LEIDEN UNIVERSITY

A Critical Assessment of Habermas's View on the Tension between the Rule of Law and Popular Sovereignty

R.N. van der Velde

7/31/2020

s1387677

Master Thesis

Philosophy of Law (120 EC)

Leiden University

July 2020

Supervisor: Dr. Thomas Fossen

Table of Contents

1. Introduction

1.1. Liberal democracy

Liberal democracy currently constitutes the predominant political regime for most western (European) states.[1] The Oxford English Dictionary defines liberal democracy as '(The advocacy of) a democratic system of representative government in which individual rights and civil liberties are officially recognized and protected, and the exercise of political power is limited by the rule of law'.[2]

Recently, the preference for this type of governance has been underlined by Dutch political life. In 2018, the Dutch Senate (or 'Eerste Kamer') accepted an amendment to the Dutch Constitution, which aims to introduce a preamble to the Dutch constitution that states that 'the constitution guarantees fundamental rights and the democratic rule of law' (translation RV).[3] The Dutch Council of State also considers liberal democracy to be of great value. In the consideration that is included with its annual report over 2019, the following is considered (translation RV, emphasis added):

> The rule of law and democracy serve different purposes. The rule of law forces the government to comply with substantive and procedural conditions in their governmental decisions and actions. Democracy, on the other hand, legitimates and gives space to the parliament to decide. **In the Dutch system, the rule of law and democracy are inextricably linked**.[4]

Whilst the Dutch government and Council of State seem to presuppose a seamless connection between the rule of law and democracy, these previous statements harbour a great deal of possible questions for philosophers. The question whether the rule of law and democracy can be unified in the concept of liberal democracy so that one does not take precedence over the other, is and has been a lively topic of debate in legal and political philosophy.

1.2. Habermas's theory of co-originality

The presumption that the rule of law and popular sovereignty *cannot* be sufficiently unified in the framework of liberal democracy leads philosophers to claim that an 'inherent tension' exists between these two concepts.[5] But what does this tension consist of, exactly?

On the one hand, liberal democracies are committed to upholding individual rights, such as the right of free speech, the freedom of religion and the right to enjoy the use of your property. These

[1] The Economist Intelligence Unit, 25
[2] Oxford English Dictionary online
[3] Proposal of Law 2018
[4] Council of State 2020, 13
[5] Green 2015, 199

rights act as boundaries which can limit democracies in their ability to make decisions. This is problematic because, on the other hand, liberal democracies are also committed to upholding the procedure of popular sovereignty, or democracy. This procedure guarantees the legitimacy of law because it makes sure the law issues from a collective decision of all the citizens of a society.[6] The problem is that there does not seem to be 'room' in the concept of liberal democracy to guarantee both the rule of law and popular democracy. Individual rights can impose limits on what the collective citizenry can decide. Democracy, on the other hand, can impose limits on the exercise of citizens' individual rights.

These two aspects of liberal democracy are also represented in two political traditions: liberalism emphasizes the importance of individual rights, and republicanism emphasizes the rights of citizens to take part in democratic participation.[7]

Jürgen Habermas, one of the most influential philosophers of our time,[8] has proposed an answer to the problem of the inherent tension in his 1992 book *Between Facts and Norms*. He argues that by introducing a procedure that creates legitimate law, he can understand the relationship between the concepts of the rule of law and popular sovereignty in such a way that they become co-original and that they will presuppose one another. This means that the two concepts should not be understood as each other's constraints, but as equally necessary in order to make each other possible. This reciprocal relationship makes that one concept does not take precedence over the other: they are equally important. If this solution is plausible, this would mean that we can actually, like the Dutch government and the Council of State do, presuppose a seamless connection between the rule of law and democracy.

1.3. Research question, approach and argument outline

The aim of this thesis is to discuss Habermas's view on the tension between the rule of law and popular sovereignty, and to critically assess whether his theory that claims to reconcile this tension is coherent and convincing. The research question of this thesis is the following:

> What is Habermas's solution to the inherent tension between the rule of law and popular sovereignty, and is this solution coherent and convincing?

This question will be answered in the three following chapters.

The aim of the second chapter of this thesis is to present an overview of the different dichotomies that Habermas distinguishes in his theory, with a special focus on the tension between the

[6] Green 2015, 199
[7] Habermas 2001, 766-767
[8] SEP Jürgen Habermas, introduction

rule of law and popular sovereignty. After that, chapter two will provide a historical overview of how Rousseau and Kant perceived the tension between popular sovereignty and the rule of law. By discussing the ideas of these two philosophers, this chapter introduces the general discussion, and shows what exactly this inherent tension consists of.

The aim of the third chapter is to explain and interpret Habermas's view on the inherent tension between the rule of law and popular sovereignty in detail. However, since Habermas's theory builds on his previous philosophical ideas, it is necessary to explain these first. Therefore, this chapter starts with a quick introduction to Habermas's theory of communicative action (section 3.2.). Next, Habermas's view on the tension between facticity and validity is presented (section 3.3.). Section 3.4. will explain Habermas's idea that if one adopts a proceduralist understanding of law, the rule of law and popular sovereignty actually presuppose one another. If law can both protect the rights of the individual citizen, as well as satisfy the needs of the popular sovereignty, the internal tension will dissolve. Finally, section 3.5. will discuss that Habermas wants to understand his theory as a self-correcting historical process.

The fourth chapter aims to evaluate Habermas's ideas by presenting a couple critical readings of his solution to the tension between the rule of law and popular sovereignty. I will use Rummens's and Rehg's criticisms in order to study whether my previously formulated interpretation of Habermas's theory can hold up. This chapter will look into the internal coherency of Habermas's arguments, but will also discuss how his theories hold up when they are applied in practice.

Finally, this thesis will end with a conclusion. I will conclude that Habermas's answer to Rummens' criticism shows that his moral principle is coherent. The rule of law and popular sovereignty can mutually presuppose one another. Unfortunately, Habermas does not have an answer to the problem of the minority democrat that Rehg introduces. This results in fundamental problems for the legitimating force of Habermas's principle of democracy in procedures of majority rule.

2. The Inherent Tension between the Rule of Law and Popular Sovereignty

2.1. Introduction

The aim of this chapter is to introduce the tension that is presumed to exist between the rule of law and popular sovereignty in legal philosophy. This chapter will first introduce the various dichotomies that Habermas works with in his philosophy in section 2.2. It is important to be able to distinguish them in order to understand Habermas's arguments. In section 2.3., I will introduce the specific tension between the rule of law and popular sovereignty. Since this thesis is concerned with critically assessing Habermas's answer to this tension, it is important to understand what this tension looks like, first. In section 2.4., I will explain how Habermas has critically responded to Kant and Rousseau's attempts to solve this tension in his book *Between Facts and Norms*[9] and in his essay 'Constitutional Democracy'.[10] Since Habermas presents a solution that claims to do better than these philosophers' solutions,[11] it will be useful to have an overview of these theories so that they can be compared to Habermas's theory in the fourth chapter. Section 2.4. will therefore contain my interpretation of these philosophers' discussions of the tension between the rule of law and popular sovereignty. This chapter will end with a conclusion.

2.2. Distinguishing the concepts

The existence of the previously mentioned tension between the rule of law and popular sovereignty is an established topic of debate in legal and political philosophy.[12] The inherent tension that has been said to be present in modern law has been presented in various dichotomies that reside at several levels. In order to avoid confusion in the reading and writing of this thesis, it is very important to distinguish Habermas's various representations of this tension. In the sections below, I will also clarify which dichotomies will be operationalized at different moments in this thesis. What they (very) generally have in common, is that we can find 'a social reality on one side, and a claim of reason on the other'.[13] What this means will be explained in detail in section 3.3.2.

2.2.1. Facticity versus validity

First of all, it is important to know that Habermas understands the tension between the rule of law and popular sovereignty and between private and public autonomy to flow from the underlying, general

[9] Habermas 1996, 90-94 and 100-104
[10] Habermas 2001, 768
[11] In Habermas 1996, 84 he claims: 'Thus far no one has succeeded in satisfactorily reconciling private and public autonomy at a fundamental conceptual level'.
[12] Green 2015, 199 and Rehg 1996, xi
[13] Rehg 1996, xi

tension between facticity and validity that will be described in this section.[14] This most abstract representation of this tension is concerned with the legitimacy of the law itself. This is the tension that Habermas believes to be *internal* to law, which he calls the contradiction of facticity with validity.[15] That Habermas is especially concerned with this specific dichotomy is reflected in the original German title of his book: 'Faktizität und Geltung'.

This distinction expresses the contradiction between following compulsory laws because non-compliance will result in punishment (facticity), versus following laws because the citizen believes legitimate laws deserve general recognition (validity).[16] Habermas describes this internal tension in modern law as a "Janus-faced phenomenon": law is both coercive and guarantees freedom at the same time. Individuals can therefore approach the law either in the capacity of a "bad man" – obeying only when the calculated risk of enforcement is too high – or from a moral point of view – obeying the law because it is the right thing to do.[17]

The *external* tension between facticity and validity exists, as the term implies, outside of the legal norm itself, in society. This external tension is concerned with the difference between the way liberal democracies claim to be working (validity), and their actual functioning (facticity).[18] Because of the duality of facticity and validity, citizens of modern societies are able to believe the law enforces valid social norms, but society also has the power to enforce unjustified power relations.[19]

2.2.2. Rule of law versus popular sovereignty

This tension is also expressed on the level of what Habermas calls the 'self-understanding of modern legal orders'.[20] This means that Habermas moves away from the tension within the legal norm itself and looks at the way the tension presents itself in our modern legal order, instead. This level is concerned with the question how the establishment of legitimate law is possible.[21] In order to gain understanding of the tension in this modern legal order, Habermas asks citizens what rights they would have to grant each other if they would 'want to legitimately regulate their common life by means of positive law'.[22] The way this first question is formulated already indicates, according to Habermas, that these rights are already 'shot through with that internal tension between facticity and validity'.[23] The question what this tension between the rule of law and popular sovereignty consists of, exactly, is difficult to answer. The third chapter of this thesis is concerned with explaining this internal tension in Habermas's philosophy in detail.

[14] See Habermas 1996, 82, 129 and 136
[15] Zurn 2011, 162
[16] Rehg 1996, xi – xii
[17] Zurn 2011, p. 162, see also Habermas 1996, 448
[18] Habermas 1996, 82
[19] Zurn 2011, 161
[20] Habermas 1996, 82
[21] Rehg 1996, xxiv
[22] Habermas 1996, 82
[23] Habermas 1996, 82

For now, it is important to know that this level concerns a dichotomy that can be expressed – and is used by Habermas – in multiple forms. For example, the dichotomies of the rule of law versus democracy,[24] human rights versus popular sovereignty,[25] moral versus civic autonomy,[26] or private versus public autonomy.[27] These dichotomies are somewhat interchangeable, but because it is very important for the clarity of this thesis to keep the terminology as clear as possible, I want to choose a specific formulation of this dichotomy to refer to throughout this thesis. From studying *Between Facts and Norms* and 'Constitutional Democracy', I deduced that Habermas generally refers to this dichotomy as 'human rights versus popular sovereignty'. I, however, have chosen to refer to this dichotomy as the 'rule of law versus popular sovereignty'.[28] This is because I fear the term "human rights" will be associated with the strictly legal understanding of "human rights", which is more limited than the category of individual rights that I want to refer to in this thesis. Therefore, the "rule of law", which is more closely associated with the German and Dutch term "*Rechtsstaat*", fits the bill better in my opinion.

2.2.3. Liberalism versus republicanism

Finally, there are certain political traditions that emphasize or express the normative importance of one side of the previously stated dichotomies. Habermas himself emphasizes that, although they cannot be aligned in direct correspondence, affinities exist between the previous dichotomy and this one. For example, the liberal tradition (liberalism) emphasizes the importance of the rule of law, personal rights and the protection of individual freedom. Liberal traditions also conceive the rule of law as the expression of moral self-determination. The republican tradition (republicanism) emphasizes the importance of the democratic process as a form of collective deliberation that will lead to agreement among the citizens to what constitutes as the common good. Republican traditions interpret popular sovereignty as the expression of ethical self-realization.[29]

Habermas specifically proposes a new solution to the internal tension between the rule of law and popular sovereignty. He claims that his solution proves that the rule of law and popular sovereignty are not paradoxically related, and one does not take precedence over the other.[30] Since this thesis is concerned with discussing Habermas's solution, I will mainly discuss the tension between the rule of law and popular sovereignty. Since this tension flows from the underlying tension between facticity and validity, I will study that dichotomy, too. The normative traditions of liberalism and republicanism are only briefly discussed in this second chapter, where they are employed to introduce the discussion.

[24] i.a. Habermas 1998, see the title of this essay
[25] i.a. Habermas 1996, 84 and Habermas 2001, 766
[26] i.a. Habermas 1996, 107
[27] i.a. Habermas 1996, 84 and Habermas 2001, 767
[28] Like Habermas also does in Habermas 2001, 766 and Habermas 1998, 258
[29] Rehg 1996, xxiv – xxv, see also Habermas 1996, 99
[30] Habermas 2001, 776

2.3. Tension between the rule of law and popular sovereignty

As we have seen in the introduction to this thesis, liberal democracy tries to unify the concepts of the rule of law and popular sovereignty. These two concepts limit each other, which causes a tension to exist within the framework of liberal democracy. But what does this tension look like, exactly? And what are the different perspectives which can be used in order to study this tension?

