Discourse theory of law in times of populism

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Abstract
Jürgen Habermas's discourse theory of law has shaped debates on what we consider to be legitimate law. This contribution will firstly identify the *Zeitgeist* in which discourse theory emerged. Secondly, it points out the emancipatory potential of law that discourse theory has helped us to understand, both on a domestic and a transnational level. Thirdly, the paper turns to discuss two recent challenges for the discourse theory of law, namely (a) the realities of social power that undermine and contradict its promises, and (b) the rise of populism, which places the core normative assumptions of discourse theory in doubt.

1 | DISCOURSE THEORY'S PROMISE

In the 1950s, Habermas opened a remarkable theoretical avenue, and much of his worldwide success may be attributed to the fact that he was able to provide the theoretical expression of an emerging *Zeitgeist*. Habermas's theory combined three important strands. On one level, his theory was very much in line with a commonly held perception that dominated much of political and social theory at that time. Thinkers with completely diverse worldviews, such as Martin Heidegger, Helmut Schelsky, Günther Anders, Theodor W. Adorno and Max Horkheimer expressed, in specific ways, the view that modern society was shaped and dominated by technology and industrial imperatives. Habermas too shared this perception, and his theory of society—built around the concepts of "lifeworld" (*Lebenswelt*) and "system" (*System*)—used the concept of the system to provide a theoretical framework to understand the character and effects of a central feature of modern societies: "systemic integration".

A second important strand was the critical drive of his theory. Technocratic views on society, for example those elaborated by Helmut Schelsky, regarded the dominance of technology and its power to shape the individual as a potentially deplorable but unchangeable characteristic of modernity.¹ Habermas, by contrast, followed the tradition of critical theory. His theory has always been normative, developed to provide the foundation for a critique that could engender an eventual change of society.

However, and this is the third strand, Habermas did not follow the negativist and defeatist approach of Horkheimer and Adorno, but rather articulated and took seriously the "intuition" that something affirmative could...
actually be found in society as it was, notwithstanding the dominance of technology and industry. Based on a theory informed by psychoanalytical insights and on their experiences during national socialism, Horkheimer and Adorno had emphasised that industrial society had crippled individuals' drive and living impulses, which, so they argued, led these stunted individuals to turn to authoritarian movements and to undermine the potential of establishing a free society. Enlightenment had, so the core idea of Dialectic of Enlightenment goes, turned against its own foundations.2

The starting point for Habermas is, by contrast, the intuition that the recognition of other human beings is deeply enshrined into human existence. Humans address each other using language and the intersubjectivity created hereby provides the normative basis for Habermas's theory. In this sense, Habermas already pointed out in his 1965 inaugural lecture at the University of Frankfurt that:

The concern with emancipation from quasi-natural authority is not just a vague idea that hovers before one's eyes: it can be a priori comprehended. What raises us above nature is indeed the only fact of which, due to its very nature, we can have knowledge: namely, language. The idea of autonomy (Mündigkeit) is given to us with the structure of language. With the very first sentence the intention of a common and uncompelled consensus is unequivocally stated.3

In other words, the grounding intuition upon which Habermas's entire oeuvre unfolds is that mutual understanding is the conditio humana. In addition to mechanisms of systemic integration that many theorists of the time placed at the centre of their theories, Habermas points towards what he calls "lifeworld integration": normative communication practices deeply embedded in everyday communicative processes.

The theory that Habermas developed provided the theoretical expression of an increasingly self-conscious civil society in the 1960s that was no longer willing to accept the dominance of the ossified political system, but rather insisted that the analyses, critiques and potential solutions to existing problems developed in deliberations outside established institutions actually mattered and were both expressions and the result of a specific and affirmative kind of rationality originating from lifeworld communication, or "communicative rationality".4 Participants of lifeworld communication argue about validity claims and, according to Habermas, it is the inherent logic of the lifeworld that within such disputes we find "the peculiarly constraint-free force of the better argument".5 Habermas has developed a theory of universal pragmatics in which he intends to show how norms in particular, and normativity in general, are created through lifeworld communications.6 Subjects find themselves involved in communicative processes that imply and demand the "inclusion of the other",7 namely the recognition of the other as a moral subject. Habermas's core claim in terms of practical philosophy is that a normative discourse principle can be derived from the principles underlying lifeworld communication.8 This discourse principle postulates: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."9 After all, the lifeworld is the sphere from which normativity can emerge and, therefore, norms can only be legitimate if they are connected to lifeworld communicative processes.

