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Jürgen Habermas' Concept of  
Co-Originality in Times of  
Globalisation and the Militant Security State

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## **Abstract**

This paper examines the concept of constituent power and constitutional form in Jürgen Habermas' legal philosophy. It argues that a concept of constituent power needs to be embedded in a constitutional theory that can explain the difference between legitimate law and a mere wielding of power. Theories operating with assumptions of a pre-legal and unbound constituent power are either pre-modern or a-historical.

While Habermas' theory can convincingly spell out general terms for a legitimate constitutionalisation and legitimate law-making, however, it appears to be at the same time too thin and too thick with regard to two recent transformations of the democratic nation-state:

Firstly, it cannot grasp the shift from enabling 'freedom' to upholding 'security' as the central description of the function of the nation-state. This shift has severe implications for the discourse on human rights and their a priori status as constraints on the popular sovereign: the security paradigm seems to trump the notion of inalienable individual rights and replace them with the rule that the end justifies the means.

Secondly, the idea of a necessary internal link between public and private autonomy in Habermas' system of rights appears to be unable to explain the emergence of supranational and transnational law outside of a national legal community. In a different reading, however, it can serve as a normative yardstick for existing regulatory structures, and as an orientation for the elaboration of new forms and institutions that may reduce the obvious democratic deficits of supranational and transnational regulation.

## **Keywords**

Constitution building / constitutional change / constituent power / constitutional form/  
democracy / governance / human rights / law / legitimacy / security



# Private and Public Autonomy Revisited: Jürgen Habermas' Concept of Co-Originality in Times of Globalisation and the Militant Security State<sup>α</sup>

Rainer Nickel\*

This paper argues that a concept of constituent power needs to be embedded in a constitutional theory that can explain the difference between legitimate law and a mere wielding of power. It holds that modern constitutional theory has to operate within the paradigms of democracy and law. Theories operating with assumptions of a pre-legal and unbound constituent power are either pre-modern or a-historical.

In the Introduction to their volume on *The Paradox of Constitutionalism*, the editors Martin Loughlin and Neil Walker suggest that at the core of modern constitutionalism there exists an apparent paradox, the paradox of constituent power and constitutional form. They claim that this paradox is an expression of the fact that modern constitutionalism is 'underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the "consent of the people" and that, to be sustained and effective, governmental power must be divided, constrained and exercised through distinctive institutional forms'.<sup>1</sup> By taking up the concept of a co-originality of private and public autonomy as developed by Jürgen Habermas,<sup>2</sup> this paper aims to show that popular sovereignty and the *Rechtsstaat* can be conceptually reconciled without producing serious paradoxical consequences.

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<sup>α</sup> This text will be published in: Martin Loughlin & Neil Walker (eds.), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2006).

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<sup>1</sup> M. Loughlin & N. Walker, 'Introduction', in M. Loughlin & N. Walker (eds.), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2006), p. 1. - The second part of this definition ('governmental power must be divided, constrained and exercised through distinctive institutional forms') roughly describes basic elements of what is called in the German constitutional tradition the *Rechtsstaat*. Because the *Rechtsstaat* concept is not equivalent to the concept of rule of law, in what follows I use the German expression.

<sup>2</sup> J Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996) [hereafter BFN].

However, while this reconstruction of constitution-making as a circular or, better, as a spiral or helical process enables us to define the general terms of legitimate constitutionalization and legitimate law-making, it appears at the same time to be both too thin and too thick with regard to two recent transformations of the democratic nation-state. First, it cannot grasp the shift from enabling ‘freedom’ to upholding ‘security’ as the central description of the function of the nation-state. This shift has severe implications for the discourse on human or constitutional rights and their a priori status as a constraint on the popular sovereign: from infinite detention, through (bio) data collections on an unprecedented scale, to the use of torture,<sup>3</sup> and from pre-emptive shootings of suspects and kidnapped or suspicious passenger planes to pre-emptive wars, the security paradigm seems to trump the traditional notion of inalienable individual rights and replace them with the rule that the end justifies the means. Secondly, the idea of a necessary internal link between public and private autonomy seems unable to explain the emergence of supranational and transnational law outside the borders of a clearly defined institutional setting of a national legal community. As a consequence, in a globalized environment where the execution of diffuse powers by diffuse actors blurs the line between public authority and private power, the well-ordered theory of the democratic *Rechtsstaat* seems to lose its empirical foundation *and* its persuasiveness altogether. In such circumstances, the question to be addressed is: do we have to start speaking (again) of unleashed market powers, and their systemic imperatives, as constituent powers that programme the constitutional form?