An example of the possible tension the unification of these two concepts could induce is provided by Michelman in his book 'Brennan and Democracy'. Michelman presents judge Brennan, who was branded an "activist judge"[31] who often provided "moral readings" of the Constitution.[32] Providing moral readings means that Brennan often would interpret the norms of the democratically legitimated constitution in such a way that they would adhere to citizens' individual rights. In Brennan's practice we can see the previously described tension at work, because individual rights are imposed as limits on democratically legitimated decisions. This means that the results of democratic discussion are limited by legal norms that are imposed on them by judges such as Brennan.[33]

There has been a lot of discussion in legal and political philosophy about how liberal democracy's attempt to unify these two concepts should be understood. Green has distinguished four general responses to this question. The first two accept the tension between the two concepts, and choose to emphasize one of these concepts. The first response called "rights foundationalism" emphasizes the importance of liberal rights in liberal democracy. These rights are grounded on something outside democracy, such as God or reason. The practice of democracy therefore only serves to enforce the status of these rights.[34] The second response is called "democratic positivism", which emphasizes the importance of popular sovereignty. However, because democratic positivism argues that all law results from democratic procedures, it cannot account for limits to democratic legislation, which would usually be imposed by the rule of law or individual rights. Green argues that Rousseau is a representative of this response.[35]

The third response argues that the relationship between the rule of law and popular sovereignty should be understood as "co-original". In this response, the tension between the rule of law and popular sovereignty is usually considered to be a false dilemma. According to Green, most philosophers that support this view, like Habermas, understand liberal rights as 'procedural preconditions that are necessary for citizens to participate as equals in a legitimate democracy'.[36] This means that the concepts of the rule of law and popular sovereignty presuppose one another: they need

[31] Michelman 1999, 5
[32] Michelman 1999, 26-27
[33] Michelman 1999, 27-29
[34] Green 2015, 199
[35] Green 2015, 200-201
[36] Green 2015, 201

each other in order to exist. The third chapter will provide an explanation of Habermas's theories and this particular solution to the tension.

Finally, the fourth response argues the complete opposite position: the concepts of the rule of law and popular sovereignty cannot be rationally harmonized, and they will always be in conflict.[37]

Now I have shown what the (potential) tension between the rule of law and popular sovereignty consists of, and the different views philosophers have on this topic, it is time to present the historical views on this tension that Habermas rejects. As I have argued above, Habermas's goal is to reconcile the two concepts in such a way that they become "co-original". Habermas rejects Kant and Rousseau's views because their solutions do not really reconcile the rule of law and popular sovereignty. Habermas argues that in Kant and Rousseau's theories, one concept takes precedence over the other.

2.4. Historical discussions of the inherent tension

2.4.1. Jean-Jacques Rousseau

Jean-Jacques Rousseau greatly values freedom (or: liberty). He famously wrote 'man is born free, but is everywhere in chains'.[38] By this, he means that man's natural freedom is limited by society. The ultimate freedom, according to Rousseau, consists of being able to lay down the rules for your own life.[39] The project that Rousseau undertakes in his *On the Social Contract* is to find some form of political organization of society that can ensure that every individual can govern him- or herself by laying down their own rules. Rousseau describes this difficulty in the following terms:

> The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before. This is the fundamental problem of which the Social Contract provides the solution.[40]

Rousseau claims that he can find a way to legitimate this subjection in chains: with the power of the social contract. Upon entering into this contract, the individual should surrender *all* of his rights. Because only when entering fully into the social contract, the individual gains an equivalent of everything he loses.[41] He does, however, not gain exactly the same freedom. Rousseau writes that when the social contract is violated, each person regains his own rights and resumes his *natural*

[37] Green 2015, 202
[38] Rousseau 2012, 156
[39] Rousseau 2012, 167
[40] Rousseau 2012, 164
[41] Rousseau 2012, 164

liberty, while losing the *contractual liberty* for which he renounced it.[42] By entering into society, the individual also acquires *moral liberty*. Moral liberty is gained by following the rules one has prescribed for himself, instead of blindly pursuing one's desires. Following one's own laws leads to liberty and, according to Rousseau, to man's true mastering of himself.[43]

This is what Rousseau means when he writes that citizens are 'forced to be free': the social contract only functions if every citizen obeys the general will. Rousseau warns that 'whoever refuses to obey the general will, will be forced to do so by the entire body'.[44] Since the general will in Rousseau's philosophy is the representation of the citizens' individual will, and an individual can only be free when he follows his own rules, obeying the general will means to be free.[45] If a citizen is therefore forced by society to obey the general will, this means that he is forced to be free.

Completely surrendering your own rights does not imply that citizens can never disagree. Rousseau develops this idea in the following passage:

> In fact, each individual can, as a man, have a private will contrary to or different from the general will that he has as a citizen. His private interest can speak to him in an entirely different manner than the common interest. His absolute and naturally independent existence can cause him to envisage what he owes the common cause as a gratuitous contribution, the loss of which will be less harmful to others than its payment is burdensome to him.[46]

Rousseau admits that there is often a difference between the general will and the combined individual opinions of every citizen. The general will is formed by 'remov(ing) from these same wills the pluses and minuses that cancel each other out, and what remains as the sum of the differences is the general will.'[47] For this general will to be well articulated, it is necessary that the formation of factions is prevented, and that each citizen decides for himself. According to Rousseau, following these precautions is the only effective way of making sure the general will is a representative reflection of society.[48]

It is difficult to reconcile the concept of moral liberty, which allows an individual to be truly his own master, with the concept of the social contract, where decisions are made on the basis of majority rule. Rousseau's solution to this is arguing that only the act of the establishment of the social contract requires unanimous consent. If there are opponents to the social contract, they are prevented from being included. In all other cases besides the establishment of the social contract, however, the

[42] Rousseau 2012, 164
[43] Rousseau 2012, 167
[44] Rousseau 2012, 167
[45] Rousseau 2012, 167
[46] Rousseau 2012, 166
[47] Rousseau 2012, 172
[48] Rousseau 2012, 172-173

vote of the majority obligates everyone, including the minority. With regard to the question whether this means that individuals can still be free, Rousseau argues the following:

> The constant will of all the members of the state is the general will; through it they are citizens and free. When a law is proposed in the people's assembly, what is asked of them is not, to be precise, whether they approve or reject the proposition, but whether or not it conforms to the general will that is theirs. (…) When, therefore, the opinion contrary to mine prevails, this proves merely that I was in error, and that what I took to be the general will was not so. If my private opinion had prevailed, I would have done something other than what I had wanted. In that case I would not have been free.[49]

Rousseau seems to propose that, when people vote they do not think of their own private opinion, but vote with the general will in mind. If their opinion does not equal the majority's opinion, they were simply wrong in what they predicted the general will to look like. According to this logic, the individual's opinion and the general opinion never clash.

There has been some criticism on whether following the general will always means that a citizen obeys only himself, especially if one's private will does not correspond with the general will. Rousseau believes an answer to this is to be found in the democratic process, because citizens' interests and private opinions are included in the process of formulating the general will. These citizens therefore share in the general will. This means that, even when citizens share the minority's opinion, they are still bound by the general will, which is considered to be a will of their own.[50] The relevancy of this argument will show itself in the discussion of Habermas's solution to the tension between the rule of law and popular sovereignty in chapter 3.

2.4.2. Immanuel Kant

Just like Rousseau, Kant starts his political philosophy by emphasizing the concept of freedom. According to Kant, there is only one innate right that belongs to every person by virtue of their humanity: innate freedom. This innate freedom consists of being 'independent from being constrained by another's choice, insofar as it can coexist with the freedom of every other in accordance with a universal law'.[51] Freedom, in Kant's philosophy, is therefore a *negative* concept: *not* being restrained in making choices. This concept of freedom is the basis of Kant's conception of juridical rights and duties, which is reflected in Kant's 'Universal Principle of Right': 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice

[49] Rousseau 2012, 227-228
[50] SEP Jean Jacques Rousseau, in section 3.3. See also Rousseau 2012, 227-228
[51] Kant MM, 6:237

of each can coexist with everyone's freedom in accordance with a universal law.'[52] Kant is concerned with a specific type of (political) freedom here: the absence of being constrained *by another person*, not by *natural forces*.[53]

This conception of freedom, however, can potentially cause difficulties for the establishment of a political state. The state has the capacity of impairing its citizens' choices and, as a result, their innate freedom. Kant, however, does not perceive the existence of the state as an impediment to individual freedom, but instead believes it to be a system that can *enable* citizens to be free. According to Kant, if a system like the state hinders the coercion of individual's choices, it can be in accordance with the innate freedom and therefore be a part of Kant's Universal Principle of Right. A good way to show how this works is the following example: an individual's choices can be constrained by another individual. This has negative effects on the first individual's innate freedom. However, the state can solve this problem by constraining the second individual, and thereby *freeing* the first individual. Kant describes this as 'a hindering of a hindrance to freedom'.[54] According to Kant, the state can be organized in such a way that it consists of 'a fully reciprocal use of coercion that is consistent with everyone's freedom in accordance with universal laws'.[55] This means that the state can be organized in such a way that it can guarantee the innate freedom of its citizens, or in Kant's words: 'use external constraint that can coexist with the freedom of everyone in accordance with universal laws'.[56]

With regard to the organization of the state, Kant considered the system of direct democracy to be in contradiction with his conception of freedom. This is because 'it establishes an executive power in which all decide for and, if need be, against one (who thus does not agree), so that all, who are nevertheless not all, decide; and this is a contradiction of the general will with itself and with freedom.'[57] Since this system of democracy clearly imposes no limits on decision-making, some citizens' (those in the minority, who will be overruled) innate freedom that consists of being free from another person's constraint, will be impaired. This is in contradiction to these citizens' innate freedom.

Kant labels this system of democracy as 'despotic' because the people are both the legislator and the enforcer of laws. Kant's preferred system of republicanism, on the other hand, represents the 'political principle of the separation of the executive power (the government) from the legislative power'.[58] According to Kant, a representative system is needed in order to ensure the innate freedom of citizens. The republican system is capable of constructing such a representative system that can

[52] Kant MM, 6:230
[53] SEP Kant's Social and Political Philosophy, in section 2
[54] Kant MM, 6:231
[55] Kant MM, 6:232
[56] Kant MM, 6:232
[57] Kant PP, 8:352
[58] Kant PP, 8:352

keep the total united view of the citizens in mind.[59] It can therefore ensure that no citizens' innate right will be impaired, which means that it is capable of conforming to Kant's concept of right.[60]

2.5. Conclusion

Habermas has distinguished multiple dichotomies in his philosophy. The most fundamental one is the tension between facticity and validity. The tension between the rule of law and popular sovereignty flows from this tension. The tension between liberalism and republicanism should be seen as a tension between political traditions that both emphasize one side of the previous dichotomy.

In philosophy, there are multiple perspectives from which one can look at the relationship between the rule of law and popular sovereignty. Although both philosophers start out with the intention of reconciling the two concepts so that they exist in a balanced manner, they did not both succeed. Rousseau, according to Green, can be qualified as a 'democratic positivist' since he supposedly argues that the legitimacy of law ultimately derives from the citizens' general will. Therefore, Rousseau prioritizes popular sovereignty. I believe, with Habermas (see also section 3.4.1. of this thesis), that Rousseau's general will actually also presupposes individual autonomy and that Rousseau therefore does not qualify as a democratic positivist. He belongs with the third response, where philosophers such as Habermas argue for co-originality. Kant, on the other hand, can easily be qualified as a 'rights foundationalist', because in his theory democracy serves as an instrument that can guarantee citizens' innate freedom. In Kant's philosophy, citizens' innate freedom always has priority. Therefore, Kant prioritizes the rule of law.

Habermas's perspective belongs in a different category: instead of prioritizing one concept over the other, he wants to formulate a theory where both concepts can be seen as 'co-original'. The next chapter will show how he manages to do this.

[59] SEP Kant's Social and Political Philosophy, in section 4
[60] Kant PP, 8:352

3. Habermas' solution to the inherent tension between the rule of law and popular sovereignty

3.1. Introduction

In 1992, Habermas published his *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. In this book, Habermas aims to present a solution to the inherent tension between the rule of law and popular sovereignty. In 2001, Habermas published his essay 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' in which he updates and further rounds out his previously established views. The book *Between Facts and Norms*, and the essay 'Constitutional Democracy' will serve as the main sources for this chapter. The goal of this chapter is to interpret Habermas's solution to the inherent tension between facticity and validity.

This chapter will start by introducing the main ideas from Habermas's theory of communicative action in section 3.2., because they are necessary in order to grasp Habermas's answer to the inherent tension between the rule of law and popular sovereignty. Since this section does not aim to interpret Habermas's theory of communicative action, but only aims to explain as much as is necessary in order to understand Habermas's solution to the tension between the rule of law and popular sovereignty, I have limited myself to mainly using secondary literature in the process of writing this section. In section 3.3., the way Habermas perceives the tension between facticity and validity will be discussed. Section 3.4. specifically looks at how a proceduralist understanding of law, which adheres to the norms of communicative rationality that have been introduced before, can help us frame law in such a way that the internal tension dissolves. In this section, Habermas's discourse principle, his moral principle, the principle of democracy and Habermas's system of rights will be introduced. Section 3.5. will discuss Habermas's "temporality reply" which he developed in his essay 'Constitutional Democracy'. At the end of this chapter, all the aspects of Habermas's theory will come together in such a way that, in his view, the tension between the rule of law and popular sovereignty will be dissolved.