Habermas's discourse theory offers a very modern promise. It takes seriously the role of the individual in her embeddedness in communicative processes and identifies this interplay as the foundation for a normative theory of society.

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2Theodor W. Adorno and Max Horkheimer, Dialectic of Enlightenment: Philosophical Fragments (Stanford University Press, 2002, German original: 1947).
3Jürgen Habermas, 'Knowledge and Interest' (translated by Guttorm Fløistad), (1966) 9 Inquiry, 285–300, 297.
4Jürgen Habermas, The Theory of Communicative Action, Vol 1: Reason and Rationalization of Society (Polity, 1986, German original: 1981), esp. 297.
5Ibid., 28.
6Jürgen Habermas, 'Was heißt Universalpragmatik? (1976)', in Habermas, Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns (Suhrkamp, 1984), 353–440.
7Jürgen Habermas, The Inclusion of the Other: Studies in Political Theory (Polity, 2005, German original: 1999).
8See esp. Jürgen Habermas, 'Diskursethik: Notizen zu einem Begründungszusammenhang', in Habermas, Moralbewußtsein und kommunikatives Handeln (Suhrkamp, 1983), 53–125.
9Jürgen Habermas, Between Facts and Norms (Polity, 1997, German original: 1992), 107.
extra-parliamentary opposition (außerparlamentarische Opposition) of the 1960s started its “march through the institutions”, Habermas incrementally developed a discourse theoretical framework for understanding the state, its institutions and the law. Throughout much of his theoretical development, Habermas remained rather critical of the law, as he regarded it to be (predominantly) a “steering medium” through which the subsystems of systemic integration are organised. In The Theory of Communicative Action, Habermas still presented a rather critical assessment of the law. He argued that systemic imperatives, constituted and organised through law, were colonising the lifeworld and herewith endangering the societal mechanisms through which legitimate action norms might be created.

It is in Between Facts and Norms—Habermas’s main work on the philosophy of law—that he presents a fundamental reassessment of law and its potential. The law is no longer seen as belonging to systemic integration, and Habermas acknowledges that law in general can be legitimate: “From the vantage point of the theory of communicative action, we can say that the subsystem ‘law’, as a legitimate order that has become reflexive, belongs to the societal component of the lifeworld.” At its core, Habermas’s theory of law is about demonstrating how the normative impulses stemming from lifeworld communications can be transformed into legitimate law, and in this way can create a legitimate framework for strategic interactions. In other words, even if systemic integration is not inherently linked to (communicatively created) norms, the bindingness of legitimate legal norms allows the creation of a framework for systemic integration and as such links the system back to the communicative practices of lifeworld communication.

In Between Facts and Norms Habermas presents a complex and multi-layered account of how legitimate law can be created and how it should operate. The law’s legitimacy depends on a combination of the form of law with a method of its creation, which is based on the discourse principle: legitimate law depends on a democratically legitimate way of creating it. One crucial element in such a creation of law is that a process of deliberative democracy takes place. In this process, lifeworld legitimacy shall diffuse, through communicative deliberations, from networks of free associations below the organisational level of state-affiliated political parties, social-power-driven mass media and dependent interest groups—that is, from a society’s periphery—into the political centre in order to affect and programme the making of law. Civil society is of central importance in this concept as it is capable of constituting a public sphere that is independent of, or at least detached from, power mechanisms at play at society’s political centre.

This process functions on the basis of what Habermas terms (in reference to Hannah Arendt) “communicative power”. Lifeworld communications and the political agenda that results from it are not just mere talk. Rather, they can create a political influence where they find widespread support. Decision makers at the political centre cannot ignore such power (as they would otherwise be unlikely to be re-elected). Habermas’s concept of legitimate law thus crucially rests on the communicative practices of civil society, which will channel their impulses into the political system and in this way prevent it from becoming self-reliant and detached from citizens.