#### ENLIGHTENMENT’S AMBIVALENT HERITAGE

Constituent power has always been a hybrid creature in modern constitutional theory, with its character oscillating between legally unbound sovereignty, on the one hand, and the paradox of the legal force of a constitution, on the other, creating a very uncomfortable situation for lawyers.<sup>4</sup> Classical conceptions of sovereignty stress the extra-legality of its bearer. In his famous definition of sovereignty, Jean Bodin described it as ‘the highest power of command’,<sup>5</sup> and Spinoza held that the sovereign is he who ‘has the sovereign right of imposing any commands he pleases’.<sup>6</sup> The sovereign, then, is unbound, not hindered even by a constitution (a ‘constituted sovereignty’): every moment of constitution-giving represents a rupture in time, a moment of discontinuity, whereby the old order cannot bind the new order because it is not binding any more, and the new order cannot bind the sovereign, because it has not yet been

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<sup>3</sup> See J Waldron, ‘Torture and Positive Law: Jurisprudence for the White House’ (2005) 105 *Columbia Law Review* 1681, who characterizes the prohibition of torture as a ‘legal archetype’ (1681 and 1728-1733).

<sup>4</sup> See M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), 99: ‘One might be forgiven for thinking that the concept of constituent power offers lawyers nothing but problems.’

<sup>5</sup> J. Bodin, *On Sovereignty: Four Chapters from the Six Books on Commonwealth*, J.H. Franklin trans (Cambridge: Cambridge University Press, 1992), 1.

<sup>6</sup> B. de Spinoza, *A Theologico-Political Treatise And A Political Treatise*, R.H.M. Elwes trans (New York: Dover, 1951), 207.

constituted. Constituent power, then, represents ultimate command, unconstrained, undivided and limitless. On this reading of constituent power as sovereign power, constitutions are only visible *expressions* of a pre-legal, natural force of political power and its unbound violence. In an even more radical interpretation by Carl Schmitt, constituent power is a characteristic of and connected to a people and its substantial 'being' as a *Volk*.<sup>7</sup>

This reconstruction of the concept of sovereignty appears inconsistent with an idea of human rights as inalienable rights. Rousseau's famous first line of *The Social Contract* reflects this paradox: 'Man is born free, but everywhere he is held in chains'.<sup>8</sup> This birthright to freedom, however, can be defined in two ways.

First, as *rights-based constitutionalism*, it can be directed against the state and against limitations of the theoretically unbound freedom of the individual. In this reading, the human rights of the individual stand against intrusions of the state. Such an individualist conception of human rights is strongly represented in nineteenth century German constitutional thought: human rights appear here as limitations to the absolute power of the sovereign.<sup>9</sup> Liberties constrain and delimitate the state. They are directed against the state and defend a sphere of freedom from intrusion, a private sphere of autonomy where the individual can do as she pleases. Modern liberalism in its version of possessive individualism derives its claims for validity from such notions of liberties as spatial spheres of *private autonomy*.<sup>10</sup> The resulting concept is that of a *Rechtsstaat*, in which the state is obliged to respect the individual rights of the citizens, and this lays the ground for a dualism of state and society.<sup>11</sup>

A second reading of freedom as the inalienable right of man, *democracy-based constitutionalism*, stresses the revolutionary power of unbound ('free') individuals. Instead of referring to an established order of natural rights, it relates to the power to establish such an order and to create rights at its own collective will. Sovereignty, then, is unbound in the sense that it is embodied in the popular sovereignty of a collective of free individuals. Their *public autonomy* expresses itself in constitution-making: independent of and unbound from established powers and rights, as James Madison put it in his defence of the decision of the Philadelphia Convention to meet without the authorization from the constituted powers established by the Articles of the Confederations, it is 'the transcendent and precious right of the people to "abolish or

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<sup>7</sup> C. Schmitt, *Verfassungslehre* [1928] (Berlin: Duncker & Humblot 2003), 22: 'Die Verfassung gilt kraft des existierenden politischen Willen desjenigen, der sie gibt' [The constitution is valid by virtue of the existing political will of him who enacts it.]: author's translation]. Also at 229: 'Der Staat beruht ... auf Homogenität und Identität des Volkes mit sich selbst' [The state rests on homogeneity and identity of the people with itself.]: author's translation].

<sup>8</sup> J-J Rousseau, *A treatise on the social compact, or, The principles of politic law* (London: J. Murray, 1791), at p 1.

<sup>9</sup> See, e.g., G. Jellinek, *System der subjektiven öffentlichen Rechte* (Tübingen: Mohr, 1905), esp. 194ff.

<sup>10</sup> For an account on the roots of possessive individualism in the philosophies of Thomas Hobbes and John Locke, see C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962).

<sup>11</sup> For a detailed historical reconstruction of the *Rechtsstaat* idea, see D. Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt am Main: Suhrkamp, 1987).

alter their government as to them shall seem most likely to effect their safety and happiness”.<sup>12</sup>

Both strains of thought are a heritage of Enlightenment thinking, and this heritage still puzzles us today. Political and legal philosophy of the Enlightenment were concerned with the consequences of secularization, and more practically, with the interpretation of the French and North American revolutions. ‘Secularization’, in this respect, means more than just the transformation of religious concepts into political philosophy and theories of the state, a misguided position on which Carl Schmitt and some of his followers ceaselessly insist upon.<sup>13</sup> While state-centred thinkers have tried to reduce the idea of republicanism to a mere exchange of the apex of power (‘the people’, embodied by a government or a president, thus replaces the king), the revolutionary decomposition of traditional hierarchies and ranks bears an additional meaning; for the first time the members of a society met each other at eye level. As Günter Frankenberg observes, this process represents a radical shift: ‘Secularization not only affected the legitimation of political authority but also the creation of a social bond between the isolated members of a decorporated society no longer symbolically represented as a mystical *body politic* and no longer integrated in a firm and unquestioned status hierarchy with its loyalties and responsibilities sanctioned by traditional law.’<sup>14</sup>