3.2. Habermas's theory of communicative action

The reason why it is necessary to discuss the central points of Habermas's theory of communicative action is because, in order to understand his solution to the tension between the rule of law and popular sovereignty (which will be explained later on in this chapter), we need to understand its underlying presuppositions. Habermas's discourse principle, which is a part of the solution to this

tension, prescribes that: 'Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses'.[61] Habermas understands "rational discourse" to include:

> …any attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations. The expression also refers indirectly to bargaining processes insofar as these are regulated by discursively grounded procedures.[62]

This means that, in order to make sense of what "rational discourses" are, we need to know what "validity claims" are, and which conditions of communication allow 'the free processing of topics, contributions, information and reasons in the public space'.[63] Habermas developed these ideas in his theory of communicative action, which he published in his 1981 book *The Theory of Communicative Action*.

3.2.1. A rational theory of communication

Habermas's theory of communicative action is foundational for all his subsequent theories because it contains his view on rationality, or how we can use language to reach mutual understanding, and use that for action coordination.[64] Habermas believes all action is goal-oriented. He makes two distinctions to categorize different types of action: between social and non-social action, and between action oriented towards success and action oriented towards understanding.[65] In (non-social) "strategic action", actors are mainly concerned with wanting to reach their individual goal, or with success. Language is used as a mechanism to obtain this goal. On the other hand, in (social) "communicative action", the actors are concerned with reaching mutual understanding (and through that: action coordination) instead. Language is used to obtain social integration.[66]

3.2.2. Validity claims

Now we know that we need communicative action in order to reach mutual understanding, Habermas has to develop an idea about *how exactly* actors can reach rational agreement. Habermas has to make sure the hearer agrees with what the speaker is saying: the hearer has to agree with the speaker's "speech act". According to Fultner, Habermas argues that we can only understand people's speech acts

[61] Habermas 1996, 107
[62] Habermas 1996, 107-108
[63] Habermas 1996, 107-108
[64] Fultner 2011, 54
[65] Baxter 2011, 10-11
[66] SEP Jürgen Habermas, section 3.1. and Fultner 2011, 56

when we know about their *validity*: about the conditions under which they are acceptable.[67] A speech act can coordinate action and be socially integrative only when it fulfils certain "validity claims".[68] Even though Habermas has never given a definition of what validity claims are,[69] a validity claim seems to be a broad term that encompasses more than just factual statements: it can also encompass moral or ethical claims. Actually, according to Bohman and Rehg, when a speaker wants to perform a speech act in communicative action, there are three validity claims it can meet: 'the speech act is sincere (non-deceptive), is socially appropriate or right, and is factually true (or more broadly: representationally adequate)'.[70] According to Fultner, all three validity claims have to be implicit in speech acts in order to reach rational agreement. For example, the speech act "Let's go home" can be sincere (if this person really wants to leave the party), it can be right (for example, something bad happened and this person feels it might be best to leave), and true (this person does not lie about wanting to leave the party).[71] If this speech act is used in this way and under these circumstances, it can indeed be used to reach mutual understanding. Actors can decide to take on a yes- or no attitude towards validity claims. If they take on a yes-attitude and accept the validity claims that are inherent to the speech act, that is when mutual understanding comes about.[72]

Although validity claims are generally easily recognized between the different actors in a conversation, sometimes problems occur when the speaker and the hearer do not agree upon certain validity claims. If this happens and when this results in discussion about the sincerity, rightness or truth of the speech act, the actors have to shift to the higher level of *discourse* in order to gain mutual understanding. This means that the challenged validity claim has to be critically assessed and rationally scrutinized.[73] This discourse looks different for every challenged validity claim: for example, sincerity claims are scrutinized by checking whether the actor's actions line up with the claim. Challenged truth claims are discussed in *theoretical discourse* about factual evidence. Finally, rightness claims are confronted with *practical discourse* about whether the moral norm in question is actually valid.[74] According to Baxter, a condition for discourse is that 'participants (…) must have equal opportunities to raise topics, arguments, and criticisms'.[75] However, this condition is almost never completely fulfilled, which is why 'Habermas has referred to these idealizations as describing an 'ideal speech situation''.[76] As a result, Habermas has admitted that interactions can also qualify as "discourse" when the previously named conditions are 'sufficiently fulfilled'.[77]

[67] Fultner 2011, 62
[68] Fultner 2011, 59
[69] Heath 1998, 23
[70] SEP Jürgen Habermas, in section 3.1.
[71] Another example is to be found in Fultner 2011, 61
[72] Fultner 2011, 61
[73] Fultner 2011, 62-63
[74] Fultner 2011, 62-63
[75] Baxter 2011, 19
[76] Baxter 2011, 19
[77] Baxter 2011, 19

3.2.3. System and lifeworld

Underlying this theory of communicative action is Habermas's presupposition of "communicative competence".[78] Habermas assumes that actors are communicatively competent in the sense that they believe they attach the same meanings to words and sentences as other actors, and can therefore understand each other. Also, they presuppose that they have the same background against which to interpret certain a speech act as other actors. Because some philosophers argue that it is actually impossible to perfectly understand what another actor means, one could argue that Habermas presents an "ideal speech situation" here. Fultner, however, claims that Habermas is very much aware of people's communicative difficulties that originate out of problems such as not sharing the same belief system. Fultner argues that Habermas's theory still works even if we take these diverging beliefs into account. First of all, if all actors agreed on the meaning of every speech act, there probably would be no need for communication. Second, having actors presuppose this "communicative competence" is actually necessary in order for them to communicate. The act of various people aiming towards reaching mutual understanding is what makes it possible for communicative action to function in the first place.[79]

However, it has to be said that this representation of communication, which is aimed towards reaching mutual understanding, represents only one end of the 'spectrum of communicative possibilities'.[80] Habermas acknowledges that this kind of communication is difficult to uphold in complex, pluralistic societies, because the conditions of communicative discourse are quite demanding. Certainly in modern pluralistic societies, where people own many different belief backgrounds, it is challenging to construct a discourse that adheres to Habermas's idealizations. In order to perform discourse, for example, one has to make sure there are equal opportunities for discussion, and that the actors' only motivation is the search for the best argument and, eventually, the truth.[81] Therefore, in these problematic cases, it makes sense to let go of these communicative demands and allow for communication that does not meet all three validity claims, or to allow the use of forms of strategic action.[82] According to Baxter, Habermas states that along the continuum that exists between communicative action and strategic action, most of our interactions would actually exist somewhere in the middle.[83]

This is where the distinction between 'system' and 'lifeworld' comes into play: the *system* includes those situations where the communicative demands are relaxed. This includes environments where there are high systemic demands that prescribe communication in other forms. There is not

[78] Fultner 2011, 63
[79] Fultner 2011, 64-65
[80] SEP Jürgen Habermas, in section 3.1.
[81] Baxter 2011, 19
[82] SEP Jürgen Habermas, in section 3.1.
[83] Baxter 2011, 17

necessarily an aim towards consensus, but a more predominant aim towards success. Examples of such environments are markets and bureaucracies. The media plays an important role in taking care of such alternative forms of communication, which are often motivated by money and power.[84] The *lifeworld*, on the other hand, refers to situations that are aimed towards consensus, and include high communicative demands. The lifeworld relies on the belief background that actors share, which helps to understand what the other person is saying.[85] According to Bohman and Rehg, in a more analytical sense this means that the lifeworld refers to 'the background resources (…) that enable actors to cooperate on the basis of mutual understanding'.[86]

3.3. The way Habermas perceives the tension between facticity and validity

3.3.1. Introduction

Now I have explained the main ideas of Habermas's theory of communicative action, we have an idea of the foundation that he built his legal theory on. This section will illustrate Habermas's thoughts on the tension between facticity and validity, as explored in *Between Facts and Norms*. According to Baxter, the 'distinction between "facticity" and "validity" organizes the argument of *Between Facts and Norms* at every level'.[87] This also means, as we have seen in section 2.2., that this tension works through in the tension between the rule of law and popular sovereignty that Habermas wants to dissolve.[88] That is the reason why this section will discuss Habermas's thoughts on the tension between facticity and validity in law in detail.

3.3.2. Facticity and validity

In section 2.2.1., I have already provided a little information on the distinction between facticity and validity. That section, however, refers specifically to the legitimation of legal norms. In *Between Facts and Norms*, Habermas points to an even more fundamental distinction between facticity and validity: one that exists within language. In this distinction, *validity* is concerned with having an 'ideal character' which ensures that everyone can recognize and relate to a particular idea that is expressed. On the other hand, Habermas recognizes that ideas or thoughts demand an answer as to whether they are true or false. This is the element of the thought or idea that is grounded in reality, which is the concern of the idea's *facticity*.[89] These ideas are neatly represented by the following quote:

> The validity (Gültigkeit) claimed for statements and norms (as well as for first-person reports of experience) conceptually transcends space and time, whereas the actual claim is, in each

[84] SEP Jürgen Habermas, in section 3.1.
[85] Fultner 2011, 64
[86] SEP Jürgen Habermas, in section 3.1.
[87] Baxter 2011, 62
[88] Habermas 1996, 82
[89] Habermas 1996, 11-12

> case, raised here and now, in a specific context in which its acceptance or rejection has immediate consequences.[90]

This quote emphasizes both the universal and ideal character of claims and their factual, context-dependent character. Habermas's explicitly distinguishes his validity (Gültigkeit) from 'social validity or acceptance (soziale Geltung)'.[91] The first one Habermas calls 'Janus-faced': it makes a universal claim, but needs to be accepted in the here and now for it to serve an agreement that can lead to mutual understanding. The combination of both factors ensures that it can be used for validating claims and justifying practices. The second validity ensures already established standards. It is therefore based on 'settled custom or the threat of sanctions'.[92] This social validity has less integrative meaning.

In order to fully understand Habermas's vision on the tension between facticity and validity that plays out in law, we need to grasp the goal of his project in *Between Facts and Norms*. Habermas is concerned with something he calls "the rationalization of the lifeworld".[93] As we have seen in the previous section, the lifeworld constitutes the common background that actors share, which they can rely upon to gain mutual understanding. According to Habermas, the process of rationalization is something that has already taken place in our society. The first step towards rationalization was taken when culture itself became a topic of discussion. By calling into question people's daily practices and the way they used to live, these customs were reduced to conventions and tradition. This resulted in the separation of these conventions from conscientious decisions that people make, which include modern ideas such as self-realization and self-determination. Because these conscientious decisions became a topic of interest, people also started thinking about ethical and moral questions. Ethics became a topic for discussion, which resulted in 'exemplary instructions in the virtuous life and recommended models of the good life' being replaced by 'abstract demand(s) for a conscious, self-critical appropriation'.[94] This individualistic ethics did not only have results for people's personal life, but also for the way culture was transferred. Culture was no longer to be found in religious or metaphysical interpretations, but in history and its interpretations, instead.[95]

Habermas believes that the secularization and differentiation of our society causes difficulties for actors to rely on the 'traditions and settled ethical conventions'[96] of the lifeworld. This is what Habermas means when he states that 'the tension must be worked off by the participants' own efforts':[97] the gap that the loss of the lifeworld leaves, has to be compensated by employing

[90] Habermas 1996, 20
[91] Habermas 1996, 20
[92] Habermas 1996, 20
[93] Habermas 1996, 95
[94] Habermas 1996, 95-96
[95] Habermas 1996, 96
[96] Habermas 1996, 95
[97] Habermas 1996, 17

communicative rationality or by other intentional acts coming from the participants. However, since Habermas's theory of communicative action relies on people being able to share a common background in order to gain mutual understanding, this "rationalization of the lifeworld" is problematic for Habermas's theory of communicative rationality, too. Moreover, gaining mutual understanding through discourse is a demanding process. It seems unlikely that communicative rationality by itself can be the answer for this problem.[98] What only adds to this problem is that Habermas believes that our modern societies are more and more influenced by forms of 'strategic action', such as the media. Habermas claims the existence of 'systemically independent spheres'[99], which are only ruled by strategic, 'media-steered interactions'.[100] The fact that these spheres are subject to systemic, and not to communicative action, results in the fact that these actors are not motivated by the prospect of gaining mutual understanding, but only by force.[101] This makes it even more difficult to employ communicative action as a form of communication. In order to solve all these problems that the "rationalization of the lifeworld" signifies for social integration, Habermas posits another solution.

3.3.3. Law as a solution to the problem of social integration

Habermas believes that modern law is the solution to this problem. It can serve as an instrument that can bridge the gap of social integration. According to Habermas, law can cater to both facets of the previously described tension between facticity and validity. Because our society exists of systemic and communicative spheres of action, law needs to be able to motivate people both by force and because they are convinced it is the legitimate thing to do. Law can allocate this two-sidedness: on the one hand, it embodies validity because of the way it is formulated. Validity is to be found in the genesis of the law, which claims to be rational because it guarantees individual liberties. The idea of self-legislation justifies the legitimacy claim of the rules themselves, and makes this claim rationally acceptable. On the other hand, law also embodies facticity, because it can be enforced on people. It secures rule acceptance.[102]

Whilst this prior information is concerned with the tension that is *internal* to law itself, Habermas also signals an *external* relation between facticity and validity. This external relation concerns a duality of power relations that exist *internal* and *external* to the framework of the constitutional state. The political power that exists within the constitutional state encounters the rule of law. The rule of law transforms this political power into law that is legitimated by the civic practice of self-legislation. Therefore, the legitimate law inside the constitutional state represents the validity. The political power represents the facticity. Outside of the constitutional state there exists an 'uncontrolled

[98] Habermas 1996, 26
[99] Habermas 1996, 118
[100] Habermas 1996, 118
[101] Habermas 1996, 56 and 118
[102] Habermas 1996, 39

social power that penetrates law from the outside'.[103] These 'illegitimate power relations'[104] and the reality of social power confront and interact with the normative framework of the constitutional state.