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10Jürgen Habermas, The Theory of Communicative Action, Vol. 2, The Critique of Functionalist Reason (Polity, 1989, German original: 1981), 365.
11Ibid., 332–373, esp. 367–368. In addition to this functionalist dimension, Habermas also described certain affirmative aspects of the law, which he termed “law as an institution”. With this notion he referred to certain constitutional provisions as well as to specific norms of criminal law that are “close to morality”. See ibid., 365.
12Ibid., n. 9, 80.
13Jürgen Habermas, ‘Interview mit Hans Peter Krüger’, in Habermas, Die nachholende Revolution, Kleine politische Schriften VII (Suhrkamp, 1990), 95.
14Habermas, above, n. 9, 151–168; see also Jürgen Habermas, ‘Hannah Arendt’s Communications Concept of Power’ (1977) 44 Social Research, 3–24.
15Habermas, above, n. 9, ch. 8 (329 et seq.).
Habermas himself has repeatedly emphasised that, in view of worldwide interdependencies, democratic procedures must be extended beyond the nation-state. Core elements of the concept of deliberative democracy have provided hugely important and influential impulses to debates on legitimising transnational law as well as transnational institutions. In a deliberative reading, as Habermas explains, popular sovereignty "pulls back into the, as it were, 'subjectless' forms of communication circulating through forums and legislative bodies." While in Between Facts and Norms Habermas has in mind deliberations that take place in one state, the idea of a communicatively resolved type of popular sovereignty can be transposed to the international level. The reason why it lends itself to such attempts is that, in contrast to classical understandings of legitimation in general, and popular sovereignty in particular, the concept of deliberative democracy does not need one clearly defined subject or political entity to be in charge. Relieved from the need to have a clearly defined group of political subjects or a clear set of relevant institutions, the concept promises to be capable of operating within the network of interlinked institutions, actors and interconnected public spheres that characterise the disaggregated international landscape.

A splendid example of such attempts to put deliberative democracy into practice at a transnational level can be found within the EU, where—in addition to the legitimation provided via the Member States—significant attempts have been undertaken to open EU decision making to communicative impulses stemming from citizens' lifeworlds. The Lisbon Treaty included into the EU's primary law Article 11 TEU and thus established a multi-faceted framework for participatory governance within the EU.

The discursive understanding of law has significant potential to move governance closer to those who are eventually affected by policy-makers' decisions because it decentres our perspective away from the activities occurring within the institutional centres towards the underlying deliberations that must precede and accompany institutional decision making. However, the discursive understanding of law faces major challenges that recent developments within the EU and beyond underline. It is to these challenges that we must now turn.

3 | RECENT CHALLENGES TO THE DISCOURSE THEORY OF LAW

3.1 | Overwhelming bureaucratic power

The usefulness of a concept of deliberative democracy has been questioned in light of the power relationships that characterise the actual political practice. This critique has been raised at a theoretical level in regard to the practice of law-making at the national level but especially also with a view to transnational legal processes where power seems even more unconstrained than in the domestic realm. To mention just one example, it has been shown that many deliberative mechanisms established by the EU are actually dominated by corporate players, whereas citizens and not-for-profit non-governmental organisations find it hard to get sufficiently organised at a transnational level in order to channel their perspectives and interests effectively into EU decision making. The reality of power relationships thus seems to negate the core assumptions of a discourse theory of law.

Habermas clearly recognises this problem. In Between Facts and Norms, he discusses the predominance of systemic imperatives with a focus on the domestic level, and his diagnosis is that in the daily political routines systemic

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16See, e.g., Jürgen Habermas, Zur Verfassung Europas: Ein Essay (Suhrkamp, 2011), 51.
17Habermas, above, n. 9, 136.
18Based on the notion of communicative power, I have outlined how an understanding of representation without election through the activities of non-governmental organisations can be conceptualised at the international level. See Christian Marxsen, 'The Promise of Global Democracy: The International Impact of Civil Society' (2015) 47 New York University Journal of International Law & Politics, 719–781, esp. 763 et seq.
19For my assessment of the functioning of deliberative processes in the EU, see Christian Marxsen, 'Participatory Democracy in Europe: Article 11 TEU and the Legitimacy of the European Union', in Federico Fabbri, Ernst Hirsch Ballin and Han Somsen (eds.), What Form of Government for the European Union and the Eurozone? (Hart Publishing, 2015), 151–169.
20See my discussion of related problems, in Christian Marxsen, Geltung und Macht: Jürgen Habermas’ Theorie von Recht, Staat und Demokratie (Wilhelm Fink, 2011), esp. ch. 7 (211–250).
21Christian Marxsen, "Open Stakeholder Consultations at the European Level: Voice of the Citizens?" (2015) 21 European Law Journal, 257, esp. 279–280; see, further, the empirical analysis in the contributions to the edited volume: Beate Kohler-Koch and Christine Quittkat (eds.), De-Mystification of Participatory Democracy (Oxford University Press, 2013).
mechanisms have the upper hand. Instead of the normatively required transferal of power from peoples' lifeworlds into the political centre, we instead witness an "unofficial countercirculation of power", in which systemic imperatives remain detached and unaffected by impulses stemming from people's lifeworlds. One critique against Habermas's theory, therefore, is that on the basis of his discourse theory we are unable to understand the actual practice of discourses and can only find guidance to what practice should be. In this sense the descriptive and analytical potential of his theory seems limited.

