' public sphere theory, Fraser claims this is impossible. For her, this would assume that the public sphere can function without being influenced by any personal characteristics. But she argues this assumption is unrealistic because societies in fact develop complex cultures and groups, which are more or less influential according to their size. This causes marginalization of less influential cultures, for which Fraser claims hegemonic habits are already enough. This resonates in the modern media landscape, in which media outlets compete for sales. Inevitably, media will try to serve larger cultures. Smaller groups, Fraser claims, therefore don't have 'equal access to the material means of equal participation'.⁷⁴ Rather than bracketing social inequalities, Fraser argues that they should be eliminated in order to ensure the equal ability to participate.⁷⁵

How would Habermas respond to this critique? Fraser emphasizes that within public sphere theory, the assumption of an inclusive and equal public sphere is incongruent with the reality of modern day societies. She concedes, however, that Habermas later developed communicative ethics that require social inequalities to be addressed explicitly.⁷⁶ This is exactly the point that Habermas would bring to the fore: social inequalities should not be eliminated, they should be addressed publicly. In *Between Facts and Norms*, Habermas indeed goes even further by claiming that the equal opportunity to gain influence is a lawlike principle of the public sphere.⁷⁷ In order to understand this, it is important that we remember how Habermas' conceptualizes *influence*. For him, informal opinion-formation (e.g. conversations we have on a daily basis) generates influence over time when arguments gain support. This generates social power, which becomes political power through elections. Habermas argues that although well-organized interest groups can capitalize on social power, this social power is always exerted *through* the public sphere. Hence, social power is only converted into

⁷³ Nancy Fraser, "Rethinking the Public Sphere: A Contribution to a Critique of Actually Existing Democracy," in *Habermas and the Public Sphere*, ed. Craig Calhoun, Studies in Contemporary German Social Thought (Cambridge, MA: MIT Press, 1992), 120.

⁷⁴ Fraser, 120.

⁷⁵ Fraser, 121.

⁷⁶ Fraser, 120.

⁷⁷ Habermas, *Between Facts and Norms*, 346.

political power to the extent with which it is able to draw public support. Bargaining tactics that can be applied behind closed doors will not work in public, Habermas claims. Once more, publicity is thus the essential feature of the public sphere. Habermas trusts that a public opinion that receives attention only by virtue of a well-organized, uncanceled funded campaign loses its credibility as soon as its background is revealed.⁷⁸

There are two obvious objections to this argument by Habermas. First, that public opinion cannot be bought or blackmailed becomes ever more doubtful in the Internet era. Huge amounts of personal information can nowadays be gathered in order to exploit deeply personal fears and feelings. Moreover, it is increasingly difficult to trace the source of opinions. Online news can be as influential as opaque. This has serious consequences for the ability of the public sphere to scrutinize utterances. In fact, it imperils the concept of publicity itself, for if the source of news is unclear, nobody can be held accountable. Second, even if we assume that public opinion cannot be bought or blackmailed, there is a discrepancy between the equal participation in the public sphere that Fraser requires and the sort that Habermas offers. Fraser worries that minorities are not as able to voice their arguments as larger groups are. Habermas insists that (proper) deliberation ensures everyone is heard.

So in whose favor should we settle this argument? Let us include the next point of critique in our consideration, that (4) deliberation requires the equal ability to voice persuasive arguments. This not only concerns material requirements, but also rhetorical ability and a discourse free from bias towards speakers on grounds like race, gender or sexual preference. Fraser claims that 'in stratified societies, unequally empowered social groups tend to develop unequally valued cultural styles'.⁷⁹ Hence, her argument goes, deliberation is never neutral. It features 'informal pressures' that favor the dominant class or dominant ideas, even if the formal boundaries for participation have disappeared. For Fraser, democracy thus requires 'substantive social equality' if it is to truly empower the public in its self-determination.

Yet this claim rests on a misguided reading of what Habermas means by participation and how an actual public opinion is formed. For him, the success of this process is not determined by social equality prior to entering in discussion in the public sphere. Rather, Habermas argues that the *quality* of public opinion and the legitimacy of

⁷⁸ Habermas, 363–64.