3.4. Habermas's solution to the tension between the rule of law and popular sovereignty

3.4.1. Habermas's criticism on other philosophers' solutions to the tension

In order to restart the discussion on the topic of the tension between *the rule of law and popular sovereignty*, we first need to take a step back and recall the discussion from the previous chapter, where this problem was discussed in a historical context. Habermas claims that so far, not one philosopher 'has succeeded in satisfactorily reconciling private and public autonomy at a fundamental conceptual level'.[105] In this sentence, Habermas distinguishes between two types of autonomy. Private autonomy is a representation of the individual liberties that a citizen has to decide for him- or herself. These individual liberties need to be secured by the exercise of public autonomy. Public autonomy is a representation of the popular sovereignty that allows citizens to legitimate norms by collectively deciding on them.[106] According to Habermas, one of the reasons why these two types of autonomy are not reconciled in the correct manner by other philosophers is, for example, because of the wrongful metaphysical subordination of positive law to moral law, which is existent in Kant's legal philosophy. Instead, Habermas argues, law and morality are co-original and therefore they exist on the same level.[107]

In order to substantiate his claim, Habermas argues in *Between Facts and Norms* that both Kant and Rousseau have not succeeded in reconciling private and public autonomy at the same level. He believes that they still prioritize one claim over the other: Kant would suggest more of a liberal reading of political autonomy, whereas Rousseau favours a more republican reading.[108] The two sections below will explain Habermas's view on Kant and Rousseau's philosophy in detail.

Kant

As we have seen in the previous chapter, Kant's first step in his political philosophy is to lay down the one innate right that belongs to every person by virtue of his humanity, which is the right to freedom.[109] Habermas explains that when this right is applied to "external property", it creates a system of private, natural rights which belong inalienably to each human being and cannot be given up.[110] Since these rights have this primordial quality, they exist independently of the constitution of

[103] Habermas 1996, 39
[104] Habermas 1996, 39
[105] Habermas 1996, 84
[106] Habermas 1996, 82-84
[107] Habermas 1996, 84
[108] Habermas 1996, 100
[109] Kant MM, 6:237
[110] Habermas 1996, 100

society. That is why these rights are not dependent on the public autonomy of citizens that is created with the social contract. In fact, because the existence of innate freedom precedes the decision of a sovereign lawgiver, individual liberty qualifies as a natural right.[111] According to Habermas, this shows that Kant prioritizes private autonomy over public autonomy, because by the time a society with a sovereign lawgiver is created, these individual rights are fixed and cannot be touched.

Private and public autonomy, although they may not exist on a similar level, are not in conflict in Kant's theory. This is because Kant assumed that no one exercising his autonomy as a citizen could agree to laws infringing on his first, innate right to freedom. This means that it is no problem that individual rights cannot be touched, because Kant assumes that no one could have the intention of touching them. But still, the fact that the two are not in conflict, does not mean that they exist on the same level.[112] Habermas believes this is problematic because if either public or private autonomy takes precedence over the other, the exercise of the system of liberal democracy will either prioritize popular sovereignty, or in this case, individual rights. This means that the tension that was solved in theory will return when one actually applies it in practice. And when one prioritizes individual rights, like Kant's theory does, who can guarantee that the chosen representatives can actually keep the *total* united view of the citizenry in mind?

Rousseau

On the other hand, Habermas shows that Rousseau starts out on the opposite side of the spectrum: by laying down the central importance of the social contract first. Rousseau's first step is the constitution of civil autonomy.[113] What is unlike Green's interpretation of Rousseau's theory,[114] is that Habermas argues that Rousseau actually incorporates an internal relationship between private and public autonomy in his philosophy. Rousseau establishes this internal relationship by setting up a legislative process that guarantees that the general will (which is a representation of all the individual, private wills of the citizens) prevails. Therefore, according to Habermas, because this system represents individual rights, it guarantees everyone's equal liberties. This means that the private autonomy of individual citizens is guaranteed by the exercise of the public autonomy in society, and that therefore an internal relationship is established. Habermas judges this to be a 'plausible idea'.[115] Since these two concepts are co-original (the constitution of popular sovereignty also implies the constitution of individual rights in Rousseau's theory), this means that at first glance, Rousseau's theory does not suffer from a prioritization of one form of autonomy over the other.

However, although Habermas agrees that Rousseau has established an internal relation, he still believes this not to be a true equiprimordial relation. Habermas's concern with Rousseau's theory is

[111] Habermas 1996, 100-101
[112] Habermas 1996, 100-101
[113] Habermas 1996, 101
[114] Green 2015, 200, and section 2.3. of this thesis
[115] Habermas 1996, 101

that the establishment of the general will is not a purely procedural process, but that Rousseau actually sneaks normative values into the process of establishing the general will. This criticism emanates from the way Rousseau frames the process of popular sovereignty through the social contract. According to Habermas, Rousseau's citizens, by entering into the social contract, transform themselves from 'isolated and success-oriented individuals' into 'citizens oriented to the common good of an ethical community'.[116] The fact that these citizens share this attitude is the normative element that is incorporated into Rousseau's procedure of forming the general will. Habermas thinks this is problematic: these citizens do not have the freedom to choose whatever they think is in their *own* interest because they have to be oriented towards the *common* good. This means that the general will cannot incorporate, in Habermas's words, the 'differentiated interest positions of private persons'.[117] The general will is therefore not fully representative and cannot have a 'universalistic meaning'.[118]

What we therefore need in order to create legitimate law, according to Habermas, is a process of legitimation where *every opinion* is welcomed and which aims towards choosing the best solution according to the strength of its arguments and the information that is relevant. Habermas emphasizes that the normative content of law is not to be found in the *results* of the legislative proceedings, but only within the *procedures* of the legislative proceedings itself. Because of this, Habermas argues that the internal connection between popular sovereignty and the rule of law exists in 'the normative content of the very mode of exercising political autonomy', which is secured by 'the communicative form of discursive processes of opinion- and will-formation'.[119] What this means is that according to Habermas, if the procedure of making laws is done right, the law will be legitimate by both ensuring individual rights and the process of popular sovereignty.

3.4.2. The principle of democracy must not be subordinated to the moral principle

We have seen in the previous section that Habermas's goal is to create legitimate law that can dissolve the tension between facticity and validity and the subsequent tension between the rule of law and popular sovereignty. We have also seen that Habermas aims to do this by making sure the *procedure* of law-making can legitimate the law it produces. In order to do this, the procedure has to adhere to both private and public autonomy. The procedure has to respect individual rights, and simultaneously respect the procedure of popular sovereignty.

In order to create a procedure that works, we first need to understand how Habermas perceives the relationship between law and morality. Habermas is aware of the legacy of the tradition of natural law (including legal arguments such as Kant's) which prioritizes morality over law. Habermas wants to start from a different point of view: the assumption that 'at the postmetaphysical level of

[116] Habermas 1996, 102
[117] Habermas 1996, 102
[118] Habermas 1996, 102
[119] Habermas 1996, 103

justification, legal and moral rules are *simultaneously* differentiated from traditional ethical life and appear *side by side* as two different but mutually complementary kinds of action norms'.[120] What Habermas states here is very important: the starting point of his theory is with *neutral* action norms.[121] These 'branch out into moral and legal rules'.[122] Therefore, because they both originate out of action norms, moral and legal rules are co-original. Justification for both moral and legal norms can therefore be explained by a principle that refers to action norms in general and that exists at a level of abstraction that prioritizes neither moral nor legal norms. This is Habermas's Discourse Principle. It is a procedural principle that can take care of the tension between facticity and validity and between the rule of law and popular sovereignty.[123]

The Discourse Principle has two variations that cater to moral and legal norms: the Moral Principle and the Principle of Democracy. The following paragraphs will show what these principles look like and how they can guarantee the procedural conditions as shown above. Habermas has claimed in multiple locations that the relationship between private and public autonomy is co-original, that the two concepts are equiprimordial and that they live in a mutual relationship with each other.[124] The next few paragraphs of this section will also explain what this relationship looks like, exactly.

According to Habermas, his discourse principle 'merely expresses the meaning of postconventional requirements of justification', which according to Baxter means that it represents the 'requirements of justification in a rationalized "lifeworld," where tradition and religious or metaphysical worldviews are no longer sufficient to legitimate social norms or institutions'.[125] The Discourse Principle is formulated as follows:

> *Discourse principle* (D): just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.[126]

Habermas qualifies what this discourse principle means. The scope of this discourse principle is broad, since he understands 'all possibly affected persons' to be 'anyone whose interests are touched by the foreseeable consequences of a general practice regulated by the norms at issue'.[127] With regard to 'rational discourse', Habermas has a specific meaning in mind which is important for his theory. That is why I quote his explanation in full. Under 'rational discourse', Habermas includes:

[120] Habermas 1996, 105
[121] Habermas 1996, 107: Habermas understands action norms as 'temporally, socially, and substantively generalized behavioural expectations'.
[122] Habermas 1996, 107
[123] Habermas 1996, 104-107
[124] Habermas 1996, 104-105 and 454, Habermas 2001, 767
[125] Baxter 2011, 68
[126] Habermas 1996, 107
[127] Habermas 1996, 107

> any attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations. The expression also refers indirectly to bargaining processes insofar as these are regulated by discursively grounded procedures.[128]

This last sentence is important because it includes the possibility of bargaining into Habermas's theory. It means that instead of requiring *all* citizens to agree on an action norm, in difficult situations one can refer to compromise, as long as it comes about under 'fair bargaining conditions'.[129] When there is no possibility of reaching mutual agreement through discourse in complex societies, Habermas allows for 'negotiation between success-oriented parties who are willing to cooperate'.[130] Habermas lays down three conditions in order for the result of the bargaining process to be acceptable: (1) the result of the bargaining process has to be better than no result whatsoever; (2) the bargaining process must not let free riders benefit; and (3) the bargaining process cannot allow 'exploiting': a situation where parties give more than what they get out of the bargaining process.[131]

The *moral principle* results from this discourse principle when one applies it to norms 'that can be justified if and only if equal consideration is given to the interests of all those who are possibly involved'.[132] The reference system for this moral principle is very broad: the reasons for deciding in a certain direction have to be acceptable to every person that could possibly be involved.[133] This means that the scope of the moral principle can be universal.

The *principle of democracy* results from the interpenetration of the legal form and the discourse principle. It comes into existence when one applies the principle of discourse to legal norms. Habermas formulates the principle as follows: 'that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted.'[134] We can deduce from this definition that the principle of democracy can be used for two things.

First, it legitimates the process of legislation.[135] Following the legislative process that the principle of democracy prescribes means that legitimate law will be created. This principle therefore

[128] Habermas 1996, 107-108
[129] Habermas 1996, 108
[130] Habermas 1996, 165
[131] Habermas 1996, 165-166
[132] Habermas 1996, 108
[133] Habermas 1996, 108
[134] Habermas 1996, 110
[135] Habermas 1996, 121-122

constitutes Habermas's definition of political legitimacy.[136] The legal norms that are created by applying the principle of democracy can be justified by either pragmatic, ethical-political or moral reasons, because justification is not restricted to moral reasons alone.[137] The reference system for this principle of democracy is dependent on the political community. It cannot be universal like the moral principle: only the people that are inside the community that makes the laws can decide. The reasons for deciding have to be acceptable to all that share the community's traditions. When there is disagreement about what these are, a balancing of these competing reasons for deciding is necessary.[138]

The second function of the principle of democracy is that it also *creates a system of rights*. Habermas emphasizes that the principle of democracy 'must also steer the production of the legal medium itself'.[139] Habermas requires the principle of democracy to establish a legally constituted procedure that can legitimate law. In order to do this whilst respecting both private and public autonomy (which is needed in order to create legitimate law), Habermas prescribes that we need a system of five basic rights that will lay down general ground rules that will govern this procedure. The first three rights will make sure citizens' private autonomy is respected. The fourth right ensures citizens' public autonomy. The detailed content of these rights will be discussed in the next section.

