# Between Facts and Norms

JÜRGEN HABERMAS

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# Contributions to a Discourse Theory of Law and Democracy

Jürgen Habermas

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# Translator's Introduction

*William Rehg*

Both legal theory and the theory of democracy stand at a crossroads today. In the long-standing democratic regimes of the postindustrial West, problems of social complexity, pluralism, and the welfare state have been putting aged constitutional frameworks under tremendous stress. Such challenges are only intensified with the spread of democratic impulses across the globe, to areas where the cultural and infrastructural conditions for democracy and the rule of law must still be consciously constructed. In this context, one of the more fertile and optimistic theoretical developments has been associated with ideas of "deliberative democracy." These ideas reflect a concern that citizens' participation in the democratic process have a rational character—that voting, for example, should not simply aggregate given preferences but rather follow on a process of "thoughtful interaction and opinion formation" in which citizens become informed of the better arguments and more general interests.[1] Jürgen Habermas's *Between Facts and Norms*, with its emphasis on the role of public discourse in democracy, certainly contributes to this intellectual trend. But it would be wrong to view it simply as one more argument for deliberative democracy. In many respects the culminating effort in a project that was first announced with the 1962 publication of his *Strukturwandel der Öffentlichkeit*,[2] *Between Facts and Norms* offers a sweeping, sociologically informed conceptualization of law and basic rights, a normative account of the rule of law and the constitutional state, an attempt to bridge normative and empirical approaches to democ-

racy, and an account of the social context required for democracy. Finally, it frames and caps these arguments with a bold proposal for a new paradigm of law that goes beyond the dichotomies that have afflicted modern political theory from its inception and that still underlie current controversies between so-called liberals and civic republicans.

An undertaking of such scope, which pulls together three decades of reflection and interdisciplinary research, which is immersed in both German and American debates, and which moves at a number of different levels, places considerable demands on its readers. The primary goal of this introduction is to lighten that burden. If one is to understand Habermas's particular approach to law, one has to have some sense of the basic features of his conceptual framework. After elucidating these in section 1, I briefly sketch the key arguments of the book in section 2. Section 3 notes certain terminological points.

## 1

Anglo-American philosophical treatises on law often begin with a definition of the concept of law itself. In *Between Facts and Norms*, the basic concept of law as a system of rights does not make its full appearance until chapter 3. The ambitious scale of Habermas's undertaking requires considerable preparation, and thus the first two chapters set a rather elaborate stage that features both his own conceptual architectonic and the surrounding landscape of debate. The conceptual apparatus was most fully expounded in his two-volume *Theory of Communicative Action*,[3] and one might read the present work as drawing out the legal, political, and institutional implications of this earlier endeavor. In this first section, I want to introduce the reader to the broader conceptual apparatus and motivate its appropriateness for the analysis of modern law and democracy. I begin by saying something about the puzzle that Habermas starts with, the paradoxical duality of modern law. We can then understand the theory of communicative action as particularly well suited to acknowledge this tension in law and deal with it constructively.

## The Duality of Modern Law

To approach the analysis of modern law in terms of a tension "between facts and norms"—or between "facticity and validity," to translate the German title of the book more literally—is not so surprising. The legal sphere has long been characterized by theorists in terms of a duality of this sort. As we shall see, this tension resides at several levels, but at each level we find a social reality on the one side and a claim of reason (which is sometimes belied by the reality) on the other. Consider, for example, compulsory laws backed by sanctions. On the one hand, such laws appear as the will of a lawgiver with the power to punish those who do not comply; to the extent that they are actually enforced and followed, they have an existence somewhat akin to social facts. On the other hand, compulsory laws are not simply commands backed by threats but embody a claim to legitimacy. Oliver Wendell Holmes's insistence that we must understand law as the "bad man" does—that is, look at laws only in view of the possible negative consequences of being caught at lawbreaking—cannot be the whole story. In fact, many citizens are not consistently "bad" in this sense, and it is doubtful whether a system of law could long endure if everyone took this external approach all the time. At least some portion of a population, indeed the majority, must look at legal rules as standards that everyone *ought* to follow, whether because they reflect the ways of ancestors, the structure of the cosmos, or the will of God, or because they have been democratically approved or simply enacted according to established procedures. What H. L. A. Hart has termed the "internal aspect" of law is a function of its legitimacy or social recognition.[4] Exactly how such legitimacy should be construed is a further question, of course. The important point is this: law is a system of coercible rules and impersonal procedures that also involves an appeal to reasons that all citizens should, at least ideally, find acceptable.