⁷⁹ Fraser, "Rethinking the Public Sphere: A Contribution to a Critique of Actually Existing Democracy," 120.

its influence on political decisions can be measured by the degree to which all opinions have been included. It is 'the formal criteria governing how a qualified public opinion comes about' that determine the success of public communication.⁸⁰

In other words, Habermas does not discard questions of voice and inclusiveness as irrelevant. On the contrary, he considers these aspects as vital measures for the quality of public opinion, for they influence the degree to which arguments have been discussed publicly and exhaustively. If certain marginalized opinions have not been discussed in forming a public opinion, the influence this opinion has on the political process of decision-making becomes less legitimate to the same degree. The difference between Habermas and Fraser then is that Habermas incorporates questions of voice and the equal ability to participate in his theory as a measure of legitimacy, whereas Fraser questions the entire conception of the public sphere on the claim that it leaves out marginalized cultures. I submit that insofar the attention given to the inclusion of marginal groups by Habermas and Fraser diverges, the deliberative model by Habermas is better at actually laying bear the legitimacy of a public opinion for two reasons. First, it deals with illegitimate influence within a system that ensures legal rights for minorities and second, it accords the necessary attention to the role of power structures that may influence public opinion, such that a society becomes aware of these structures and is able to judge them. As Habermas puts it, laying bear the sources and motives of influence is the best way to judge whether we agree with this influence or whether we discard it, thus stripping it of its credibility.

For Habermas, a fair system of decision-making does not depend on social or economic equality. It depends on the fairness of the system of decision-making. That is, in terms of the public sphere, the degree to which an opinion has been discussed publicly and exhaustively. This public opinion then translates to the political process of actual decision-making.

With this conclusion, we are able to answer the last element of the elitist argument as well. It claims that (5) the emphasis on universality makes deliberation blind to difference. This claim rests on a familiar critique of Habermas' public sphere theory, that a focus on reaching agreements in terms that everyone could accept effectively favors hegemonic ideas and thus suppresses different views of the good life. Now, this critique has led to two proposals in political theory. The first is to strengthen

⁸⁰ Habermas, *Between Facts and Norms*, 362.

Habermas' public sphere theory such that it accommodates the reality of difference. The second is to conclude that Habermas' model is wholly inadequate at conceptualizing the public sphere and as such, a new conception of the public sphere must be developed – one that embeds contestation instead of consensus seeking. The first of these possible consequences I will answer at this stage, the second I will attend to when discussing Norval's alternative model of the public sphere.

Habermas' public sphere theory should not be altered on grounds that it fails to accommodate difference sufficiently because of its focus on universality. Firstly, it is important to remember that Habermas' account of public communication has come about through his examination of actual communicative practices. This means that his theory is more empirical than it is normative. Any critique of the place of difference in Habermas' conception of the public sphere must therefore challenge his reconstruction of communicative practices, rather than challenge his model as if it was designed as an idealistic, normative model. But, secondly, even if we ignore this theoretical misconception, we can still argue that the reconstructive model of the public sphere accommodates difference, even *thanks to* its focus on universality. As we have seen, the quality of public opinion depends on the extent to which every opinion has been discussed exhaustively. If a lack of discussion on any topic becomes apparent, it has repercussions for the quality of its resulting public opinion. Public opinion will be revised accordingly. As such, deliberation contains the principle of the revision of public opinion according to new views. As Rehg and Bohman argue, universality and the process of revision enhance the inclusivity of the public sphere, for its condition of exhaustive discussion forces participants to consider all views.⁸¹

This actually grants the concept of universality, contra many of Habermas' critics, a *pluralistic* character. For it is above all the requirement of open discussion and giving reasons that are not obviously unreasonable. This still leaves room for disagreement, but it takes away the possibility of claiming that a public opinion cannot be argued for. If public opinion has been discussed exhaustively such that its quality is high, I might still disagree with it, but I will not be able to claim that it cannot be argued for. Hence, the supposed singular character of a universalized claim actually contains pluralistic considerations.

⁸¹ William Rehg and James Bohman, "Discourse and Democracy: The Formal and Informal Bases of Legitimacy in Habermas' Faktizität Und Geltung," *Journal of Political Philosophy* 4, no. 1 (March 1, 1996): 96–97, <https://doi.org/10.1111/j.1467-9760.1996.tb00043.x>.

4.2 The loyal critics

Let us move on to the second line of critique that Norval distinguishes. This is a line taken by critics she considers loyal to Habermas' model, because it attempts to strengthen the theory from an internal position. It questions the requirement present in Habermas, that 'the consensus brought about through argument must rest on identical reasons able to convince the parties *in the same way*'⁸². As we have seen earlier, Habermas admits that such consensus is not always possible. If consensus can't be reached, bargaining must take place, albeit that the rules of this bargaining must themselves be legitimated by consensus.