What the principle of democracy more specifically does, according to Habermas, is: 'the democratic principle must specify (…) the conditions to be satisfied by individual rights in general, that is, by any rights suitable for the constitution of a legal community and capable of providing the medium for this community's self-organization.'[140] These rights are *general, institutional* rights. This means that they are not *filled in* yet, or specified to fit a specific society. These rights only aim to guarantee that citizens can 'legitimately regulate their interactions (…) by means of positive law'.[141] This is the function of the system of rights: it guarantees the constitution of legitimate legal norms. It guarantees that both individual rights and the procedure of popular sovereignty are respected. Therefore, this system of rights guarantees citizens' individual liberties, but also every person's equal participation in the legislative process.[142]

3.4.3. System of rights that gives equal weight to both the private and the public autonomy of the citizen

Habermas formulates his system of rights in order to secure the individual rights that derive from Habermas's discourse principle. These include rights that need to be respected in order for individuals to join the discourse in such a way that they can legitimately regulate their life. The first three rights

[136] Rehg 1997, 357
[137] Habermas 1996, 110-111
[138] Habermas 1996, 108, 110-111
[139] Habermas 1996, 110
[140] Habermas 1996, 111
[141] Habermas 1996, 122
[142] Habermas 1996, 110

result from applying the discourse principle to the medium of law.[143] These rights guarantee the *private autonomy* of legal subjects, because these three rights recognize citizens as addressees of the law:[144]

> 1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.
> 2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
> 3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection.* [145]

In translation, the first three rights ensure: (1) the maximum amount of equal liberty for all, which is logical when we think that citizens in the discourse principle would never agree to a system of unequal liberties. Therefore, the first right ensures the maximum of equal liberties that can be ensured.[146] Habermas calls the two following rights 'necessary corollaries': (2) the regulation of membership in an association of citizens, and (3) rights that anyone can invoke if they feel that their rights have been infringed.[147] The first right, according to Baxter, establishes 'legal personhood'. With that information in mind, Habermas's claim that membership of a legal community and the actionability of rights flow logically from this sounds logical.[148]

Since Habermas wants to establish an association of citizens that makes their own laws, his next (and fourth) category of rights guarantees that citizens can also recognize each other as the authors of these rights.[149] This fourth right makes sure the first three rights are actually effective.[150] By introducing the next basic right, Habermas therefore ensures the *public autonomy* of legal subjects:

> 4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law. [151]

[143] Habermas 1996, 122
[144] Habermas 1996, 123
[145] Habermas 1996, 122
[146] Baxter 2011, 70
[147] Schaffer 2015, 101
[148] Baxter 2011, 71
[149] Habermas 2001, 777
[150] Baxter 2011, 72
[151] Habermas 1996, 123

Habermas argues that this right applies 'reflexively' to the previous three rights, and the fourth right itself.[152] What he means by this is that this fourth right can be used to interpret and develop the rights that are contained in these four categories. By doing this, Habermas links private and public autonomy. Up to this point the "rights" are empty. It is the citizens' job to fill them in. This can only be done by a procedure that exercises both private and public autonomy. Citizens can only ensure (fill in) their private autonomy by exercising their political autonomy. Vice versa, political autonomy can only be exercised if the first three rights of private autonomy are guaranteed. The way these rights rely on each other for their existence, shows that they are truly co-original.[153]
Finally, according to Habermas, the previous rights imply the final, *social right*:

> 5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).[154]

The value of these basic rights is that without them, a legitimate legal system cannot exist. This is because they both guarantee private and public autonomy, and can therefore guarantee an equal relationship between the rule of law and popular sovereignty. However, Habermas emphasizes that these rights only constitute a framework, and do not portray the full story. More input is needed in order achieve the level of basic rights such as one that would be familiar to us, in our society. Part of the reason for this is because Habermas's system of rights does not presuppose a central organized state authority: it only presupposes popular sovereignty. But the main reason for this is that Habermas's basic rights are what he calls 'unsaturated'.[155] According to Habermas, 'thus far, nothing has *actually* happened'.[156] This means that these rights still have to be interpreted and be given concrete shape by the political legislature.[157] According to the discourse principle, this is something that the legal subjects of a state have to accomplish.[158] This means that every community's system of rights will differ, because the legal subjects will have different opinions. *The* system of rights does not exist. However, there are points on which the different systems of rights will overlap.[159]

The construction of the system of rights therefore has two phases. The first stage is conceptual: the citizens recognize the necessity of individual rights and derive from this an association of free and equal people, which has to be embodied in a system of popular sovereignty. The second stage is practical: the previously established concepts have to be carried out in real life. What this

[152] Habermas 1996, 123
[153] Baxter 2011, 72-73
[154] Habermas 1996, 123
[155] Habermas 1996, 125
[156] Habermas 2001, 777
[157] Habermas 1996, 125
[158] Habermas 1996, 126-127
[159] Habermas 1996, 128-129

means is that in order to create these substantive rights, public autonomy has to presuppose the individual rights of private autonomy. Vice versa, private autonomy can only exist if public autonomy is protecting its existence. By progressively elaborating the system of fundamental rights, the principle of popular sovereignty becomes in time part of the idea of a government by law.[160]

The basis of the answer to the question how popular sovereignty and human rights (or public and private autonomy) can work together lies, according to Habermas, in the fact that enabling conditions do not impose any limitations on what they constitute. The establishment of the legal code implies the status of legal persons, who own basic liberty rights. When the legal medium is used to institutionalize the exercise of political autonomy, these rights become necessary enabling conditions. And as such conditions, they cannot restrict the sovereignty of the legislator. They enable it.[161]

Through Habermas's formulation of the discourse principle and his system of rights, we can see how he guarantees, on the one hand, the individual rights of its citizens by implementing laws that guarantee equal liberties. On the other hand, Habermas's system also guarantees the legal subjects' communicative freedom that is oriented towards the common good, by instating a particular practice of legislation.[162] We have seen that this private and public autonomy can only function if they can rely on each other: private autonomy can only be guaranteed by exercising public autonomy. Simultaneously, public autonomy can only function if a system of private autonomy is in place. This is what Habermas means when he states that these rights are co-original. This system can protect both individual rights and the exercise of popular sovereignty, which means that Habermas has found a way to dissolve the inherent tension between the rule of law and popular sovereignty.

3.5. Habermas's "temporality reply"

One final thing that needs to be discussed in order to fully understand Habermas's theory is the extra dimension to his theory that Habermas explicated in his 2001 essay 'Constitutional Democracy'. In this essay, Habermas responds to criticism by Michelman. This last section before the conclusion of this chapter will therefore look into Michelman's criticism to Habermas's theory, and the way Habermas's responds to it.

The essence of Michelman's criticism lies with the founding moment of Habermas's deliberative democracy. He claims that Habermas's theory of deliberative democracy does not function as a solution to the paradoxical relation between the rule of law and popular sovereignty, because the paradox returns when we look back at the moment the constitution is created. Habermas's theory of deliberative democracy does not function there, because at that moment, public autonomy does not yet exist because political society has not yet been established. With one element missing, it is therefore

[160] Habermas 2001, 778
[161] Habermas 1996, 127-128
[162] Habermas 1996, 128-130

not possible for private and public autonomy to presuppose one another. This means that public discourse and popular sovereignty cannot work in the way Habermas supposed them to work, and forms of communication have not yet been established. The lack of existence of public autonomy also means that the value of individual liberties cannot be guaranteed.[163]

The problem is that in order to guarantee legitimate law in Habermas's theory, one needs a system of legitimate discourse. But in order to create a system of legitimate discourse, one needs legitimate law. Habermas himself calls this 'the circularity of legal self-constitution' which gets 'trapped in infinite regress'.[164] Habermas signals the possible disastrous results from this conclusion: if we cannot depend on the legitimacy of the first discursive processes that established the foundations of our society, how can the legitimacy of all the subsequent decisions that have been built on that framework be guaranteed? According to Habermas, 'the chain never terminates, and the democratic process is caught in a circular self-constitution that leads to an infinite regress'.[165]

Habermas does not solve this problem by pointing to some kind of primordial moral standard, but instead chooses to understand this regress as 'the understandable expression of the future-oriented character, or openness, of the democratic constitution'. The democratic constitution works as a 'tradition-building project with a clearly marked beginning in time' that is characterized by its open character which expresses itself not just in its content, but also in its 'source of legitimation'.[166] According to this idea, the constitution develops itself through time because the people keep interpreting and adapting rights to current circumstances. This process, however, can only break the chain of infinite regress if it is, in the long run, understood as the same project, 'a self-correcting learning process'.[167] Habermas therefore argues that the connection between private and public autonomy can 'develop only in the dimension of time – as a self-correcting historical process'.[168] In order to understand this process as *the same*, self-improving historical process, however, the citizens need to assume that they still hold the same standards as the founders once did. This is why Habermas states that 'the descendents can learn from past mistakes only if they are 'in the same boat' as their forebears'.[169]

What we should take away from Habermas's added explanation of his theory, is that we should understand Habermas's theory as a process that aims towards reaching an ideal standard. It is because of the fact that citizens are constantly aiming for the common good, that the protection of individual liberties and political autonomy can constantly be improved.

[163] Habermas 2001, 772-773
[164] Habermas 2001, 773
[165] Habermas 2001, 774
[166] Habermas 2001, 774
[167] Habermas 2001, 774
[168] Habermas 2001, 768
[169] Habermas 2001, 775

3.6. Conclusion

The aim of this chapter was to give an interpretation of Habermas's solution to the tension between the rule of law and popular sovereignty. Habermas's theory is founded on his theory of communicative rationality. The most important aim of communicative action is to gain mutual understanding, and though that, action coordination. An important instrument in order to reach mutual understanding is by agreeing on validity claims. The demands of this type of discussion – discourse – are high. The lifeworld, with its shared belief background, helps actors to cooperate on the basis of mutual understanding.

We have seen that Habermas is concerned about the 'rationalization of the lifeworld', a process of societal secularization and differentiation that makes it harder for actors to reach mutual understanding. According to Habermas, law can serve as an answer to this problem of social integration. This is because it can answer to both the demands from facticity and validity: it can make people comply by force, or by choice.

Law can help bridge the gap between facticity and validity, which means that it also can be employed to bridge the tension between the rule of law and popular sovereignty. Kant did not manage to do so in a satisfactorily manner, because he prioritizes private autonomy over public autonomy. Whilst Rousseau managed to reconcile both concepts, he is guilty of sneaking normative values into the process of establishing the general will. What Habermas takes away from this, is that he needs a process that is purely procedural in order to reconcile the rule of law and popular sovereignty.

Habermas starts his argument by explaining how legal and moral norms are co-original, because they both derive from neutral action norms. The procedure that can justify action norms in general is the discourse principle. The moral principle and the principle of democracy both equally derive from this discourse principle. Therefore, they are co-original. The discourse principle is concerned with legitimating law and establishing a system of rights. These rights help secure private and public autonomy in the legal sphere. Only by instating these rights, the rule of law and popular sovereignty can exist in an equiprimordial relationship where one does not take precedence over the other. Therefore, without these rights, a legitimate legal system cannot exist.

Finally, Habermas's later developed temporality reply explained how we should see Habermas's theory as a self-correcting learning project that improves over time. It is therefore not yet an ideal system in which private and public autonomy are perfectly protected, but it is a system that is constantly improving.

4. Critical assessment of Habermas's solution

4.1. Introduction

This fourth chapter aims to answer the research question of this thesis: what is Habermas's solution to the inherent tension between the rule of law and popular sovereignty, and is this solution coherent and convincing? In this chapter, I have chosen to discuss two critical reflections on Habermas's theory that deal specifically with his solution to the inherent tension between the rule of law and popular sovereignty, as has been presented in the previous chapter. These criticisms are provided by Rummens and Rehg. In this chapter, I will set their criticisms against my reading of Habermas's arguments, and see whether Habermas has a good response to them.

Section 4.2. will discuss Rummens' arguments. Rummens claims that Habermas, because he uses a purely procedural theory of moral deliberation, cannot explain how moral and individual autonomy can mutually presuppose one another. He claims that, in order to create a true relation of co-originality, Habermas needs to insert moral presuppositions into his theory. Section 4.2.3. will include some critical reflections on Rummens' criticism and will explain why Habermas has a good answer to Rummens' claim. In my interpretation of Habermas's theory, it is not necessary to insert moral presuppositions into his theory.

Section 4.3. will look into Rehg's proposal to save Habermas's theory from the problem of the minority democrat. I will argue that Rehg's proposal – inserting Habermas's 'two-level reply' – cannot serve as a solution since it is inconsistent with the rest of Habermas's argument. Habermas therefore cannot answer the problem of the minority democrat. If Habermas cannot provide an answer to the problem of the minority democrat, this means that his theory of the legitimation of law is questionable in practice.

This chapter will end with a conclusion in which I will answer the research answer of this thesis. I will argue that Habermas's theory is coherent, but its application in practice causes inconsistencies in Habermas's theories that could lead to a failure to produce legitimate law.