Theories of ‘unbound sovereignty’, thus, overlook a decisive aspect of the historical transformation from the world of transcendental legitimacy to the era of self-government. Instead, they treat the ‘sources’ of sovereignty as interchangeable and concentrate instead on the dramatic rupture of constitutional change: once a new constitutional order is established, the legal norms it produces establish the legality of this order.<sup>15</sup> A purely legal positivist approach to such a legal order cannot but accept this order for what it is, so long as its hierarchy of norms can be traced back to a (non-positivist or imaginary) *Grundnorm*.<sup>16</sup> The inherent quality of law, then, becomes a formal quality: a legal order is established if it fulfils certain formal conditions of hierarchy and unity.

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<sup>12</sup> J. Madison et al, *The Federalist Papers*, Clinton Rossiter ed. (New York: Modern Library, 1938), No.40, 257-8; cited in A. Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’ (2005) 12 *Constellations* 223, 226.

<sup>13</sup> C. Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (1922; 2nd ed. 1934), 49: ‘„Alle prägnanten Begriffe des modernen Staatsrechts sind säkularisierte theologische Begriffe’ (‘All incisive terms of modern theories of the state are secularized religious terms’: author’s translation).

<sup>14</sup> G Frankenberg, ‘Why Care? The Trouble with Social Rights’ (1996) 17 *Cardozo Law Review* 1365, at 1367.

<sup>15</sup> A variant to this concept appears in Kalyvas, above n.12, which stresses the ‘emancipatory promises of popular sovereignty’ and holds that a constitution is ‘valid’ only ‘if the act that created it complies with the immanent principles of participation and inclusion’ (238-9). If measured by this strict standard, the German *Grundgesetz* would have to be called ‘invalid’.

<sup>16</sup> Hans Kelsen, *Pure Theory of Law* (Gloucester, Mass: Peter Smith, 1989). This may also explain why Kelsen’s theory of law became so popular in twentieth century South America, especially in Argentina and Brazil: in a context of permanent political and constitutional instability and long periods of authoritarian regimes, a concept of norms as ‘legal norms’ can only be preserved if law can be defined in a perspective from within the legal system, i.e. by formal qualities of the legal system itself.

But despite legal positivism's emancipatory and anti-ideological elements and values, and its anti-statist thrust,<sup>17</sup> the law's inherent 'power to force', its coercive character (Kant), can only be justified within a framework of a concept of *legitimate* law. Law itself – as a medium of communication - cannot provide for such legitimacy. Contrary to Niklas Luhmann's concept of legitimacy through procedures (*Legitimation durch Verfahren*),<sup>18</sup> legality alone does not suffice if it is understood merely as a bundle of mechanical or communicative operations of a functional system within a binary code of legal/illegal. The 'night of the long knives' in 1934 (when the leaders of the SA, perceived as a potential threat to the absolute power of the Nazi party, were executed) and its subsequent 'legalization' offers a negative example that supports this pessimistic view on legitimacy through legality, and of legal positivism. Carl Schmitt's attempt to justify the killings with legal arguments in *Der Führer schützt das Recht* (the *Führer* protects the law)<sup>19</sup> denoted the first of many steps from literally unbound sovereignty to naked power and violence. As Ernst Fraenkel has shown with respect to Nazi Germany, a normative order can have more than one side, function along more than one rationality, and the transition zone between these rationalities can deliberately be blurred.<sup>20</sup>

Enlightenment's heritage,<sup>21</sup> thus, is indeed a paradox: While inalienable rights and liberties, directed against state power, shield the citizens from arbitrary power and preserve their private autonomy, at the same time 'the "society of individuals" emerges, bereft of social obligations that came with a status (*noblesse oblige*) or a sacrosanct

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<sup>17</sup> Kelsen was a decisive critic of the state fetishism prevailing in German constitutional thought at the beginning of the twentieth century. In his theory, he almost completely de-substantialized and de-institutionalized the state, to the extent that the substance of the state evaporated: the state simply represents the sum of legal norms of which the legal system consists. Accordingly, Kelsen was no more sympathetic towards the idea of state sovereignty. For him, international law was part of the legal order, and one state's claims of state sovereignty 'excludes the sovereignty of every other state': see H Kelsen, *General Theory of Law and State* (Cambridge, Mass.: Harvard University Press, 1945), 387–8. The dogma of sovereignty is then 'the main instrument of imperialistic ideology directed against international law': H Kelsen, *Introduction to the Problems of Legal Theory*, B.L. Paulson and S.L. Paulson trans (Oxford: Clarendon Press, 1992), 124.