However, for the normative theory that Habermas presents, a norm-contradicting reality does not pose a theoretical challenge. Habermas employs a reconstructive methodology. In the Hegelian tradition, reconstructive methodology aims to establish norms based on an analysis of practice. Basic concepts must be chosen in a way—so Habermas explains—that allows us to "identify particles and fragments of an 'existing reason' already incorporated in political practices, however distorted these may be". Thus, reconstruction aims to find the seeds of normativity in society, to bring it into a sound conceptual framework, and use such a reconstructed normativity as a foundation for critique. In this sense, a reality that contradicts the claims of reconstructive normative theory is not a challenge to the theory because it is the very idea of normative theories to uphold the norm against (parts of) reality.

In Habermas's view, it can be well shown that such "fragments of 'existing reason'" do indeed exist. Civil society may generally be weak, but it is, according to Habermas, not always condemned to be overwhelmed by systemic imperatives. Rather, civil society can switch to a "conflict mode" in which the prevailing systemic power can be neutralised and the impulses from the periphery can effectively be channelled into the political centre. Habermas is here thinking of situations of social mobilisation, for example, in opposition to the nuclear arms race during the Cold War or against the use of nuclear power since the 1970s; and in addition we could think of the (more recent) social mobilisation of students that aim to push policy makers to take effective steps in cutting carbon dioxide emissions.

Thus, as a normative theory, Habermas's concept of deliberative democracy is not disproved. However, in view of the overwhelming social power that characterises the actual political practice of nation-states, as well as at the transnational level, the empirical foundation to which Habermas's reconstruction connects is rather thin. In my view this foundation is not sufficient to carry the overall normative weight of Habermas's theory.

3.2 | The increasingly irrational character of lifeworld communication

A more foundational challenge against the core assumptions of discourse theory has recently been underlined by the realities of public deliberations and by the extent to which irrational and partly archaic views have been gaining ground. This in fact raises the question about the expectations we can legitimately have towards the "communicative rationality" of communications, particularly those within networks below the institutionalised level. Within Habermas's theory, communicative networks outside of the political centre are not just an additional feature but rather are the core of a legitimate political system. As explained before, lifeworld legitimacy is supposed to diffuse from the periphery into the political centre. But what are the theoretical consequences when the communicative processes located at society's periphery are more often than not corrupted and are highly ideologically charged?

Two related phenomena deserve to be mentioned. The first concerns a development that may amount (or may have already amounted) to a digital transformation of the public sphere, with potentially severe consequences for the overall discursive quality—and eventually also for deliberative processes—on which discursive law-making depends. New patterns of communication have emerged. Social media has deposed mass media from their once undefeated role of shaping public opinion. In the earlier days of the internet and later of social media, this development seemed to bear significant democratic potential for a broader involvement and participation of ordinary citizens.

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22Habermas, above, n. 9, 384.
23See also ibid., 379.
24Ibid., 287.
25Ibid., 373.
26Ibid., 384.
27I have elaborated this critique in more detail in Marxsen, above, n. 20, 238–247.
in public debates. However, it has turned out that the newly created media landscape is in fact often hostile to argumentation. As traditional media no longer reach significant parts of society, we have witnessed the emergence of detached and self-reliant discourse bubbles. Within these bubbles we can often recognise a radicalisation of the users and participants, as well as the concomitant spread of hate speech. Christoph Türcke has recently described the new media landscape as an emerging new clan society. 28 People tend to follow the lead of questionable figures, such as influencers, who care less about arguments and more about their own reputation and communicative influence. These developments seem to indicate the decline of a general public sphere capable and willing to rely on “the peculiarly constraint-free force of the better argument”.

The second related phenomenon concerns the growing influence of populist and authoritarian movements across Europe and beyond. The characteristic emergence of such movements is usually one where citizens unite behind authoritarian ideas, push them into the public sphere, and channel them into the debates occurring at the political centre; and an accompanying phenomenon of such movements’ success is the growing power of authoritarian parties within the political centre. At first glance, the activities of such movements closely resemble what Habermas describes and affirms as civil society’s “conflict mode”. We see public demonstrations, social mobilisation, and an intensified articulation of political positions. It can hardly be disputed that populist movements were very effective in creating “communicative power” and in unfolding a dominant influence on the public discourse. Formally assessed, we see citizens deliberating, raising and contesting validity claims and political visions, and channelling them into the political centre—a practice generally affirmed by discourse theory.29 The problem is that based on its substance, these political movements explicitly proclaim political values that conflict with the inclusive conception of public discourse advocated by discourse theory.