4.2. Is Habermas's explanation of the co-originality of private and public autonomy coherent?

4.2.1. Introduction

The key to understanding Habermas's theory of deliberative democracy is grasping his theory of the co-originality of private and public autonomy. Habermas believes his co-originality theory to be purely procedural. We have seen in section 3.1.4., which discusses Habermas's criticism of Kant and Rousseau's theories, that Habermas thinks inserting moral presuppositions into his theory causes his principles of private and public autonomy to no longer exist on an equal level anymore. Habermas wants to avoid this conclusion because he fears 'moral paternalism'; the practice where preliminary

substantive moral norms limit the outcome of democratic deliberation. According to Habermas, this is not in line with the aim of his theory: moral and individual autonomy should enable one another, instead of limiting each other.[170]

According to Rummens, philosophers such as Rawls and Larmore criticise Habermas's claim that the co-original relationship between private and public autonomy is purely procedural. Rummens agrees with them; he argues that Habermas's 'model contains many more morally substantive assumptions than he is willing to admit'.[171] Rummens' aim in his article 'Debate: The Co-originality of Private and Public Autonomy in Deliberative Democracy', is to explicate these normative and moral presuppositions that Habermas needs in order to operate his theory of co-originality. By 'outing' these necessary presuppositions, Rummens wants to 'make clear which moral position one commits oneself to when embracing deliberative democracy'.[172]

Rummens argues that these moral presuppositions exist in the co-original relationship of the individual and moral autonomy of the moral agent. Individual autonomy can presuppose moral autonomy, but the presupposition does not work the other way around. This is, unless one adds the substantive moral core of the recognition of everybody's individual autonomy to the concept of moral autonomy. Rummens argues that this also has its effects on the co-original relationship between private and public autonomy in the legal sphere: this legal co-originality, after all, should be understood as the 'political institutionalization of this moral core'.[173]

In order to fully understand the structure of Rummens's argument, I will discuss Habermas's co-originality theory in the moral sphere first. After that I will concisely discuss Rummens' ideas on the results of this study for Habermas's co-originality theory in the political sphere.[174] In order to keep the terminology clear, it is important to know that Rummens, in the first part of his article, uses the terminology of moral autonomy versus individual autonomy. He also explains this as the discourse principle (D) versus the moral principle (U). The discourse principle and the moral principle are, according to Rummens, the representatives of moral and individual autonomy in Habermas's philosophy.[175]

By moral autonomy, Rummens means: 'the capacity of moral subjects on the basis of which they take part in the process of shaping the norms that organize the way they live together as moral subjects'.[176] By individual autonomy, Rummens means: 'the capacity of subjects to lead a life of their own design. The recognition of this capacity entails that moral agents are free to pursue their own

[170] Habermas 2001, 767
[171] Rummens 2006, 470
[172] Rummens 2006, 469
[173] Rummens 2006, 470
[174] Rummens 2006, 474
[175] Rummens 2006, 470
[176] Rummens 2006, 470

interests and live by their own values'.[177] When Rummens switches from the moral to the political sphere, he starts using the terms public autonomy versus private autonomy.

4.2.2. Rummens' argument in the moral sphere

Rummens shows that individual autonomy necessarily presupposes moral autonomy in Habermas's theory by picking up on Habermas's argument that is represented in section 3.4.1. of this thesis. Habermas claims that *every opinion* is welcomed in the discursive process. However, according to Habermas's theory, the moral individual has to represent his own interests in the discursive process in order to guarantee his individual autonomy is respected. This sounds logical when we remember that individual autonomy includes the notion of leading a life of one's own design.[178] It is therefore indeed necessary for a moral individual to represent himself. Moreover, according to this reasoning, it is necessary for *every* moral person to take part in discourse. This is the exact reason why, Rummens states, individual autonomy presupposes moral autonomy. When the individual is partaking in any kind of decision-making procedure, he is automatically exercising his moral autonomy because he and all other moral individuals are all necessarily collectively shaping the norms that will organize the way they live together.[179] Therefore, this means that individuals exercising their individual autonomy automatically presupposes moral subjects exercising their moral autonomy.

Rummens believes it is more difficult to argue the other way around: that moral autonomy also necessarily presupposes individual autonomy. Rummens' problem with this statement starts with Cohen's remark that 'anything can come from discourse'.[180] What this means, is that Habermas's discourse theory does not seem to prescribe anything regarding to the outcome of the process. The discourse principle only tells moral individuals *that* they should reach an agreement, not *how*. Remember from our previous discussion of Habermas's theory in section 3.4. that his theory is *procedural*, not substantive. According to Rummens, Habermas believes that this should not cause problems because the 'non-moral universal structures of communicative rationality'[181] will rule out all the unwanted results. Rummens does not believe this is enough and argues that not imposing any limits on moral autonomy in the form of respect for individual autonomy will cause problems. In order to show how solely relying on Habermas's procedural rationality will harm the process of deliberative democracy, Rummens introduces an example:

> If a person from a traditionalist background argues for the inequality of men and women, he can *prima facie* do so without violating either the discourse principle or any of the rules of

[177] Rummens 2006, 471
[178] Rummens 2006, 471
[179] Rummens 2006, 471
[180] Cohen 1999, 395
[181] Rummens 2006, 472

> discourse. He can try to obtain agreement by arguing for his case on the basis of religious arguments. He can also give all people involved, including the women, equal chances of participation in the discussion. In this case, the result will of course not be consensus, but a standoff between two opposing parties.[182]

The problem for Habermas in this example, is that his procedural account seemingly allows the production of non-ethical claims that can never lead to a consensus. Rummens argues that Habermas, in order to prevent this, now has to add an additional normative assumption to his definition of moral autonomy, which is: to 'give equal consideration to everybody's interests and values *in the sense* that we should recognize everybody's right to choose a life of his or her own design and pursue the values he or she holds dear'.[183] In other words, Rummens prescribes the recognition of individual autonomy. This, among others, means that Habermas's theory should accept the moral notions of 'pluralism', or that 'no single worldview has ultimate authority over the way we organize society'.[184]

Rummens ends his argument by stating that his proposal of inserting the recognition of individual autonomy into the moral principle is actually quite in line with Habermas's theory. He calls his argument 'hardly an arbitrary assumption'[185] and even claims that not recognizing individual autonomy would lead to 'a performative contradiction'.[186] Rummens can claim this because he studied Habermas's view on modern society. In Habermas's perspective, moral deliberation is necessary because it acts as a tool to find common ground in our secularized and differentiated modern society, where there is no longer any common authority to lean on.[187] For this reason, it is necessary that when agents are engaged in moral deliberation, 'we accept that no single worldview has ultimate authority over the way we organize society'.[188] This is, according to Rummens, the only way citizens can have an actual discussion in the rationalized lifeworld such as Habermas describes. Moral deliberation therefore already implies recognition of individual autonomy and respect for pluralism. That is why Rummens labels deliberating without this presupposition 'a performative contradiction'.[189]

4.2.3. Rummens' argument in the legal sphere

Rummens' next step is to transpose this argument into the legal sphere. As has been stated earlier, Rummens believes public and private autonomy to be the legally institutionalized counterparts of moral and individual autonomy.[190] Habermas, on the other hand, explicitly states that legal orders are a

[182] Rummens 2006, 472
[183] Rummens 2006, 472
[184] Rummens 2006, 473
[185] Rummens 2006, 473
[186] Rummens 2006, 473
[187] Habermas 1996, 95
[188] Rummens 2006, 473
[189] Rummens 2006, 473
[190] Rummens 2006, 474

complement of autonomous morality, and not related 'by a kind of imitation'.[191] Because the positivity of law allows citizens to follow the law in two aspects (because it is legitimate and because the law forces you to) the *legal autonomy* of citizens is split up in private and public autonomy. However, *moral autonomy* 'springs from a single source'.[192] The moral individual can only obey himself and has therefore only one source of autonomy. Habermas claims that moral autonomy, for this reason, cannot be limited. Rummens believes that moral autonomy *has* to be limited by the individual autonomy of other moral actors.[193] Because of this disagreement, both authors do not understand the transposition of the arguments in the moral sphere versus the legal sphere in the same way.

What both authors *do* agree on is the separation of autonomy in the legal sphere. Habermas, after all, claims that private autonomy (in the legal sphere) can be limited by public autonomy. The only thing where Rummens disagrees with Habermas's account of deliberation in the legal sphere, is Habermas's reconstruction of private autonomy. According to Rummens, Habermas's definition of private autonomy 'fails to explain why individual liberties should be granted in the *greatest possible measure*' and not just *an equal measure* for everyone.[194] Rummens shows, by bringing in the argument of the traditionalist again, that we should not want an outcome where one has adhered to all the rules of discourse but still manages to only grant very little liberty. The problem here is that this liberty should not be granted in *just* equal amounts, but in the largest equal amount possible. In order to guarantee this last option, Rummens proposes to 'shift the argumentative weight from the medium of law to the discourse principle'.[195] This means that individual autonomy will not just be guaranteed by individual rights, but also by the exercise of the discourse principle. According to Rummens, this discourse 'needs to proceed from an impartial point of view and requires democratic discourse of a moral kind'.[196] We have previously seen what this implies: recognition of the individual autonomy of the other citizens, which leads to better moral deliberation. Because now every citizen's interests have to be taken into account, this will guarantee not just equal liberty for everyone, but the maximum amount of equal liberty for everyone.[197]

4.2.4. Habermas's potential answer to Rummens' criticism

Although Rummens offered a lot of criticism on Habermas's reconstruction of autonomy in the legal sphere and his system of rights, the greatest problem for Habermas's theory lies with how the co-originality of moral and individual autonomy can be explained in the practice of moral deliberation. That is where his problems in the legal sphere, according to Rummens, also originate from.[198] As I

[191] Habermas 1996, 107
[192] Habermas 2001, 779
[193] Rummens 2006, 474
[194] Rummens 2006, 476
[195] Rummens 2006, 476
[196] Rummens 2006, 476
[197] Rummens 2006, 476-477
[198] Rummens 2006, 474

have explained in 4.2.1., Habermas does not want to subject his moral autonomy – by which he means the capacity of moral subjects to collectively decide on the way they will live together – to moral presuppositions included in individual autonomy. That is because this would lead to a limitation of citizen's moral autonomy by a priori recognition of every person's individual autonomy.[199] The insertion of preliminary moral presuppositions is something Habermas himself criticised in Kant's theory and in natural law theories.[200] The result of this would be that citizens would lose their moral freedom: it would be impaired by the morally substantive precondition of having to recognize everybody's right to choose their own life and to pursue their own values.

Therefore, Habermas needs to prove that there also exists a complementary, co-original relationship between moral and individual autonomy in the practice of moral deliberation. As we have seen, proving that individual autonomy presupposes moral autonomy is simple. If Habermas can also prove that moral autonomy can presuppose individual autonomy, he proves the mutual co-original relationship, and Rummens loses the argument that he uses to criticise not only Habermas's ideas of moral autonomy, but also his ideas of legal autonomy.

According to Rummens, the goal of moral autonomy is to lay down norms that can organize the way moral subjects live together.[201] I propose that Habermas can read individual autonomy into moral autonomy by introducing a Rousseauian argument. Habermas can argue that, in order to guarantee that *all* moral subjects can satisfactorily live together, one needs general and universal norms.[202] This is only logical if you think about it: if rules have to regulate how people live together, you need them to apply to everyone equally. The correct application of these general and universal norms can only be guaranteed if one excludes all interests that cannot be generalized and only admits norms that can guarantee equal liberties for all.[203] These non-discriminatory general laws protect the private autonomy of citizens. This means that the procedurally correct exercise of moral autonomy also guarantees equal liberties.

Rousseau, according to Habermas, claims that the right to equal liberties is inscribed in the sovereign will of the people.[204] This sovereign will of the people can also be found in moral autonomy, where moral subjects are concerned with shaping norms that will organize the way they will live together. Securing equal liberties for moral subjects means that 'they are free to pursue their own interests and live by their own values',[205] or in other words: it guarantees individual autonomy. This means that moral autonomy *does* in fact presuppose individual autonomy.

[199] Rummens 2006, 472
[200] See, for example, section 3.4.1. of this thesis, and Habermas 1996, 104-106
[201] Rummens 2006, 470
[202] Habermas 1996, 103
[203] Habermas 1996, 101
[204] Habermas 1996, 101
[205] Rummens 2006, 471

Rummens's (and Cohen's) starting point about the discourse principle was that it can produce *anything*.[206] If we study the implications of the discourse principle, this does not seem to be true. Since Rummens argued in his article that the discourse principle embodied the recognition of moral autonomy,[207] this means that his previous argument works exactly the same, here. In order to create action norms that are valid for all possibly affected persons (as the discourse principle prescribes), one needs general and universal action norms. These can only be guaranteed if one excludes non-generalizable interests and only includes norms that guarantee equal liberty for all. As we have seen stated above, this means that the discourse principle presupposes the moral principle, which prescribes that equal consideration should be given to everyone's needs and values. Therefore, just by using procedural arguments, Habermas can prove that moral autonomy presupposes individual autonomy, and the discourse principle can presuppose the moral principle.

This means that Rummens' problem of the traditionalist can also be solved. The application of the discourse principle means that the traditionalist cannot argue for gender inequality on the basis of religious arguments.[208] Arguing for gender inequality is not arguing for general and universal norms because the argument for gender inequality cannot guarantee equal liberties for all. This means that the traditionalist, with his discriminating argument, goes against the implications of the discourse principle. His arguments can therefore not be accepted in discourse.

It would be difficult for Rummens to prove, on the basis of this new assessment of communicative rationality, that we really need an extra normative presupposition that requires adding respect for individual autonomy to the discourse principle. This principle is not necessary because the respect for individual autonomy already flows from the discourse principle. It is presupposed, so to say. Therefore, Rummens' criticism does not take hold, and Habermas's explanation of the co-original relationship between private and public autonomy is coherent. This also proves, contrary to Rummens' aim, that moral individuals do not have to commit to a moral position when they embrace deliberative democracy. Habermas's model of moral deliberation is morally neutral.

4.3. How convincing is Habermas's idealized discourse principle in practice?

4.3.1. The idealized content of Habermas's theory of deliberative democracy

In the previous chapters, we have seen that Habermas's theory of deliberative democracy and of communicative rationality is somewhat idealized. His discourse principle, for example, prescribes that 'just those action norms are valid to which *all possibly affected persons* could agree as participants in rational discourses'.[209] Habermas's formulation of his democratic principle, which is used in order to legitimate law, is equally strong: 'only those statutes may claim legitimacy that can meet with the

[206] Rummens 2006, 472
[207] Rummens 2006, 470
[208] Rummens 2006, 472
[209] Habermas 1996, 107

assent of *all citizens* in a discursive process of legislation that in turn has been legally constituted.'[210] If this would imply that Habermas requires universal assent in order to legitimate law, this would be an impossible standard to work with in our modern, secularized society.