<sup>18</sup> N. Luhmann, *Legitimation durch Verfahren* (Neuwied, Berlin: Luchterhand, 1969). In this early work, Luhmann holds that – empirically – the legitimacy force of legal procedures is a result of the special character of judicial procedures, especially because judicial procedures are able and fit to absorb protest. Procedures that produce legitimacy cannot be themselves legitimized. For a more recent confirmation of this view, see N Luhmann, 'Quod omnes tangit . Remarks on Jürgen Habermas' Legal Theory' (1996) 17 *Cardozo Law Review* 830, esp. at 892.

<sup>19</sup> C. Schmitt, 'Der Führer schützt das Recht' (1934) 39 *Deutsche Juristenzeitung* 945.

<sup>20</sup> E. Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Octagon Books, 1969), first published in German in 1941. Nazi Germany was characterized by the dual face of a *Normenstaat* (state of norms) which safeguarded the functioning of the capitalist economy for the part of the population that was not persecuted, and a *Massnahmestaat* (state of selective measures) which used legal norms, but also arbitrary measures against those parts of the population that were defined as enemies.

<sup>21</sup> This heritage is by no means only a problem of constitutional orders with a written catalogue of rights; the common law tradition of parliamentary sovereignty only vested the dispute in different terms and its intense discussion of the rights-related essentials of common law and the content of the principle of 'rule of law' reflects the unclear heritage of enlightenment thinking.

tradition’, and burdened with the task to *create* a political and legal order by executing their public autonomy.<sup>22</sup>

This ambivalent heritage is embodied and duplicated in contemporary interpretations of Kant and Rousseau. For some authors, Kant has become a crown witness for the transnational status of liberties - as constitutional rights - on a world scale; this is reflected especially in the work of Ernst-Ulrich Petersmann, who refers extensively to Kant whenever he pleads for the existence of a set of liberties that pave the way for a rights-based constitutionalism, and who calls for a ‘constitutionalization of the WTO’.<sup>23</sup> Others claim that Kant’s philosophy has laid the ground for the idea of cosmopolitan civil liberties (Otfried Höffe) and possessive individualism (Wolfgang Kersting).<sup>24</sup> In contrast to this rights-based argumentation, other authors, especially Ingeborg Maus, vehemently deny that Kant can be claimed for a set of already existing rights that constrain popular sovereignty and the legislator as a priori conditions; in her interpretation, Kant has to be seen as the founder and central theorist of post-traditional democratic theory.<sup>25</sup> And, in similar vein, Rousseau can be interpreted as a defender of inalienable, equal rights of man, and at the same time as a radical democrat whose political philosophy directly opposes constraints on the *volonté générale*.<sup>26</sup>

#### THE INTERNAL LINK BETWEEN PRIVATE AND PUBLIC AUTONOMY:

#### ESSENTIAL ELEMENTS OF A THEORY OF LAW IN THE DEMOCRATIC *RECHTSSTAAT*

A (popular) sovereign bound to ‘human rights’ or liberties is not unbound. On the other hand, a modern, secularized theory of constitutional law cannot rely on a priori rights, rights that exist before a legal order is constituted, as ‘natural rights’. This would build up to an ideology and lead to a paternalistic trap where the legal philosopher and the constitutional theorists are the ones who can claim the privilege to identify the ‘real’, material content of ‘natural rights’. Constitutional theories have dealt with the dilemma of a bound *and* unbound sovereignty for a long time without being able to offer concepts that can resolve the tension between the facticity (of unbound powers to create constitutional orders) and validity (of unjust and ‘inhuman’ constitutional orders) in a satisfying manner.

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<sup>22</sup> Frankenberg, above n.14.

<sup>23</sup> See E-U. Petersmann, ‘Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism’, in C. Joerges and E-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Oxford: Hart, 2006), 47; for critique see R.Nickel, ‘Transnational Participatory Governance’ *ibid.* 209, esp. at 218-9.

<sup>24</sup> O. Höffe, *Demokratie im Zeitalter der Globalisierung* (Munich: Beck, 1999); W. Kersting, *Die politische Philosophie des Gesellschaftsvertrags* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1994).

<sup>25</sup> I. Maus, *Zur Aufklärung der Demokratietheorie* (Frankfurt am Main: Suhrkamp, 1992).

<sup>26</sup> See Maus, *ibid.*

*Law and the 'linguistic turn': the discourse theory of law*

Jürgen Habermas' theory of the democratic *Rechtsstaat* attempts to overcome this apparent dilemma by applying his discourse principle to the form of law. He starts from the observation that law as a form has a specific rationale, a content that is intrinsically connected to it: 'The concept of law or legal statute makes explicit the idea of equal treatment already found in the concept of right: in the form of universal and abstract laws all subjects receive the same rights'.<sup>27</sup> In this perspective modern law enables private autonomy by shielding and protecting decentralized decisions 'of self-interested individuals in morally neutralized spheres of action'.<sup>28</sup> On the other hand, and beyond this functional dimension, modern law has to fulfil an additional requirement; it has to 'satisfy the precarious conditions of a social integration that ultimately takes place through the achievements of mutual understanding on the part of communicatively acting subjects, that is, through the acceptability of validity claims'.<sup>29</sup>