Habermas is heavily indebted to Immanuel Kant's concept of legitimacy, which brings out this tension in law particularly well. Consider, for example, the basic equal rights of individual liberty, such as property and contract rights. Kant grounded their legitimacy in a universal principle of law (the *Rechtsprinzip*, often trans-

lated as "principle of right"), which can be interpreted as summarizing the conditions under which it is possible for a morally oriented subject to universalize coercible limits on the external behavior of strategically oriented individuals. According to Kant, the "moral conception" of law is "the sum of those conditions under which the free choice (*Willkür*) of one person can be conjoined with the free choice of another in accordance with a universal law of freedom."[5] This analysis of rights brings out the *internal tension* between facticity and validity inhabiting law in general: as actionable and enforced, such rights (and legal norms in general) represent social facts demarcating areas within which success-oriented individuals can choose and act as they wish; as linked with a universalizable freedom, rights deserve the respect of moral subjects, and thus carry a claim to legitimacy.

However, Kant's account of legitimacy, as Habermas reads it, ultimately subordinates law to morality. Kant also relied on a metaphysical framework that is no longer plausible: on his account, the possibility of universal rational acceptability depends on a preestablished harmony of reason beyond the empirical world. Whereas subordinating law to morality oversimplifies the rational bases of legitimacy, invoking a transcendentally unified reason presumes consensus prior to actual public discourse. Nonetheless, Kant's appeal to rational consensus as a regulative ideal captures an important part of the tension in law. If law is essentially constituted by a tension between facticity and validity—between its factual generation, administration, and enforcement in social institutions on the one hand and its claim to deserve general recognition on the other—then a theory that *situates* the idealizing character of validity claims *in* concrete social contexts recommends itself for the analysis of law. This is just what the theory of communicative action allows, without the metaphysical pretensions and moralistic oversimplification we find in Kant.

## A Postmetaphysical Theory of Reason

The theory of communicative action is primarily a theory of rationality, an attempt to rescue the claims of reason that were once advanced within encompassing metaphysical systems (such as that

of Thomas Aquinas), philosophies of history (such as G. W. F. Hegel's), or philosophies of consciousness (such as Kant's). According to Habermas, the growth of empirical science, the pluralization of worldviews, and other developments have rendered such grand philosophical approaches generally implausible—and have in the process given rise to impoverished views of reason as merely instrumental. Hence if one is to salvage a comprehensive concept of reason today, one must take a "postmetaphysical" approach. As Habermas uses it, the term "postmetaphysical," which should not be confused with "postmodern," covers a number of different philosophical theories. As specific examples, one might point to John Rawls's "political not metaphysical" theory of justice and Ronald Dworkin's theory of "law as integrity."[6] In any case, for Habermas a postmetaphysical vindication of reason is possible only insofar as philosophy—in an interdisciplinary cooperation with empirical inquiries of various sorts—can show how the use of language and social interaction in general necessarily rely on notions of validity, such as truth, normative rightness, sincerity, and authenticity.[7] This necessitates not only a philosophical analysis of communication but also an attention to debates within a range of disciplines.

Postmetaphysical philosophy thus need not surrender all ambitions of its own. This is already evident in the focus on validity. On Habermas's view, claims to validity involve an idealizing moment of unconditionality that takes them beyond the immediate context in which they are raised. This is clearest with certain types of truth claims, as they are commonly understood. For example, when we assert today that the earth is a sphere (approximately), we do not simply mean that it is "true for us" that the earth is spherical. Rather, we are also saying that anyone, of whatever generation or culture, who believes otherwise is mistaken. To be sure, the universalist understanding of truth has come under fire even in the philosophy of the natural sciences, and thus it should be no surprise that a philosopher who defends a universalist concept of normative validity in the practical domain—the domain of morality, politics, and law—faces rather imposing hurdles. The crux of the challenge is constructively to maintain the tension between the strongly idealizing, context-transcending claims of reason and the

always limited contexts in which human reason must ply its trade. It is thus quite understandable that the tension "between facts and norms" should stand at the very center of Habermas's attempt to bring his theory of communicative action to bear on the existing institutions of law and democracy. A legal-political theory based on a theory of communicative action cannot avoid this tension, which in fact appears at every level of the analysis, as Habermas takes pains to demonstrate in the first chapter: within the use of language itself, within modern law, and between law and social reality. I turn now to Habermas's application of the theory of communicative action, first to social coordination in general and then to modern law.