It is therefore important to add that Habermas has acknowledged the idealized character of his theory himself. We know this because Habermas has provided a few indications in this direction in his writings. First of all, in his postscript, he claims that the idea that a norm deserves universal assent is 'counterfactual': that it is not in line with the factual, or 'real' situation.[211] However, it is important for Habermas's theory that citizens do still aim for this counterfactual consensus. In fact, Habermas's theory relies on it in order to keep its deliberative character. I quote the following paragraph in full because I believe it gives a very clear perspective of Habermas's view on the idealized nature of his theory:

> Deliberative politics would lose its meaning and constitutional democracy would lose its basis of legitimacy if participants in political discourses do not want to convince and learn from others. Political disputes would forfeit their deliberative character and degenerate into purely strategic struggles for power if participants do not assume – to be sure, fallibilistically, in the awareness that we can always err – that controversial political and legal problems have a correct solution. If they were not oriented towards the *goal* of solving problems by giving reasons, participants would have no idea what they were *looking for*. At the same time, even as participants, we may not naïvely ignore the empirical evidence. McCarthy is correct to insist that what we *know* from the observer perspective about permanent dissensus must be integrated with what we *assume* as participants seeking to reach an understanding in political deliberations and discussions – the former should not contradict the latter. In practical affairs, decisions must be made despite ongoing dissensus, but they should nonetheless be made in such a way that they can be considered legitimate.[212]

Other indications, according to Baxter, are the fact that Habermas added the word 'can' in both his definition of the discourse principle and in his definition of the principle of democracy, which implies that he gives himself room to lower the standards from universal assent. Another example is that Habermas allows bargaining processes under his definition of 'rational discourse' in the discourse principle.[213] Since Habermas states that 'compromises make up the bulk of political decision-making processes in any case',[214] it is clear that he believes compromises to be the 'usual' mode of decision-making. Finally, the last argument in favour of a less-idealized interpretation of Habermas's theory is

[210] Habermas 1996, 110
[211] Habermas 1996, 458
[212] Habermas 1996 (Reply), 1493
[213] Habermas 1996, 107-108, also 165-166
[214] Habermas 1996, 282

the use of his system of rights. According to Baxter, the use of Habermas's system of rights is to shift the requirement of universal assent from it being a problem for the legislative outcome of the principle of democracy, to it being a problem for the lawmaking procedure that flows from the system of rights. This lawmaking procedure focuses on guaranteeing an inclusive procedure, which is instrumental for creating a result that is generally acceptable.[215] All these arguments point towards a new understanding of Habermas's theory that is less idealized.

Still, the fact that Habermas's procedural theory is still *somewhat* idealized begs the question how it will function in practice. The fact that Habermas shifted the burden from the ideal solution (and the principle of democracy) to the ideal procedure of legitimation (the system of rights) means that there is still a (procedural) ideal standard that citizens should aim towards. How can this theory apply in real life? That is the question that William Rehg is concerned with answering in his essay 'Legitimacy and Deliberation in Epistemic Conceptions of Democracy: Between Habermas and Estlund'. This real-life problem shapes itself in the form of the minority democrat, which according to Rehg, is 'especially instructive for showing the difficulties involved in the move from democratic ideal to political reality'.[216] Section 4.3.2. will examine the problem that the minority democrat causes for Habermas's theory. Section 4.3.3. will explain Rehg's proposed interpretation of Habermas's theory, his two-level reply, of which he believes it will help solve this problem. Finally, section 4.3.4. will provide a critical reflection on how convincing this interpretation is.

4.3.2. The problem of the minority democrat

Rehg believes Habermas's theory to be an epistemic account of deliberative democracy, which means that it is focused on finding 'correct answers to political problems'.[217] These correct answers can be found in idealized rational procedures. These rational procedures legitimate their results: that is why they deserve the obedience of those that subject to it. According to Rehg, Habermas's standard of correctness is his discourse principle, because this principle is what legitimates action norms in his theory. Therefore, Habermas's standard of *political legitimacy* is his principle of democracy. Because the discourse principle aims at consensus, Rehg believes the principle of democracy to be 'something of a *regulative ideal*, given the realities of political dissension and obstacles to consensus'.[218] He argues that when real discussion is channelled through the principle of democracy, the 'ideal of legitimacy becomes a 'justifiable presumption' that legal outcomes are reasonable'.[219]

According to Rehg, this is the reason why in democratic procedures with majority rule, the majoritarian decision justifies the presumption that the decision is correct, without actually

[215] Baxter 2011, 74-75
[216] Rehg 1997, 355
[217] Rehg 1997, 355
[218] Rehg 1997, 357
[219] Rehg 1997, 357

guaranteeing that the outcome is correct. This means that the results of democratic deliberation are legitimate as long as they justify the idea that this outcome is in line with what *all* citizens would have decided if they were given ideal circumstances to decide it in. Of course, Rehg adds that Habermas also argues that democratic procedures presuppose individual rights, but he insists that 'the core of legitimacy resides in the rational acceptability, or justifiability, of particular outcomes for all citizens.[220]

This is what leads us to the problem of the minority democrat: what happens if this procedure legitimates a decision that a citizen disagrees with? For example: a legitimated procedure of majority rule decides on A. Citizen X was overruled in this procedure – he is part of a group of minority democrats – and disagrees with outcome A. The discourse principle claims that decisions cannot be legitimated without universal assent. Still, decision A is legitimated by the procedure of majority rule. This means that the problem of the minority democrat consists of the following: the procedure should legitimate the result, but what if this result is not in line with what this citizen believes to be legitimate? Rehg argues that Habermas forces the minority democrat into a difficult position here. He basically leaves this citizen with two options. Either the minority democrat is stubbornly persistent in his argument, refuses to believe in Habermas's justified presumption that the majoritarian outcome is legitimate and keeps fighting until the majority opinion has changed in his favour. The question is if and when this may happen. The other option for the minority democrat is to trust the process of the justified presumption, to concede his own argument and to join the majority.[221] Is it convincing that a minority democrat in real life would, simply for the reason of procedural rationality, for the fact that he was outvoted, surrender his judgement? This sounds very unlikely.

Rehg's problem with Habermas's theory is that it does not seem to leave room for a decision to be legitimated, and at the same time having citizens disagreeing with its outcome. In his article, Rehg studies whether Habermas's 'two-level reply' can be an answer to this problem of the minority democrat.

4.3.3. Rehg's interpretation of Habermas's argument: the two-level reply

Rehg claims that Habermas's best solution to the minority-democrat problem lies in focusing on *multiple* procedures. In this argument, Habermas 'splits up' the acts of justification and deliberation. Justification happens on a higher level: this is where citizens will agree on the procedures that can be used to bring about legitimated outcomes. Deliberation happens on the lower level: after these procedures are established, citizens will use them in order to discuss and create the content of legitimate decisions.[222] According to Rehg, Habermas creates a system of 'conferred legitimacy' here: if citizens have agreed on justifying a certain procedure, the decisions that result from that procedure

[220] Rehg 1997,
[221] Rehg 1997, 357-358
[222] Rehg 1997, 359

are legitimated. They are not legitimated because of their content, but because of the way they have been established.[223] This system can be detected in Habermas's formulation of the principle of democracy: statutes are legitimate if they meet with the assent of all citizens, but the discursive process of legislation in which this happens, also has to be legally constituted itself.[224] What this means in practice is that the minority democrat can still believe the initial outcome of the substantive process to be wrong, but he will consider it legitimate and himself morally bound by it, because the decision stems from a fair procedure of decision making that he has consented to before.[225] The legitimation of the decision is therefore 'conferred'.

Rehg inserts another nuance in this discussion of how majority decisions can still be legitimate for the people who find themselves in the minority. In order to understand this nuance, we need to distinguish between what counts as a justification for society as a whole, versus what counts as a justification for the individual's choice. Rehg proposes that we should see the outcome of public deliberation as the 'best collective guess'[226] about what the public, at a certain point in time, perceives to be publicly justifiable. This is, of course, only legitimate if this decision has been backed by high-quality deliberation. The minority democrat subsequently only has to acknowledge that, at this moment in time, this is the solution the polity thinks it should try out.[227] With this distinction, the individual voter can agree to surrender his judgement on what is publicly justifiable. However, he does *not* have to surrender his judgement on what he personally thinks is correct.[228]

4.3.4. Critical reflection on Rehg's presentation of Habermas's two-level reply

I think Rehg's attempt to align Habermas's theory with the *real* situation by means of the 'two-level reply' is admirable. This reply hits really close to the 'reality' of democratic deliberation in the sense that it acknowledges that citizens often do not feel that substantive norms need to be unanimously accepted: they accept the legitimacy of norms because they have been *created* in the right way. Furthermore, this solution explains how citizens can at the same time feel that certain normative decisions are legitimated, but also feel that there is still possibility for them to disagree with the content of this decision. However, as Rehg has acknowledged himself, there is also a downfall to this reply: this solution 'weakens the link between consensus and legitimation'.[229] I think that we can see this very clearly if we compare his theory to the demands of the principle of democracy.

If we look again at the principle of democracy, we see that it states that 'only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation

[223] Rehg 1997, 361
[224] Habermas 1996, 110
[225] Rehg 1997, 362
[226] Rehg 1997, 367
[227] Rehg 1997, 366
[228] Rehg 1997, 367
[229] Rehg 1997, 374

that in turn has been legally constituted'.[230] An important question is what exactly Habermas means by *assent*, in this definition. Does Habermas's principle of democracy require second-level assent of first-level assent? The formulation of the principle seems to point towards the second option: that the condition of unanimous assent applies to the content of discursive processes of legislation. If this is the case, this is problematic for Rehg's interpretation of Habermas's theory: since his theory can only guarantee the assent of all citizens on the procedural level (and not for the substantive level), his theory cannot legitimate these statutes.

A second critical argument is that the two-level reply puts too much emphasis on the procedural side of things. By this I mean that although it is acknowledged that individual rights are also important in Habermas's theory,[231] they do not really seem to be incorporated into this two-level reply. This results in that there does not seem to be much eye for what the results of this proposed solution could be. For example, it would not be unreasonable to presume that citizens could unanimously agree on a procedure of majority rule in order to legitimate decisions. The decisions that this procedure of majority rule produces will be legitimate. But what if, one day, the majority decides to create laws that aim to persecute the minority for arbitrary reasons? The minority would not approve of these laws, but according to the two-level reply, that will not harm the legitimacy of the norm. What is necessary in order to legitimate these laws, is that the minority has agreed to the procedure that created these laws. And so they did, which means that they are bound by these legal rules.

Our first reaction would be that it would be unreasonable for these citizens to be bound by these laws because simply because they are constituted in a way that guarantees legitimacy. What is problematic is that there seems to be no room for protection of substantive individual rights in the two-level reply. The procedure has been executed in the right way, and that is the end of the story. This outcome should not feel right to us. And it should not feel right to Habermas. Habermas, in his philosophy, has always aimed to provide a theory that can cater to both the democratic procedure and the protection of individual rights. This solution only seems to cater to one of these factors: the legitimation of the democratic procedure, of popular sovereignty. There is no equal protection in the two-level reply, because the legitimacy of norms is only dependent on whether legislative rules have been established and followed in the right way.

Of course, I will admit that the sketched problem is more black-and-white than reality will be. A real democratic procedure probably won't lack substantive safeguards that guard individual liberties in the democratic procedure. However, if the procedure, which incorporates majority rule, is the only factor that legitimates results, protecting individual rights will always come in second place. And as we have seen in the previous chapters, this observation is inconsistent with the goal of Habermas's own philosophy, which is to reconcile the rule of law and popular sovereignty in such a way that they

[230] Habermas 1996, 110
[231] Rehg 1997, 357

presuppose one another. The two-level solution should incorporate individual rights as a substantial condition that can *actually* limit the results of popular sovereignty. A result like this would be more in line with the content of the principle of democracy and with Habermas's theory in general.

The result of this is that the two-level reply cannot serve as a solution to the problem of the minority democrat. Moreover, the results of the application of the two-level solution are not in line with Habermas's own theory. Therefore, the problem of the minority democrat still stands. It is therefore not possible to produce legitimate law in systems of majority rule, because the decision cannot meet with the assent of all citizens. If Habermas cannot produce another response to this problem, this has serious results for his principle of democracy and his legitimacy of law. Habermas's theory is therefore incoherent and is not convincing when applied in practice.

4.4. Conclusion

This chapter aimed to assess two criticisms that were aimed specifically at Habermas's theory of the co-originality of the rule of law and popular sovereignty. In section 4.2., I studied the coherency of Habermas's claim of co-originality. Rummens argues that Habermas's account of moral autonomy cannot presuppose his account of individual autonomy without introducing some moral presuppositions. I have argued, by explaining how the implications of Habermas's discourse principle should be understood, that this is not the case. Habermas's theory, therefore, does manage to mutually presuppose private and public autonomy. Rummens's argument has therefore not proven that Habermas's theory is incoherent or that moral individuals have to commit to certain moral positions when following Habermas's theory.