As we have seen, secularization had set the individuals free from status and sacrosanct traditions. Modern law, then, carries the burden of societal integration; it 'displaces normative expectations from morally unburdened individuals onto the laws that secure the compatibility of liberties',<sup>30</sup> and it is insofar valid only if it achieves this aim. This leads to the 'paradoxical emergence of legitimacy out of legality': if the exercise of both private autonomy and public autonomy, as subjective rights, are treated in the same way, then we disregard a striking difference, that is the different modalities in the use of these rights. As public autonomy is connected to the democratic process of law-making, it has a specific connotation that separates it from the set of rights safeguarding private autonomy. The procedure of democratic legislation:

'must confront participants with the normative expectation of an orientation to the common good, because this procedure can draw its legitimating force only from a process in which citizens reach an understanding about the rules for their living together. In modern societies as well, the law can fulfil the function of stabilizing behavioural expectations only if it preserves an internal connection with the socially integrating forces of communicative action.'<sup>31</sup>

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<sup>27</sup> Habermas, above n.2, 83.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid. with reference (n.3) to Ernst-Wolfgang Böckenförde. This interpretation of the function of law as *the* medium for societal integration tends to imply a concept of *consensual* integration within a given institutional framework of political parties, parliaments, governments, courts, and an organized public sphere. This framework, however, can also serve as a straitjacket, leaving only very limited room for dissent and *supplement* (J Derrida, *De la grammatologie*, Paris: Éditions de Minuit, 1967). In contrast to this narrow approach it is held here that societal integration is a product of conflict-laden processes, with repercussions both for a concept of popular sovereignty and a concept of constitutional rights: see R. Nickel, 'Gleichheit in der Differenz? Kommunitarismus und die Legitimation des Grundgesetzes' in W. Brugger (ed.), *Legitimation des Grundgesetzes aus Sicht von Rechtsphilosophie und Gesellschaftstheorie* (Baden-Baden: Nomos, 1996), 395; G. Frankenberg, *Das Recht der Republik* (Frankfurt am Main: Suhrkamp, 1997).

<sup>31</sup> Habermas, *ibid.* 83-84. In his *Theory of Communicative Action (Theorie des Kommunikativen Handelns Vol I and II*, Frankfurt am Main: Suhrkamp, 1981) Habermas had paved the way for the integration of the philosophical 'linguistic turn' of the end of the nineteenth century into social and moral philosophy.

In the context of law, these ‘socially integrating forces of communicative action’ are not identical with the concept of morality, as Habermas shows in his reconstruction of Kantian legal theory where rights are still the offspring of the autonomous will of the moral persons.<sup>32</sup> He distances himself from this metaphysical heritage of enlightenment, with its subordination of positive law to natural or moral law, and holds that the principle of morality and the democratic principle are distinct versions of the general discourse principle.<sup>33</sup> What links these two spheres of discourse is simply the notion that rights are intersubjective rights, based on the reciprocal recognition of co-operating legal persons via discursive practises.<sup>34</sup> In other words, moral discourses and the democratic principle have common operational features, but they are not linked to law in the same way. Therefore, law (or, better, the principle of law) is not a middle term between the moral principle and the democratic principle, but simply the reverse side of the democratic principle itself: ‘Because the democratic principle cannot be implemented except in the form of law, both principles must be realized *uno actu*’.<sup>35</sup> This is the fundamental assumption on which Habermas bases his account of a ‘system of rights’, a system which contains the essential elements and necessary conditions for the establishment of a *legitimate* legal order.

### *The system of rights*

The justifications Habermas gives for a system of rights bring together the central intentions of his theory of law.<sup>36</sup> His reconstruction of the premises of rational law is grounded in discourse theory and understands the ‘system of rights’ as a legal system, one ‘which is legal from the start and inconceivable without an enactment by a democratic legislator’.<sup>37</sup> The classical hierarchy between natural law and positive law is dissolved and consequently transformed into a tension between facticity and validity *within* the law.<sup>38</sup> Building his theoretical framework from Kant’s theory of law, Habermas introduces the principle of popular sovereignty and the concept of individual liberties at the same time. The tension between facticity and validity, however, is not

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<sup>32</sup> Ibid. 92-94.

<sup>33</sup> This general discourse principle reads: ‘Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses’ (ibid. 107). Habermas again refers here to the *Theory of Communicative Action* (above n.31) where he argues for a procedural understanding of rationality. In *BFN*, Habermas takes up the central ideas of this theory, albeit with a significant new distinction between the (general) discourse principle and the moral principle: ‘In my previous publications on discourse ethics, I have not sufficiently distinguished between the discourse principle and the moral principle. The discourse principle is only intended to explain the point of view from which norms of action can be impartially justified; I assume that the principle itself reflects those symmetrical relations of recognition built into communicatively structured forms of life in general’ (*BFN* ibid 108-9).

<sup>34</sup> Habermas, *BFN*, ibid. 88.

<sup>35</sup> Ibid, 94 (emphasis in original).

<sup>36</sup> I. Maus, ‘Liberties and Popular Sovereignty: On Jürgen Habermas’ Reconstruction of the System of Rights’ (1996) 17 *Cardozo Law Review* 825, at 825.