## The Communicative Structures of Social Coordination

The first chapter can be read as Habermas's own highly theoretical reconstruction of the paradoxical character of law and the special role of law in modern society. This reconstruction has a number of densely interwoven strands: not just an abstract theory of validity but an ambitious theory of modernity as well, it attempts to reconstruct the rise of modern law with its dual structure. Rather than trace its intricacies step by step, in what follows I will illustrate the basic categories necessary to follow Habermas's account.

One should first be aware that the theory of communicative action involves a particular view about how social coordination is effected through language. Drawing on insights from American pragmatism and the speech-act theories of J. L. Austin and John Searle, Habermas considers a "formal-pragmatic" approach to language as most adequate for social theory. This approach goes beyond semantic and syntactic analyses of meaning and grammar to examine the general structures that enable competent speakers actually to engage in successful interaction, which involves more than simply knowing how to form grammatical sentences.[8] Specifically, competent speakers know how to base their interactions on validity claims that their hearers will accept or that could, if necessary, be redeemed with good reasons. As already mentioned, this involves a tension between facticity and validity insofar as a claim to validity raised here and now, and perhaps justified according to local standards, ultimately points beyond a particular com-

munity. At least this is the case with truth claims and moral claims. As understood by participants engaged in interaction and discourse, truth claims are claims about the objective world that all human beings share, and moral claims have to do with norms for interpersonal relationships that any autonomous adult should find rationally acceptable from the standpoint of justice and respect for persons. If such claims are valid, then any competent speaker should, under suitable conditions, be able to accept the claim on the basis of good reasons. When a claim is contested, actually bringing about such rational acceptance requires actors to shift into a *discourse* in which, the pressures of action having been more or less neutralized, they can isolate and test the disputed claim solely on the basis of arguments.[9]

To be sure, not all types of claims anticipate the agreement of a universal audience. The differences between types of discourse can be quite important in this regard. For example, claims about what is good for a particular group (or person), or about a particular group's authentic self-understanding, may be addressed only to the individuals concerned and those who know them well. Such discourses, which Habermas labels "ethical," differ both in theme and scope of audience from the "moral" discourse concerned with universal norms of justice.[10] But even these more limited ethical claims presuppose an orientation to mutual understanding, which for Habermas is constitutive of communicative action. The orientation to reaching understanding about validity claims serves as a mechanism for social integration inasmuch as it grounds shared expectations, ways of interpreting situations, and so forth.

To illustrate Habermas's approach further, imagine that a dispute arises within a group and that its members wish to resolve it consensually on the basis of validity claims. According to Habermas, conflict resolution on the basis of reasoned agreement involves at least three idealizing assumptions: members must assume they mean the same thing by the same words and expressions; they must consider themselves as rationally accountable; and they must suppose that, when they do arrive at a mutually acceptable resolution, the supporting arguments sufficiently justify a (defeasible) confidence that any claims to truth, justice, and so forth that underlie their consensus will not subsequently prove false or mistaken. No

local, spatiotemporally finite consensus can fully realize these idealizations; yet if they should subsequently prove false—if members discover that a crucial term was understood in two different ways or that they were seriously self-deceived or that they were mistaken about certain facts or norms—then there are grounds for questioning the original agreement and reopening the discussion. That is, these idealizations imply a tension between the de facto social acceptance (*soziale Geltung*) of a group consensus and the idealized validity (*Gültigkeit*) that such a consensus must claim for itself if members are to accept it as reasonable. Communicatively achieved agreements are in principle always open to challenge, and thus are at best a precarious source of social integration. If a community is to be a stable one, then, it requires more than explicit agreement as a basis for social cooperation.

Conflict resolution will be rendered easier the more the members of the group can limit their discursive efforts to a few problematic validity claims. For example, if they are at odds over how best to manage a particular environmental threat—one might imagine a city council debating how to deal with an imminent flood—they have a better chance of reaching agreement if they only have to resolve an empirical question about the effectiveness of two competing strategies, and do not also have to argue over fairness criteria, or what would count as a successful outcome. In short, reaching agreement communicatively requires a large background consensus on matters that are unproblematic for group members.