In section 4.3., I studied Habermas's response to the problem of the minority democrat, as formulated by Rehg. Habermas's principle of democracy prescribes that all citizens need to assent to a law in order for it to be legitimate. At the same time, Habermas' procedural conception of legitimation prescribes that following a legally constituted democratic procedure such as majority rule will produce legitimate law. But how can it be that the results of a system of majority lawmaking can both be legitimate by procedure, and illegitimate in the mind of the citizen who disagrees? Rehg interprets Habermas's philosophy and proposes an answer to this question in the form of the two-level reply. I have argued that the results of this reply are inconsistent with Habermas's own theory, because it prioritizes the legitimating process of popular sovereignty and neglects the protection of individual rights that is necessary in Habermas's theory. Therefore, the two-level reply cannot qualify as an answer to the problem of the minority democrat. Since this interpretation of Habermas's theory cannot solve the problem of the minority democrat, it is questionable whether Habermas's theory of procedural legitimacy, when it takes the demands of its principle of democracy seriously, can actually legitimate law that is produced in a system of majority rule.

5. Conclusion

Habermas, in his attempt to bridge the tension between the rule of law and popular sovereignty, has created a complex and nuanced theory which is incredibly multifaceted. In this thesis, I have specifically focused on giving an interpretation of Habermas's account of the problem of the inherent tension between the rule of law and popular sovereignty, and his solution to this tension. I have also critically assessed Habermas's theory by checking whether, in my interpretation, his arguments are coherent and convincing. The goal of this thesis was to answer the following question: *what is Habermas's solution to the inherent tension between the rule of law and popular sovereignty, and is this solution coherent and convincing?*

The aim of the second chapter was to introduce the inherent tension between the rule of law and popular sovereignty. The tension between the rule of law and popular sovereignty derives from the tension between facticity and validity. In order to properly distinguish the terminology, I have first introduced the multiple levels at which this tension between facticity and validity establishes itself. Distinguishing these levels is essential in order to understand Habermas's theory.

The tension between validity and facticity is the original tension, from which all other tensions derive. Habermas acknowledges this specific tension, but does not try to solve it. He is primarily concerned with solving the tension that exists between the rule of law and popular sovereignty. This tension is active within modern legal orders and shows itself in multiple variations. The political traditions that flow from this tension are called liberalism and republicanism, and they constitute the last category that I distinguished in this chapter.

Since Habermas is predominantly concerned with the tension between the rule of law and popular sovereignty, I introduced Green's four general responses in order to understand the different perspectives on this tension. Kant, because he argues for a predominant position of individual rights, can be qualified as a 'rights foundationalist'. Green argues that Rousseau, because he locates the legitimacy of rights in the general will, can be qualified as a 'democratic positivist'. I have argued, following Habermas's argument, that Rousseau's general will also represents individual rights and that he can therefore reconcile the rule of law and popular sovereignty, just like Habermas does. Rousseau can therefore be qualified as a representative of the third response which argues for the co-originality of both concepts. Finally, on the opposite side of the spectrum from co-originality, we have philosophers that argue that these concepts will always be in conflict.

The aim of the third chapter was to interpret Habermas's philosophy – specifically his solution to the tension between the rule of law and popular sovereignty. In order to understand Habermas's solution, however, we need to make sure we understand the presuppositions it rests on. Therefore, this third chapter first introduced basic elements from Habermas's theory of communicative action, such as its

aim of reaching mutual understanding. We have seen that validity claims play an important role in reaching mutual understanding: one needs to agree on the validity of claims in order to reach true mutual understanding. These claims are to be discussed in discourse. The lifeworld helps with reaching that mutual understanding by providing shared belief backgrounds.

We have seen that Habermas worries about the existence of the lifeworld. Its 'rationalization', which among others consists of societal secularization and differentiation, makes it more difficult for actors to reach mutual understanding because they no longer share the same social background. Habermas believes that law can serve as the solution to this problem. Law can bridge this gap of social integration because it can comply with the facticity and the validity of norms. This means that citizens can comply with law both because they want to, but also because they can be forced to. Law can therefore act as a bridge that can help people with reaching mutual understanding and action coordination.

Because law can act as the bridge between facticity and validity, it can also act as the bridge between the concepts of the rule of law and popular sovereignty. Habermas argues that Kant and Rousseau both could not reconcile these concepts in such a way that they would exist in a co-original relationship. First of all, as we have previously noted in this conclusion, Kant prioritizes private autonomy (or innate freedom) over public autonomy. Rousseau manages to reconcile both concepts, but sneaks a normative presupposition into the process of establishing the general will. Habermas prevents this from happening in his own theory by creating a purely procedural theory of legitimation of law, which does not presuppose moral values.

Habermas explains how his theory starts by establishing morally neutral action norms. His discourse principle establishes a procedure that can justify these action norms. Since this discourse principle exists on a morally neutral level, it prioritizes neither private nor public autonomy. The moral principle and the principle of democracy result from the application of the discourse principle to moral and legal norms. Because they both derive from the discourse principle, they are co-original and they do not take precedence over one another. The principle of democracy justifies legal norms, but also *creates* them. These general basic rights that it creates establish a procedure to create legitimate law in political society. This procedure can create legitimate law because it equally protects private and public autonomy in the legal sphere. Because these rights ensure this equal relationship, the rule of law and popular sovereignty can exist in an equiprimordial relationship where one concept does not take precedence over the other.

Finally, the temporality argument that Habermas developed in his 'Constitutional Democracy' shows that we should understand the ideal value that is inscribed in Habermas's theory as a goal that we should work towards in a self-correcting learning project.

Finally, the aim of chapter four was to critically discuss two specific criticisms on Habermas's theory of the co-originality of the rule of law and popular sovereignty.

Rummens argued that Habermas cannot make moral and individual autonomy mutually presuppose one another without inserting morally substantive presuppositions. I have argued that Habermas's procedural theory *can* make sure that moral and individual autonomy mutually presuppose one another. This is because we should understand the discourse principle to be prescribing general and abstract laws. The only way to guarantee these general laws is to only include norms that can guarantee equal liberty for all and norms that will exclude all non-generalizable interests. The requirement of equal liberty in those norms means that equal consideration should be given to everyone's needs and values, and that therefore, moral autonomy does presuppose individual autonomy. Rummens argument fails because Habermas can prove that just by using procedural arguments, he can make moral and individual autonomy mutually presuppose one another. Therefore, Habermas's theory is coherent.

The second criticism is presented in Rehg's theory. Rehg presented the problem of the minority democrat: in procedures of majority rule, how can law both be legitimated by procedure, and believed to be illegitimate by citizens at the same time? Rehg interprets Habermas's theory and formulates an answer to this problem in the shape of the two-level reply. I have argued that this reply cannot solve the problem of the minority democrat. The results of this reply are inconsistent with Habermas's own theory, since it neglects to present private autonomy on the same level as it does protect the public autonomy. The results of not solving the problem of the minority democrat for Habermas's theory are is that the internal consistency of Habermas's procedure of legitimate lawmaking is in trouble. In order to make legitimate law, the principle of democracy prescribes that the norm should meet with the assent of all citizens. This is not the case in procedures of majority rule, which means that their decisions are not legitimate. Habermas therefore needs to find another way to legitimate law in procedures of majority rule.

This means that Habermas's account of his moral principle is coherent and convincing, but unfortunately, the same cannot be said about his principle of democracy. Habermas's two-level reply could not solve the problems of the minority democrat. This means there is a serious problem with the legitimation of law in procedures of majority rule. If there is not another way to guarantee universal assent in democratic systems of majority rule, as the principle of democracy prescribes, the principle of democracy cannot legitimate law.

6. Bibliography

Legislation

Proposal of Law 2018

Proposal of Law (Wet van 9 maart 2018, houdende verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering van de Grondwet, strekkende tot het opnemen van een algemene bepaling), Kamerstukken *II* 2017/18, 34 516, nr. 86

Literature

Baxter 2011

Baxter, H., 2011. *Habermas the discourse theory of law and democracy*, Stanford, Calif.: Stanford Law Books.

Baynes 1995

Baynes, K., 1995. Democracy and the Rechtsstaat: Habermas's Faktizität und Geltung. In: S. White, ed., *The Cambridge Companion to Habermas*, 1st ed. Cambridge: Cambridge University Press.

Cohen 1999

Cohen, J., 1999. Reflections on Habermas on democracy, *Ratio Juris*, 12

Council of State 2020

Council of State, 2020. *Annual Report 2019*. [online] Den Haag. Available at: <https://jaarverslag.raadvanstate.nl/2019/wp-content/uploads/sites/7/2020/05/Raad-van-State-jaarverslag-2019.pdf> [Accessed 23 June 2020].

Fultner 2011

Fultner, B., 2011. Communicative Action and Formal Pragmatics. In: Fultner, B. ed, *Jürgen Habermas: Key Concepts*, Durham: Routledge Ltd.

Green 2015

Green, J.E., 2015. On the Co-originality of Liberalism and Democracy: Rationalist vs. Paradoxicalist Perspectives. *Law, Culture and the Humanities*, 11(2), pp.198–217.

Habermas 1996

Habermas, J., 1996. *Between Facts and Norms*. Cambridge, UK: Polity Press.

Habermas 1996 (Reply)

Habermas, J., 1996. Reply to Symposium Participants, trans. W. Rehg. *Cardozo Law Review* 17(4-5), p. 1477-1558

Habermas 1998

Habermas, J., 1998. On the Internal Relation between the Rule of Law and Democracy. In: C. Cronin, P. De Greiff ed., *The Inclusion of the Other: Studies in Political Theory*, Cambridge: MIT Press, p. 253-264

Habermas 2001

Habermas, J., 2001. Constitutional Democracy. *Political Theory*, 29(6)

Heath 1998

Heath, J., 1998. What is a validity claim? *Philosophy & Social Criticism*, 24(4)

Kant MM

Kant, I., Gregor, M., 1996. *The metaphysics of morals*, Cambridge, MA [etc.]: Cambridge University Press.

Kant PP

Kant, I, Gregor, M., 1996. *Practical philosophy*, Cambridge [etc.]: Cambridge University Press.

Michelman 1999

Michelman, F.I., 1999. *Brennan and Democracy*, Princeton N.J., Princeton University Press

Olson 2003

Olson, K., 2003. Do Rights Have a Formal Basis? Habermas' Legal Theory and the Normative Foundations of the Law. *Journal of Political Philosophy*, 11(3), pp.273–294.

Oxford English Dictionary online

In: *The Oxford English Dictionary*, Liberal Democracy, n. [online] Oxford. Available at: <https://www.oed.com/view/Entry/276732?redirectedFrom=liberal+democracy#eid> [Accessed 23 June 2020].

Rehg 1996

Rehg, W. 1996. Introduction. In: Habermas, J. *Between Facts and Norms*. Rehg, W. ed. Cambridge: Polity Press

Rehg 1997

Rehg, W., 1997. Legitimacy and deliberation in epistemic conceptions of democracy: between Habermas and Estlund. *The Modern Schoolman*, 74(4)

Rousseau 2012

Rousseau, J., Cress, D. and Wootton, D., [ed] 2012. *Basic Political Writings: Discourse on the Sciences and the Arts, Discourse on the Origin of Inequality, Discourse on Political Economy, on the Social Contract, the State of War.* 2nd ed.

Rostbøll 2016

Rostbøll, C., 2016. Kant, Freedom as Independence, and Democracy. *The Journal of Politics*, 78(3)

Rummens 2006

Rummens, S., 2006. Debate: The co-originality of private and public autonomy in deliberative democracy. *Journal Of Political Philosophy*, 14(4), pp. 469–481.

Schaffer 2015

Schaffer, J., 2015. The co-originality of human rights and democracy in an international order. *International Theory*, 7(1)

SEP Immanuel Kant

Rohlf, M., *Immanuel Kant*, The Stanford Encyclopedia of Philosophy (Spring 2020 Edition), Edward N. Zalta (ed.), Available at: <https://plato.stanford.edu/archives/spr2020/entries/kant/>. [Accessed 23 June 2020]

SEP Jean Jacques Rousseau

Bertram, C., *Jean Jacques Rousseau*, The Stanford Encyclopedia of Philosophy (Summer 2020 Edition), Edward N. Zalta (ed.), Available at: <https://plato.stanford.edu/archives/sum2020/entries/rousseau/>. [Accessed 23 June 2020]

SEP Jürgen Habermas

Bohman, J. and Rehg, W. *Jürgen Habermas*, The Stanford Encyclopedia of Philosophy (Fall 2017 Edition), Edward N. Zalta (ed.), Available at: <https://plato.stanford.edu/archives/fall2017/entries/habermas/>. [Accessed 23 June 2020]

SEP Kant's Social and Political Philosophy

Rauscher, F. *Kant's Social and Political Philosophy*, The Stanford Encyclopedia of Philosophy (Spring 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/spr2017/entries/kant-social-political/>.

The Economist Intelligence Unit 2020

The Economist Intelligence Unit, 2020. *Democracy Index 2019, A Year Of Democratic Setbacks And Popular Protest*. [online] London: The Economist. Available at: <https://www.in.gr/wp-content/uploads/2020/01/Democracy-Index-2019.pdf> [Accessed 23 June 2020].

Zurn 2011

Zurn, C., 2011. Discourse theory of law. In: B. Fultner, ed., *Jürgen Habermas: Key Concepts*. Durham: Acumen