<sup>37</sup> Maus, ibid. 832; see Habermas, *BFN*, above n.2, 105.

<sup>38</sup> Maus, ibid. 832 (with reference to Habermas, *BFN*, 82, 106) (emphasis supplied).

simply another expression of the contrast between the constituent power of an unbound and voluntaristic popular sovereign, on the one hand, and individual rights that bind every sovereign, on the other. This tension is instead 'located *within* the system of rights itself, and even within the rights that embody private autonomy'.<sup>39</sup>

In Kant's theory, before the establishment of democracy, these rights are pre-emptive rights, 'unfinished' in the sense that they exist without the formal confirmation of the legislator; in this regard, they lack the intersubjective character of rights (as rights we conceive of as resting on mutual recognition and the guarantee of equal rights).<sup>40</sup> This can only be achieved by an additional step. Consequently, Habermas ties the production of legitimate law, as well as the positive juridification of rights that can be justified via discourse, to the principle of popular sovereignty as reconstructed in terms of discourse theory (the democratic principle). The democratic principle is 'born' in the very moment when the discourse principle is applied to the process of legal institutionalization: 'The principle of democracy is what then confers legitimating force on the legislative process. The key idea is that the principle of democracy derives from the interpenetration of the discourse principle and the legal form.'<sup>41</sup>

The result of this interpenetration is the system of rights which aims at explaining the internal link between human rights and popular sovereignty. It is based on the equal value and mutual enabling of private and public autonomy. Habermas describes the process of the application of the discourse principle on the category of law as a 'logical genesis of rights'. This genesis can be characterized as a 'circular process' in which the legal form – with its liberties of autonomous private individuals (the *bourgeoisie*) - and the mechanism for producing legitimate law – the democratic principle with the rights of politically autonomous citizens (the *citoyennes*) to participate in the democratic lawmaking process - are *co-originally* constituted (as '*gleichursprünglich*').<sup>42</sup>

From these central assumptions Habermas derives a normative *system* in the form of a catalogue of rights. These are exactly the rights 'citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law'.<sup>43</sup> Although it is a circular process, the actual reconstruction of this process has to start somewhere. Habermas argues that this reconstruction has to start with three categories of rights that circumscribe the private autonomy of citizens, albeit in an unconfirmed status. These rights, Habermas holds, are the ones that only 'regulate the relationships among freely associated citizens *prior to* any legally organized state authority', and thereby establish the status of legal subjects as *addressees* of laws. Only by virtue of the fourth category of rights – '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' – the legal subjects also become *authors* of their legal order. This last step introduces the concept of public autonomy into the system of rights, and it also

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<sup>39</sup> Maus, *ibid* (emphasis supplied).

<sup>40</sup> Rights are here understood as an expression of a legal relation between people (and not as a dimension of rule over things).

<sup>41</sup> Habermas, *BFN*, above n.2, 121.

<sup>42</sup> Habermas, *ibid*. 121-2 (emphasis in original).

<sup>43</sup> *Ibid*. 122.

encompasses a self-reflexive element with regard to the first three categories as it opens up the possibility of a procedure in which these rights can be changed, expanded, and fleshed out as actual rights within a constituted legal order.<sup>44</sup>

In a final step Habermas pleads for a fifth category of rights, directed at providing the material living conditions for the actual use of the rights listed in category 1 through 4. Such material rights include social rights as well as infrastructural rights and ecological rights. These rights, however, are derivative rights; not only is their content subject to the decisions of the (constituted) democratic institutions, but they are not even essential for the establishment of a system of rights itself. With the fifth category of rights Habermas introduces the most flexible element of his system of rights, and at the same time rounds up his project of the discourse theory of law.

### *A paradox vanishes?*

The discourse theory of law as spelled out in the system of rights is not, or is not only, a constitutional theory. Its scope of application is not restricted to constitutions as it phrases out a general theory of (legitimate) law. It certainly comprises, however, a constitutional theory as it spells out clear conditions for any legal order that claims to be legitimate. Its main features are a proceduralization of the category of law and a rejection of extra-legal, metaphysical, or a priori conditions for constitutional forms other than those that are necessarily invoked when a constitutionalization process takes place. For the discourse theory of law, constituent power is neither bound by natural law, nor is it a hidden, magical force that expresses itself from time to time in the wild and unbound outbursts and movements of a *Volk* or a multitude. It is bound by the formal conditions essential for the constitution of a legal order that can produce legitimate law.

This does not mean that in Habermas' reconstruction a system-changing power - as raw power, as multitude, as revolution - simply disappears, or is dissolved into a well-ordered circular process where the participants, the citizens, first grant themselves those rights necessary for the execution of their private autonomy, and then proceed to confirm and flesh out these rights within the realm of public authority, by executing their popular sovereignty. The thrust of Habermas' theory is counter-factual: a group of people, a society, may establish an order, but it does not establish a constitutional or legal order that deserves recognition if it neglects the conditions that are spelled out in the system of rights. With his discourse theory of law Habermas delivers criteria for the claim that a specific legal order is illegitimate. Constituent power, then, is neither embodied in the substance of a *Volk* (culture, heritage), nor is it a factum, a given (as the actual political power) or an unspeakable, almost metaphysical *Grundnorm*. Constituent power is embedded and executed in communication, in discourses, it is dematerialized and proceduralized.