But as we have seen, Norval questions whether it is possible to add the possibility of bargaining to discourse theory, as Habermas and his sympathizers have done, and 'retain the absolute primacy of rational consensus over compromise formations'.⁸³ She claims this isn't possible, because including bargaining as a means of actual decision-making is incompatible with the ideal conditions of deliberation that Habermas has theorized.⁸⁴ It is this conclusion that leads her to take a postmodern approach to democratic theory.⁸⁵

So is it true that the addition of compromise formation to Habermas' deliberative model weakens the theory such that it must be revised entirely? In order to answer this question, the concept of generalizable interests is important. For Norval, universalization in democratic theory is either conceived of as the process of 'the generalization of norms, or as resulting from the hegemonization of demands'.⁸⁶ The former is the approach taken by deliberative theorists; the latter is the postmodern approach. Now, Norval claims that if rational deliberation doesn't lead to consensus, Habermas considers there to be a lack of generalizable interests. Universalization must then be reached through compromise. But Norval claims this undermines the primacy Habermas grants to consensus. For, 'even though achieving consensus is not conceived of as the aim of all social interaction, there is no disputing in the fact that the model of deliberative democracy does indeed privilege consensus over dissensus'.⁸⁷

⁸² Habermas, *Between Facts and Norms*, 339.

⁸³ Norval, *Aversive Democracy*, 32.

⁸⁴ Norval, 20.

⁸⁵ Norval, 38.

⁸⁶ Norval, 19.

⁸⁷ Norval, 34.

But the claim that the need for an addition to the deliberative model of Habermas ‘calls for a reconsideration of the original model’⁸⁸ rests on a misinterpretation of the process and the purpose of compromise-formation, Habermas would argue. Firstly, the possibility of bargaining does not weaken the discourse model because it needs this model to produce fair agreements. As we saw, discovering generalizable interests through discourse leads to consensus. If generalizable interests can’t be found, this means that there are only particular interests in relation to the issue at hand, that is, interests and value-orientations that (continue to) conflict. But for Habermas, testing whether interests are generalizable or not can only take place in moral discourses, to which the discourse principle applies. Habermas would thus claim that compromise-formation or bargaining is indirectly yet decisively subjected to the discourse principle, for it draws on this principle for distinguishing interests and, consequently, for determining if bargaining can and should take place.⁸⁹ Moreover, as Norval conceded, the rules of bargaining must also be legitimated through discourse in order to make *fair* agreements a possibility.

Secondly, Habermas would argue that the possibility of bargaining is not an *addition* to the discourse model. Norval claims that logically, adding something to a model should lead to questioning the original model. But Habermas considers bargaining to be an integral part of the process of reaching legitimate decisions. He is well aware that in real situations participants in discourse can’t always agree on interests in the same way. Of course, decision-making based on discourse is preferred by Habermas, but that does not mean that bargaining that is procedurally regulated can’t contribute to legitimate decisions.

That is not to say that a focus on universalization is not problematic. But the focus on universalization in Habermas is not *as* strong as his critics would like us to believe. His conception of bargaining illustrates this. For Habermas, the purpose of bargaining is being able to introduce laws even if interests and values (continue to) conflict. The deliberative model is not simply directed at ensuring the ethical validity of laws. Its purpose is rather to ensure that particular interests are discussed ‘in a manner compatible with the common good’ and to ensure that particular cultures take

⁸⁸ Norval, 32.

⁸⁹ Habermas, *Between Facts and Norms*, 166–67.

‘universalistic principles of justice’ into account.⁹⁰ This is indeed an account of the deliberative model that is weaker than the simple claim that decisions are legitimate only when all participants agree on them in the same way, but Habermas’ entire model of deliberation is indeed more nuanced than his critics like to assert. My contention is that we should understand the process of bargaining in similar fashion to my earlier reading of the exhaustive discussion of interests, which stated that it is the *degree* to which interests have been discussed exhaustively that determines the legitimacy of political decisions. The assessment of the validity claim of bargaining on laws is qualitative as well. In addition to securing the consideration of universal norms in bargaining, it serves as a guideline for empirical enquiry into its legitimacy.

4.3 The post-structuralist critique

Let us move on to the third and post-structuralist line of critique that Norval mentions. As we saw in our outline of Norval, the post-structuralist conception of decision-making differs with the deliberative model on three important aspects. Firstly, the post-structuralist approach focuses on disagreement rather than on consensus. Secondly, it places great emphasis on the role of power relations in politics instead of devising a framework that attempts to neutralize the political of such relations. Lastly, it purports that ethical and cultural questions should be contested instead of removed from debate.