The implicit agreement represented by such a *lifeworld* background stabilizes a communicatively integrated group insofar as it removes a large body of assumptions from challenge—as it were, fusing validity with the facticity of a given cultural background. This is because the background not only provides its members with shared resources for managing conflict; as a source of shared identities, it also lessens the number of issues that are likely to be contested at any given time, so that large areas of social interaction rest on a stable basis of unquestioned consensus.[11]

If members cannot agree on how to resolve a specific conflict, say on the aforementioned question of how to deal with an impending flood, they can attempt to bargain. As Habermas understands this mode of conflict resolution, it involves a certain shift in perspective

on the part of the conflicting parties from communicative to *strategic action.* Rather than attempting to convince one another of a validity claim regarding the intrinsically better strategy, each party begins to bargain with threats and promises in the hope of inducing the other to cooperate with it in pursuing a given flood policy. In more general terms, an actor who adopts a strategic attitude is primarily concerned with getting his or her way in a social environment that includes other actors. In many contexts it is understood by those involved that such an attitude is appropriate. In fact, the need for modern law partly arises because, with the growth of capitalist market economies, contexts dominated by strategic action become increasingly important for social coordination.

## The Need for Positive Law

To understand modern law within the framework provided by Habermas's theory of communicative action, we need to introduce some complications that the above illustration provisionally set aside for the sake of clarity. First, because modern societies are pluralistic, conflict resolution must occur across a number of subgroups, each of which has a somewhat different self-understanding and set of shared background assumptions. Second, modern pluralization has engendered a process that Max Weber called the "disenchantment of the world." For our purposes, this refers to the loss of the "sacred canopy," the fact that pluralization has undermined, or at least fragmented, common religious authorities and worldviews.[12] Third, modern societies have developed a complex differentiation of functional spheres defined by specific tasks of social reproduction (economy, educational system, politics, and so on).

Pluralization and disenchantment undermine the ways in which communities can stabilize themselves against shared backgrounds and authorities that removed certain issues and assumptions from challenge. Modern societies witness an increasing variety of groups and subcultures, each having its own distinct traditions, values, and worldview. As a result, more and more conflicts must be settled by reaching explicit agreement on a greater range of contestable

matters, under conditions in which the shared basis for reaching such agreement is diminishing. Areas of life in which facticity and validity were once fused come under increasing critical scrutiny—facticity and validity increasingly split apart, as it were—setting in motion a process of societal rationalization. That is, members are increasingly forced to separate different spheres of validity, for example, to distinguish scientific questions from those of faith, those of justice and morality from aesthetic judgments, and so forth, a development that Weber attempted to capture with his concept of the differentiation of "value spheres."

This increasingly differentiated use of communicative reason at the level of the lifeworld is associated with the third of the above aspects of modernity, the functional differentiation of semi-independent subsystems in which strategic action acquires greater importance for social coordination.[13] The capitalist economy is perhaps the most obvious example of this. Buyers and sellers act "strategically" rather than communicatively inasmuch as they make decisions according to their own interests and external market conditions. The social coordination that arises on this basis is achieved not by reaching agreement on validity claims but "behind the actors' backs," through anonymous market mechanisms created by the intermeshing of largely unintended consequences of action. In functionalist parlance, the economy represents a level of social integration that occurs through the "nonlinguistic steering medium" of money. This medium relieves market participants of the need to reach a substantive consensus, so that—in theory, at least—they can simply pursue their own personal advantage and trust to the overall aggregate effect of the market to distribute goods and services evenly and efficiently.[14]

Besides money and the economic reproduction it steers, "system integration" is also effected through the medium of power in formally structured organizations. In bureaucratic administrations, for example, the hierarchically stratified power of superiors over subordinates effects a coordinated realization of collective goals. The authority to issue binding commands means that the superior does not have to convince subordinates of the advisability of each task assigned to them, thus reducing the need for explicit consensus. Although this is by no means the whole story of how bureau-

cratic organizations actually function,[15] it does indicate how hierarchical organization at least reduces *some* of the burdens involved in reaching explicit agreement.