The radical quality of this step from natural law through material law to procedural law, with communicative rationality and the form of law as the sources of constituent power, is put into question from many angles and viewpoints. One line of criticism argues that the structure of the system of rights, with the classical bourgeois rights in category 1-3 at the apex, simply restates the classical conception of rational

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<sup>44</sup> Ibid. 122-3 (emphasis in original).

law as natural law. It repeats the idea of pre-political rights that can bind the democratic legislator in a hierarchical fashion, only vested here in the terminology of discourse theory.<sup>45</sup> Diametrically opposed to this view is a second line of criticism of the system of rights; these critics claim that classical human rights are devalued and put completely at the disposal of a popular sovereignty, with the risk of the popular sovereign 'run amok',<sup>46</sup> if they can be hollowed out in the political process on which Habermas relies upon as the decisive step for the establishment of a legitimate legal order in category 4 of his reconstruction.

It may be argued that Habermas' theory is flexible and abstract enough to resist such attacks.<sup>47</sup> This virtue, however, might at the same time turn out to be its core problem.<sup>48</sup> At least from the viewpoint of constitutional theory, a legal philosophy that claims to establish criteria for a legitimate constitutionalization process, while at the same time leaving the details apart, may be too flexible and abstract to be of significant value. By claiming that the system of rights does not represent these rights *in concreto* Habermas avoids allegations that he puts himself into the position to specify the perfect constitutional order. The idea that the catalogue of 'rights' in the system of rights only consists of placeholders instead of already constituted rights leaves a lot of room for the democratic process. This process, then, carries the heavy burden to express and concretize the idea of co-original autonomies, public and private. The democratic principle – that those affected by norms can possibly view themselves as their authors – and the idea of subjective rights can be constitutionalized in a wide variety of forms *within the limits* of the system of rights.

To be sure, private and public autonomy as embodied in the system of rights can be invoked in a discourse on constitutional theory, as normative claims, or at least as regulative ideas that allow for the formulation of preferences in case of conflicting normative claims. It supports, for example, attempts to institutionalize broad public debate and participation and endeavours to resist a degeneration of the public discourse into elitist or corporatist structures controlled by few. Apart from these general guidelines, however, the system of rights relies heavily on an *entgegenkommende Lebenswelt*, a social sphere that meets the expectations of discourse rationality.

This can be exemplified by reference to the problem of structural minorities, a problem inherent in the democratic process: while the system of rights guarantees that these minorities (for example, ethnic or religious minorities) can participate in the democratic process, it is clear that the concrete legal order will be deeply influenced or even dominated by majority views and preferences. The limits of this 'ethic

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<sup>45</sup> See, e.g., T. Kupka, 'Jürgen Habermas' Reformulierung des klassischen Vernunftrechts' (1994) 27 *Kritische Justiz* 461; cf. K.Günther, 'Diskurstheorie des Rechts oder Naturrecht in diskurstheoretischem Gewande?' (1994) 27 *Kritische Justiz* 470.

<sup>46</sup> See C. Larmore, 'Die Wurzeln radikaler Demokratie' (1993) 41 *Deutsche Zeitschrift für Philosophie* 321.

<sup>47</sup> Ingeborg Maus has delivered the most comprehensive and outspoken defence of the system of rights against criticism from a variety of viewpoints such as Marxist theory, radical democratic theory or systems theory: see Maus, above n.36.

<sup>48</sup> This may additionally explain why the discourse theory of law does not play a significant role, at least in Germany, in legal discourse. In constitutional theory and constitutional law literature, such as commentaries on the *Grundgesetz* provisions, or textbooks on constitutional law hardly any references can be found to *BFN* or the discourse theory of law.

impregnation', as Habermas calls it,<sup>49</sup> are also defined by the 'cultural' majority, with the effect that minorities depend heavily upon the good-will of the majority to include the minority's views into the fabric of the legal order. This may cause many conflicts about minority rights, but one may also argue that it does not pose unbearable problems within a society where each member can indeed be viewed as being at the same time author and addressee of the legal order, via her citizenship. The viability of this theoretical construction ends, however, when a considerable number of a society's members are not citizens but only addressees of the legal order, as is the case in many Western European nation states. Are there absolute limits to the 'ethic impregnation' of a legal order, and what are the legal positions, or rights, members of minority groups can claim? The close connection of private and public autonomy in the system of rights seems to prevent a conclusive answer to this pressing problem.<sup>50</sup>

It can justly be argued that a philosophy of law does not necessarily have to provide for comprehensive answers to contemporary constitutional problems. A concept of legitimate law, on the other hand, should at least be able to address significant structural deficiencies of its theoretical construction in view of constitutional practices. This leads to two recent phenomena that challenge contemporary constitutional theory and practice alike, two phenomena that may put the explicatory power of the discourse theory of law and its fundamentals into question. One arises from within the nation state and is connected to its transformation into a militant security state, and the second concerns the unleashing of constituent powers beyond the nation state. I will argue that in the first case the system of rights is too thin to counter this development, and that in the second case, the system of rights is too dense and compact to capture the constituting moments of supranational and international juridification.