As we saw earlier, the first difference, that the emphasis should be on disagreement rather than consensus, is supported by the claim that it is impossible to reach final closure on any identity or structure. As such, the argument goes, the process of reaching consensus by abstracting disputes and discussing them publicly and rationally is not what is central to politics. Rather, disagreement, the formation of interest groups and the struggle to occupy the place of power is constitutive of politics. How would Habermas respond to the claim that disagreement should be central?

The insistence on disagreement indicates that Norval and the post-structuralist theorists she cites fear that deliberation’s depiction of consensus as a goal misconceives what the most important aspects of politics are. However, for Habermas an orientation towards consensus does not mean that agreement is the goal of discourse. It merely describes the willingness to provide reasons for one’s claims and the rejection of

⁹⁰ Habermas, 283.

coercive decisions. Some theorists would object to this that citizens are not consensus-oriented and that its role in deliberation is therefore questionable. But if we interpret consensus-orientation as the mere willingness to provide reasons and the rejection of coercion, then to claim that citizens are not consensus-oriented would pertain that they will refuse to provide reasons for their claims and that they accept coercion. As much as post-structuralists detect disagreement, a general refusal to provide reasons and acceptance of coercion will not be among their assertions of real politics. Moreover, as Patchen Markell notes, Habermas theorized the idea of an orientation towards consensus in order to contrast it with an orientation towards *success*.⁹¹ This latter orientation is part of strategic communication, which Habermas considers coercive. Now, since for Habermas the only legitimate consensus can come from a discourse in which reasons are given and that is free from coercion, being oriented towards consensus rather than success is much more about the process towards than the goal of consensus. Hence, *discussion* is what is central to deliberation, not consensus.

The second difference between Habermas and the post-structuralist theorists is what place power relations have in their theories. Norval claims it is a fundamental difference, since it reflects different takes on universalization. As we have seen, Habermas claims that universalization takes place through finding generalizable interests. For Norval, it is the hegemonization of demands that leads to universalization. But does Norval's emphasis on power and hegemony really constitute an entirely different take on universalization?

Norval herself admits that hegemonic universalization may lead to similar 'commonalities' as compromise-formations would. However, she insists that unlike compromises, commonalities reached through hegemonization are not 'second-best alternatives'.⁹² Now, we have already seen that compromise-formations are an essential element of democracy for Habermas. Of course, his model favors consensus-formation in the sense that it favors the communicative action featured in discourse over the strategic action that joins it in compromise-formation. But that doesn't mean Habermas prefers consensus over compromise in a *normative* sense, for the orientation towards agreement is a fact that he has derived from his reconstruction of communicative structures in the public sphere. If any preference for consensus exists, it is descriptive

⁹¹ Patchen Markell, "Contesting Consensus: Rereading Habermas on the Public Sphere," *Constellations* 3, no. 3 (January 1, 1997): 390, <https://doi.org/10.1111/j.1467-8675.1997.tb00066.x>.

⁹² Norval, *Aversive Democracy*, 50.

rather than normative. Of course, these descriptions of practices of argumentation are used when we switch to the normative perspective of assessing to what extent issues have been discussed exhaustively and, as such, to which degree the influence of the public sphere on political decision-making is legitimate.⁹³ But that does not render compromise second best.

How people engage in discussion is thus the basis of justification in the discourse model. Habermas claims that, although this is a rather thin basis, the corresponding neutrality with respect to content of the discourse model allows it to be open to pluralistic worldviews.⁹⁴ Hence, Norval's claim that the discourse model accords little attention towards ensuring the mitigation of the influence of power structures is true. It only enables us to determine if a public opinion is formed through a discourse that was power-ridden and therefore did not feature exhaustive and fruitful debate. As such, the neutrality towards content of the discourse model is a major strength in the sense that its descriptive genesis is void of normative imperatives. This opens it to pluralism. But it is problematic if we take into account the undisputed problem of power relations, since our only response from within the discourse model can be one of emphasizing the need for procedural rules that compensate for the role of power in decision-making, as Habermas has indeed insisted on.

This brings us to the last difference between Habermas and post-structuralist theorists, that ethical and cultural questions should be contested instead of removed from debate. This assertion is directed against Habermas' principle of *neutrality* in the public sphere. It holds that discussion in the public sphere must in principle be impartial in the sense that conceptions of the good life have no place in it. This ensures the existence of a private sphere in which citizens are free to act according to their conception of the good life. That is not to say, however, that Habermas would argue that ethical and cultural questions should be removed from debate, as Norval implies. Habermas would rather reply that neutrality does not entail that private matters are not to be discussed in public. The boundary between the public and the private sphere is in each case an object of public debate that is open to scrutiny.