Modern law is meant to solve social coordination problems that arise under the above conditions, that is, where, on the one hand, societal pluralization has fragmented shared identities and eroded the substantive lifeworld resources for consensus and, on the other, functional demands of material reproduction call for an increasing number of areas in which individuals are left free to pursue their own ends according to the dictates of purposive rationality. The solution is to confine the need for agreement to general norms that demarcate and regulate areas of free choice. Hence the dual character of law: on the one hand, legal rights and statutes must provide something like a stable social environment in which persons can form their own identities as members of different traditions and can strategically pursue their own interests as individuals; on the other hand, these laws must issue from a discursive process that makes them rationally acceptable for persons oriented toward reaching an understanding on the basis of validity claims.

We now have the basic elements in Habermas's concept of modern law: (a) an account of certain features of modern societies; (b) a distinction between communicative and strategic action; and (c) an account of communicative action in terms of validity claims that must be vindicated in discourses of different types. Note how this last feature goes beyond Kant's account, which ultimately subordinated law to morality. Whereas Kant took universalizable moral validity as the model for legitimate law, Habermas proposes a more complex set of discourses that underlie legitimate lawmaking. In fact, this discourse approach is the key to his argument that democracy and the rule of law are internally related.

Before taking up this argument in section 2, though, we should note that there is also an *external tension* between facticity and validity, specifically a tension between the claims of the constitutional-democratic legal order and the ways in which forms of social power actually intrude on and undermine the conditions for legitimate lawmaking. For theorists with Habermas's sociological awareness, no plausible concept of modern law can ignore this external tension between facts and norms, and it is precisely the

failure to appreciate this tension that leads to a certain one-sidedness in many contemporary political theories. The second chapter gives us a sense of Habermas's course by charting the shoals on which some leading alternatives have run aground. To close this first section, then, I briefly indicate Habermas's path between the two main alternatives.

## Between Rawls and Luhmann

Many Anglo-American readers will already be familiar with one of these alternatives, John Rawls's theory of justice.[16] As much as he agrees with Rawls, Habermas finds that the highly normative theory of justice does not sufficiently appreciate the social facticity confronting constitutional ideals. To be sure, Rawls's concern with overlapping consensus and the social stability of his conception of justice does attempt to show how this conception can find acceptance within a particular *cultural* context. Rawls's theory can plausibly appeal to the fact that constitutional democracies have flourished in societies in which certain political traditions and ideas of fairness are widely shared. But this still ignores the problem of how legal *institutions* can realize such ideals in contexts shaped by powerful interests and complex functional requirements. And, to judge from the pessimism of many sociological observers of democracy, appeals to cultural ideals alone will not answer the problems posed by welfarism, bureaucratization, powerful corporate interests, an apathetic citizenry, and so forth.

The other main alternative, the systems theory of Niklas Luhmann, will probably be less familiar to English-speaking readers. In fact, Luhmann is one of the most influential social theorists in Germany today (along with Habermas himself) and, judging by translations of his work, he is not completely unknown to English-speaking audiences.[17] Nonetheless, a lengthier introduction to his approach, beginning with some historical background, is called for.

In the social-contract tradition going back to Thomas Hobbes, which Habermas also refers to under the umbrella of "rational" or "modern" natural law,[18] the legal constitution of society on the basis of individual rights appeared as a plausible extension of the contract relationship that governed the bourgeois economy. The

economic institutions of contract and ownership already entailed a view of legal persons as free and equal, and thus as bearers of equal rights. Karl Marx's critique of capitalism turned this normative intuition inside out. Marx viewed the economy as a system of anonymous relations oriented not toward the freedom and equality proclaimed in 1789 but toward a humanly alienating self-reproduction of capital. Law—and more generally, the consciously accepted norms and ideals behind law—was no longer seen as the key element in social coordination; the focal point of social analysis shifted to the depersonalizing economic system whose integrating achievements proceeded behind the participants' backs. Coming out of the tradition of political economy (Adam Smith, David Ricardo, James Mill, et al.), this theoretical approach requires one to adopt an external-observer perspective, or what Habermas calls an "objectivating perspective" on social relations. The "performative perspective" of the participants themselves tends to be viewed with some suspicion, as subject to illusions, and it may even be dismissed as irrelevant. For Marx, the participant perspective still retained theoretical relevance inasmuch as the awareness of systemic mechanisms of capitalist integration had a critical, revolutionary power: even as he relied on an observer perspective, he addressed his theoretical analysis to participants who took the bourgeois norms of freedom and equality seriously. Contemporary systems theory, however, drops this normative involvement altogether for a thoroughly objectivating, technocratic approach to society. With its rigorous restriction to the observer perspective, systems theory takes an approach the very opposite from that of Rawls, with his commitment to the normative self-understanding of constitutional democracy.