A discourse-theory-immanent answer to this challenge would be to point out that civil society is not supposed to directly gain influence. Civil society is not understood as “a macrosubject supposed to bring society as a whole under control”.30 It can only have an "indirect effect on the self-transformation of the political system".31 In this sense its impulses must be processed and transformed by the political system so that an additional level of control exists.

However, these recent "populist" developments cast serious doubts against the normative structure underlying Habermas’s discourse theory of law. If lifeworld communications increasingly turn out to be ideological and irrational, can and should they still take a central position in terms of the normative foundations of a legitimate political system? The current developments clearly underline that lifeworld communicative processes are corruptible, as are the institutional centres of political systems. If true, political and legal theory, as well as positive law, must focus on how the achievements of liberal legal orders can be preserved and how red lines can be drawn.32 This will often require us to find ways to protect the values institutionalised in the political centre against networks from the periphery.

4 | THEORY EMBEDDED IN TIME

Theories are developed and gain support in specific historical and societal environments. Truth is not eternal but, as Walter Benjamin pointed out, characterised by a Zeitkern (nucleus of time).33 Discourse theory grew out of societal circumstances in which communicative networks outside of societal centres clearly seemed normatively superior to the state’s political system. Oftentimes they will continue to be so, and in any case, it cannot be doubted that citizen participation and public deliberation are core components of a legitimate societal and legal system. After all, the

28Christoph Türcke, Digitale Gefolgschaft: Auf dem Weg in eine neue Stammesgesellschaft (C.H. Beck, 2019).
29One might, of course, argue that such discourses do not follow the idealised requirements that Habermas considers important but, as discourses always function under empirical conditions and are never ideal, this would be an argument of the type: “I don’t like the outcome so it is not a discourse”.
30Habermas, above, n. 9, 372.
31Ibid.
32See, e.g., the debates in regard to the rule of law in Europe: Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Matthias Schmidt and Maciej Taborowski, ‘Drawing Red Lines and Giving (Some) Bite— the CJEU’s Deficiencies Judgment on the European Rule of Law’, 3 August 2018, https://verfassungsblog.de/drawing-red-lines-and-giving-some-bite-the-cjeus-deficiencies-judgment-on-the-european-rule-of-law/ (accessed 26 October 2019).
33Walter Benjamin, The Arcades Project (Harvard University Press, 2002), 463 (N3.2).
critique presented here does not so much relate to the actual institutional conclusions that Habermas draws. Obviously, Habermas also aims to protect democratic institutions against populist attacks, and civil society is only—as recapitulated above—supposed to give impulses into the political system. The point of the critique presented here, however, relates to the underlying normative structure of Habermas’s theory. It seems the intuition that communicative processes at society’s periphery should form the foundation of a normative theory of society and law can no longer go unquestioned, as recent developments underline their often irrational and ideological character. The societal polarisation we witness today make it appear unlikely that rational consensus can emerge from lifeworld communication. Moreover, it seems that the once strong interlink between such communicative networks and democratic values has eroded and this must also affect our theoretical architecture and its normative foundation.

The two challenges discussed in the previous section in any case explain the renewed focus on earlier materialist critiques of society, within Habermas’s thinking itself, but also in terms of broader societal debates. In his lecture at Goethe University Frankfurt, given on 19 June 2019 on occasion of his 90th birthday, Habermas focused on insights of Karl Marx and his analysis of the mechanisms of social power. Moreover, and likewise crucially, he emphasised the importance of a critique of ideology, which—in the tradition of Marx—describes a “false consciousness” resulting from a lack of understanding of the complexities at work in a society. The pendulum might be about to swing back and we may now live in a time in which we should—in view of ideological polarisation—seriously study again the insights incorporated in the works of earlier critical theorists, especially of Horkheimer and Adorno, who developed their theories in times in which ideologies unfolded their destructive potential.

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34Veith Selk and Dirk Jörke, ‘Back to the Future! Habermas and Dewey on Democracy in Capitalist Times’ (2019) Constellations, https://doi.org/10.1111/1467-8675.12423, 1–15, 10.
35Jürgen Habermas, Noch einmal: Zum Verhältnis von Moralität und Sittlichkeit, lecture held at Goethe University Frankfurt, 19 June 2019, manuscript available at: https://www.normativeorders.net/de/69-veranstaltungen/7291-noch-einmal-moralitaet-und-sittlichkeit (accessed 26 October 2019), esp. 2, 10–13.