But more importantly, the claim that ethical questions should not be removed from debate again rests on a misconception of the nature of Habermas' argumentative

⁹³ Habermas, *Between Facts and Norms*, 362.

⁹⁴ Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran P. Cronin and Pablo De Greiff, Reprint edition (Cambridge: The MIT Press, 2000), 41.

rules. Habermas does not bring neutrality to bear because of some normative preference, but because it results from his reconstruction of the process of argumentation. In fact, that reconstruction and the norms he derives from it are themselves open to scrutiny. If a new empirical study were to explain the process of argumentation more convincingly, Habermas would be keen to accept it.

Yes, the role of power relations is real and should be addressed. And yes, pluralistic views have a place in debate. In fact, for a well-functioning public sphere Habermas encourages minorities to speak out.⁹⁵ But the core of deliberative theory simply provides an account of the basic rules that govern how arguments become accepted. Not as something to strive for, but as an empirical account of argumentation. Hence, Norval's claim that ethical questions should be contested instead of removed from debate is misguided because it is made from the outside perspective of post-structuralism, in which insufficient weight is attributed to the reconstructive nature of Habermas' model and in which his principle of neutrality is stretched as a normative goal.

⁹⁵ See for example Habermas, *The Inclusion of the Other: Studies in Political Theory*, 211.

5. Conclusion

The deliberative model as developed by Habermas does not produce illegitimate outcomes in the sense that Norval purports. Firstly, the elitist argument fails because it either misconceives the reconstructive core of deliberative theory or it underestimates the ability of the public sphere to accommodate difference. The aspects of revision in deliberation ensure that universalized claims come about through pluralistic discussion.

Secondly, Norval's argument that the need for compromise-formation weakens the deliberative model such that it should be reconsidered as a whole, fails as well, because bargaining depends on that same discourse model in order to produce fair agreements. If generalizable interests can't be found, this means that there are only (conflicting) particular interests in relation to the issue at hand. But for Habermas, testing whether interests are generalizable or not can only take place in moral discourses, to which the discourse principle applies. Compromise-formation is thus indirectly yet decisively subjected to the discourse principle, for it draws on this principle for distinguishing interests. Moreover, Habermas considers bargaining to be an integral part of the process of reaching legitimate decisions, no mere addition. I argue that we can use the rules of bargaining to determine the *degree* to which interests have been discussed exhaustively and, as such, determine the legitimacy of political decisions.

Lastly, the post-structuralist critique fails as well. For Habermas, an orientation towards consensus does not mean that agreement is the goal of discourse, as Norval claims. Discussion, not consensus, is what is central to deliberation, because the former is connected to communicative action and the latter to strategic action. Furthermore, the principle of neutrality does not preclude differences from being discussed. It is not a normative principle, but rather a result from the reconstruction of actual practices of argumentation.

All this is not to say that the role of power relations should be neglected. The struggle for recognition can be hard, which is why democracies should constantly reassess the strength of its capabilities to fend off strategic communicators.

6. Bibliography

Bernstein, Richard J. "The Normative Core of the Public Sphere." *Political Theory* 40, no. 6 (2012): 767–778.

Fraser, Nancy. "Rethinking the Public Sphere: A Contribution to a Critique of Actually Existing Democracy." In *Habermas and the Public Sphere*, edited by Craig Calhoun, 109–42. Studies in Contemporary German Social Thought. Cambridge, MA: MIT Press, 1992.

Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Studies in Contemporary German Social Thought. Cambridge, MA: MIT Press, 1996.

———. *The Inclusion of the Other: Studies in Political Theory*. Edited by Ciaran P. Cronin and Pablo De Greiff. Reprint edition. Cambridge: The MIT Press, 2000.

———. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Sixth Printing edition. Cambridge, MA: MIT Press, 1991.

———. "Three Normative Models of Democracy." *Constellations* 1, no. 1 (1994): 1–10.

Markell, Patchen. "Contesting Consensus: Rereading Habermas on the Public Sphere." *Constellations* 3, no. 3 (January 1, 1997): 377–400. <https://doi.org/10.1111/j.1467-8675.1997.tb00066.x>.

Norval, Aletta J. *Aversive Democracy: Inheritance and Originality in the Democratic Tradition*. Cambridge: Cambridge University Press, 2007.

Rehg, William, and James Bohman. "Discourse and Democracy: The Formal and Informal Bases of Legitimacy in Habermas' Faktizität Und Geltung." *Journal of Political Philosophy* 4, no. 1 (March 1, 1996): 79–99. <https://doi.org/10.1111/j.1467-9760.1996.tb00043.x>.