In broad terms, systems theory has a certain appeal because of its ability to conceptualize forms of complex social organization that are effected more at an anonymous macrolevel than through the direct intentions of individual participants. I have already briefly described two such forms of organization, the market economy and bureaucratic organizations. As a "system," society (or its subsystems, such as the political system or economy) is not just the sum of individual beliefs and decisions but a set of functionally interdependent elements whose coordinated operation maintains the

whole system or subsystem. Which elements are selected and how their functioning is conceived varies with the particular version of systems theory, but mechanistic equilibrium models and biological homeostasis models have provided two of the more influential metaphors for early systems theory.[19] Though heavily indebted to Talcott Parsons, Luhmann has radicalized systems theory by drawing on a concept of "autopoiesis" that was originally intended for living organisms.[20] Systems are "autopoietic" in the sense that "the states of the system are exclusively determined by its own operations. The environment can eventually destroy the system, but it contributes neither operations nor structures. The structures of the system condense and are confirmed as a result of the system's own operations, and the operations are in turn recursively reproduced by structural mediation."[21]

This implies that systems are "operationally closed." One should not confuse this with causal independence from the outside world. The legal system, for example, could not exist without the psychological systems of its judges, lawyers, clients, and so forth. Rather, systems are operationally closed in the sense that the communication of meaning within the system is defined solely in terms of the system's own language. As a result, a system can register events outside itself only insofar as they can be "translated" into its own language. An exchange of property, for example, can be "observed" by the legal system only insofar as it is mediated by an appropriate legal mechanism, such as a deed or valid will. Conversely, legal actions, such as a suit for damages to property, have meaning in the economic system only insofar as they impinge on monetary transactions. Inasmuch as the system's language, or "code and programming," determine what, and how, external events are observed, a system reproduces not only itself but its environment as well. Conversely, there is no central, overarching perspective on society as a whole but only a multiplicity of perspectives corresponding to the different subsystems. On Luhmann's systems approach, society is "polycentric."

If we examine the structure of the systemic language of law, however, we can see that such closure is compatible with a certain kind of "cognitive openness." Programs and codes are the means by which a system solves its basic problem, that of selecting possibili-

ties in environments that are both complex and contingent.[22] In virtue of its binary code of legal versus illegal (where "illegal" has a broad sense that includes "not legally binding"), law selects certain actions and omissions as expectable within the legal community. Thus actors can expect that others will expect them to do action *A* in situations of type *X*, or not to do *B* in situations of type *Y*, and so forth.[23] To handle disappointments of these expectations, the law attaches sanctions to their violation. Normative expectations thus have the property that disappointments of the expectation do not lead to "learning"; that is, one does not adjust one's expectation as one does in the case of a disappointed cognitive expectation, say, about how nature will behave. Rather, one punishes the violator so as to reinforce the original expectation. Learning, or development in law, occurs in virtue of its "programming," which allows the legal system to adapt to new situations by developing new "programs," that is, by creating new norms. In this way, law is "cognitively open" to its environment.

Since the environment is itself an internal construct of the system, however, cognitive openness does not break social subsystems out of their operational self-enclosure. The turn to autopoiesis has thus forced systems theorists to search for ways to account for intersystemic effects.[24] This problem also turns up in Gunther Teubner's modifications of systems theory, modifications that in Habermas's view either are empirically untenable or tacitly presuppose the very kind of communicative action that systems theory must exclude. Habermas argues that such problems cannot be resolved if theory is closed to the participant perspective that governs the everyday use of language. It is from the perspective taken in communicative action, and thus through the flexibility provided by ordinary language, that legal "communications" are able to mediate between functional subsystems and the lifeworld.

The lesson of Habermas's reading of Rawls and Luhmann is this: if an account of modern law is to be neither sociologically empty nor normatively blind, then it must incorporate a dual perspective. The theorist of law can ignore neither the participants' own normative understanding of their legal system nor those external mechanisms and processes that are accessible to the sociological observer. The need for this dual perspective explains Habermas's

continuing respect for such thinkers as Weber and Parsons, who attempted to combine internal and external perspectives in their analyses. To be sure, neither thinker succeeded in consistently maintaining both perspectives. But their failures are at least instructive, and in fact lie behind the complexity and multiperspectival character of Habermas's own analyses. More specifically, to do justice to the dual character of law, Habermas proposes to examine it from *both* normative and empirical perspectives, both as a "system of knowledge" (or set of public norms) and as a "system of action" (or set of institutions) embedded in a societal context. He thus devotes chapters 3 through 6 to the normative self-understanding of constitutional democracies, whereas chapters 7 and 8 take up issues connected with empirical sociology: how the normative model relates to empirical investigations of democracy and how it must be situated in regard to social-power processes. Chapter 9 then caps off the investigation by proposing a new paradigm for approaching the rule of law and democracy.

## 2

Having set forth the basic parameters of modern law in chapter 1 and charted various theoretical pitfalls in chapter 2, Habermas is ready to reconstruct the normative understanding of the modern rule of law—how legitimate law is possible—in chapters 3 and 4. In analyzing modern law as a system of rights, chapter 3 supplies the basis for the central thesis of the book: the rule of law, or constitutional state, is internally related to deliberative democracy.[25] Because some of the most important debates in political and legal theory arise between these two conceptual poles, showing how they are internally linked together promises to represent a considerable theoretical advance. To see what Habermas is up to, it helps to position his thesis between two opposed views, which are admittedly somewhat stylized for purposes of presentation.

On the one side are classical "liberal" views. Stemming from such thinkers as John Locke, this approach emphasizes the impersonal rule of law and the protection of individual freedom; democratic process is constrained by, and in the service of, personal rights that guarantee individuals the freedom to pursue their own goals and

happiness.[26] On the other side, one finds traditions of "civic republicanism" stemming from Plato and Aristotle and later reshaped by, among others, Jean-Jacques Rousseau. This approach gives pride of place to the democratic process as a collective deliberation that, at least ideally, leads citizens to reach agreement on the common good. On this view, human freedom has its summit not in the pursuit of private preferences but in self-governance through political participation.[27] Consequently, republican views tend to ground the legitimacy of laws and policies in notions of "popular sovereignty," whereas liberal views tend to define legitimate government in relation to the protection of individual liberty, often specified in terms of human rights.

This split is not entirely surprising if one recalls the features of modern law noted in section 1 above. Modern legal norms require only outward compliance regardless of individual motivation, but they should, at the same time, have a rational basis that also makes it possible for persons to accept them as legitimate and thus deserving of obedience. The need for legitimation is acute, because such norms must be positively enacted without appeal to a higher source of justification, such as a shared religious worldview. In view of this duality, one can see that coercible law can be accepted as legitimate insofar as it guarantees two things at once. On the one hand, as demarcating areas in which private individuals can exercise their free choice as they desire, law must guarantee the *private autonomy* of individuals pursuing their personal success and happiness. On the other hand, because its enactment must be such that reasonable individuals could always assent to its constraints rationally, legitimate law must also secure the *public autonomy* of those subject to it, so that the legal order can be seen as issuing from the citizens' rational self-legislation, as it were. The two broadly construed approaches, liberal and republican, tend to stress either one side of autonomy or the other as the basis of legitimacy.

In arguing for an "internal relation" between private and public autonomy, Habermas wants to do justice to both sides, that is, provide an account of legitimate law in which both human rights and popular sovereignty play distinct, irreducible roles. Before giving this account, it helps to note the twin pitfalls Habermas wants to avoid: one must be careful to locate the legitimacy of law at the

proper level, neither subordinating law to morality nor conflating it with a community's assertion of shared values and traditions of the good life. This is not to deny that both moral considerations and "ethical" reflection on substantive values are pertinent to law: laws regulate interpersonal relations in a manner similar to moral norms, but they do so only within a concrete community having a particular history and, pluralization notwithstanding, probably at least some shared understanding of the common good. Moreover, both issues of justice and the determination of policies and collective goals form important parts of law and politics. It is not surprising, then, that attempts to explain legitimacy often turn to one type of discourse or the other, depending on whether private or public autonomy receives greater emphasis.

Habermas sees a general tendency in modern natural-law theory, Kant's included, to understand basic liberties in overly moralistic terms, merely as the legal expression of the mutual respect that persons ought to show one another as morally autonomous agents. By contrast, Rousseauian civic republican accounts, by emphasizing the importance of shared traditions, civic virtue, and agreement on the common good, run the risk of reducing deliberative democracy to the ethical discourse in which a concrete community reflects on its substantive values and traditions in order to determine what course of action is good for it in a given social situation. Neither moral respect nor ethical reflection, however, can by itself account for the legitimacy of law in complex pluralistic societies.

To deal with these problems, Habermas centers his account of legitimacy on a discourse principle (D) that lies at a different level than the distinction between moral and ethical discourse. As a principle for the impartial justification of norms in general, (D) also underlies both morality and law: "Only those norms are valid to which all affected persons could agree as participants in rational discourses."[28] By anchoring the legitimacy of law in a discourse principle that is conceptually prior to the distinction between law and morality, Habermas hopes to avoid a moralistic interpretation of law and consequent favoring of private autonomy in the form of human rights. At the same time, the discourse principle points to a model of legitimation that undercuts the liberal-republican split. Legitimate law must pass a discursive test that potentially engages

the entire range of different types of discourse. These include not only moral and ethical discourses but also "pragmatic" discourses in which alternative strategies for achieving a given aim are assessed; in addition, insofar as an issue involves conflicting particular interests and values that do not permit consensus, a legitimate legal regulation of the issue must involve fair compromise.

With this framework in place, Habermas can argue that the internal relation between private and public autonomy requires a set of abstract rights that citizens must recognize if they want to regulate their life together by means of legitimate positive law. This "system of rights," which each concrete democratic regime must appropriately elaborate and specify, delineates the general necessary conditions for institutionalizing democratic processes of discourse in law and politics. To summarize, these rights fall into five broad categories. The first three are the basic negative liberties, membership rights, and due-process rights that together guarantee individual freedom of choice, and thus private autonomy. The fourth, rights of political participation, guarantees public autonomy. Habermas argues that each side is indispensable and cannot simply be reduced to the other: without the first three sets of rights, there is no private autonomy (and thus no free and equal subjects of law), but without the fourth set the laws and rights guaranteeing private autonomy are merely paternalistic impositions rather than expressions of self-governance. Rights of political participation, that is, enable citizens themselves to shape and further define the rights they enjoy as "privately autonomous" and thus to become "the authors of the laws to which they are subject as addressees." Finally, a fifth category of social-welfare rights becomes necessary insofar as the effective exercise of civil and political rights depends on certain social and material conditions, for example, that citizens can meet their basic material needs.

As conceived so far, the system of rights regulates only the interactions among equal citizens; it is only in chapter 4 that Habermas introduces the role of state authority, whose police power is necessary to enforce and thus stabilize the system of rights. This introduces a further step in the institutionalization of discourse and, with it, a further dimension of the tension between facticity and validity that is internal to the rule of law, namely, the

tension between state power and legitimate law. To capture this tension, one must keep two things in view at once. On the one side, law and political power fulfill certain systemic functions for each other: the law authorizes some exercises of power and disallows others and, in addition, provides the procedures and forms that define various governmental powers and competences to begin with; government power, meanwhile, provides a threat of sanctions that makes law socially effective. On the other side, the law employed by the state in its various offices and activities must itself be legitimated through a broader discourse of citizens and their representatives. Hence, pace Luhmann, a functionalist analysis of bureaucratic power and legal procedures cannot stand on its own but must be tied to an account of public reason. For Habermas, this latter account must ultimately refer to democratic processes of "opinion- and will-formation" in the public sphere. As a formation of opinion *and* will, public discourse is not merely a cognitive exercise but mobilizes reasons and arguments that draw on citizens' interests, values, and identities. Political discourse thus brings in the citizens' actual sources of motivation and volition. It thereby generates a "communicative power" that has a real impact on the formal decision making and action that represent the final institutional expression of political "will."

In this further step in his analysis of law, then, Habermas is concerned to link the informal discursive sources of democracy with the formal decision-making institutions that are required for an effective rule of law in complex societies. The constitutional state represents the crucial set of legal institutions and mechanisms that govern the conversion of the citizenry's communicative power into efficacious and legitimate administrative activity: law "represents . . . the medium for transforming communicative power into administrative power."[29] It is from this perspective that one must account for the various principles, tasks, and institutions of the constitutional state, such as the separation of powers, majority rule, statutory controls on administration, and so forth.

Having sketched a philosophy of law in chapters 3 and 4, Habermas turns in chapters 5 and 6 to jurisprudence proper, or legal theory. Hence these chapters should be of special interest to jurisprudential and constitutional scholars. There Habermas tests the philo-