#### DE-SUBSTANTIALIZED CONSTITUTIONALISM AND THE SECURITY PARADIGM

Most critiques of rights-based democratic theories concentrate on the character and function of rights to limit the democratic legislator, in an attempt to strengthen parliament in view of courts, especially constitutional courts. What they sometimes underestimate is the value and function of rights to contain the state institutions (including the established parliamentary institutions) and to bind them to the *Rechtsstaat* idea. In this respect, law's formality (in terms of its creation and of its application) operates to contain excesses of the state; human or constitutional rights not only exist on paper, but must be put into practice.<sup>51</sup>

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<sup>49</sup> J. Habermas, *The Inclusion of the Other* (Cambridge, Mass: MIT Press, 1998), 215-8, where the original term *ethische Imprägnierung* is translated as 'permeation by ethics'.

<sup>50</sup> For a more detailed discussion, see Nickel, above n.30.

<sup>51</sup> See R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

*The substance of the system of rights*

To determine the substance of the system of rights in constitutional democracies is the first and foremost task of the legislator, and here we meet again the original paradox of constituent power and constitutional form, albeit in a more concrete institutional setting. How can parliament be the guardian of constitutional rights if it is, at the same time, a primal source of possible devaluations of the same rights? Modern constitutions have tried to overcome this paradox by instituting constitutional courts or similar institutions that were given the task to determine the limits of parliamentary power.<sup>52</sup>

In Habermas' system of rights, it is maintained that there is *neither an a priori need nor a systematic position* for such an institution. The central function of popular sovereignty, embodied in the category 4 rights to public autonomy, is to determine the contents of private autonomy, and this is a process, as already explained, in which these rights can be changed, expanded, and fleshed out as actual rights within a constituted legal order. Even if one presumes with Habermas that this constituted legal order needs institutions that are organized along the principle of the separation of powers,<sup>53</sup> this does not determine whether there has to be an institution that can actually challenge or even invalidate parliamentary decisions.

It may be argued that the principle of co-originality demands from the parliament that it respects essential elements of private autonomy, especially by stating that means have to be established for legal protection (category 3 of the system of rights) against infringements of rights that safeguard the greatest possible measure of equal individual liberties (category 1 of the system of rights). This does not mean, however, that the legislator itself is bound by other legal institutions, and Habermas' category 1 expressly states that the greatest possible measure of equal individual liberties results from a 'politically autonomous elaboration',<sup>54</sup> and not from court interpretations.

As a result, the system of rights leaves much room for the legislator. It may even be argued that it reflects a *functional understanding* of fundamental rights, as they seem to serve only the purpose to enable and support the political process of establishing a constitutional order. Even if this is not the case,<sup>55</sup> it remains an essential weakness of the system of rights that it does not address properly the systematic significance of an institutional protection of fundamental rights.

*The transformation of fundamental rights and emergence of the militant security state*

The consequences of a de-substantialization of fundamental rights in Habermas' system of rights may not be too dramatic, so long as functioning institutions and a vigilant public provide for an effective 'constitutional culture', where a changing but stable

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<sup>52</sup> There are numerous variations of institutional settings, ranging from full-fledged constitutional courts (eg Germany, Spain, South Africa) over supreme courts with a constitutional court mandate (eg USA) or similar functions (eg UK) up to institutions that more resemble parliamentary self-control (eg France with its *Conseil Constitutionnel*).

<sup>53</sup> Habermas, above n.2, esp. at 186 et seq.

<sup>54</sup> Habermas, *ibid.* 122.

<sup>55</sup> See Larmore, above n. 46. Maus, above n.36, at 837-41, forcefully defends Habermas against this critique.

consensus about the essence of fundamental rights can be established and maintained. But this assumption is quite demanding, and it becomes less plausible under conditions of a fundamental change in the perception of constitutional rights and their function within constitutional states, especially when the constitutional order is perceived to be a medium to protect citizens against all kinds of threats and dangers rather than as a method of safeguarding constitutional rights against infringement.<sup>56</sup> This has severe repercussions on the interpretation of constitutional rights.<sup>57</sup>

As early as in the 1970s, historically situated in the context of politically motivated bank robberies, kidnappings, and assassinations as well as massive ecological threats, in Germany the discourse of constitutional law took up the idea that safety is not only a public good among others, such as social security or a functioning infrastructure, but of constitutional value, embodied in various provisions within the *Grundgesetz*, the constitution itself.<sup>58</sup> This culminated in an early account of a fundamental right to security, the *Grundrecht auf Sicherheit*.<sup>59</sup> Perennial discussions about declining public safety, accompanied by accounts on a new dimension of crime in the form of organized crime and terrorism, kept this security discourse alive throughout the 1980s, and by the 1990s the paradigmatic transformation from liberty to security - as part of a greater transformation of the trias *Freiheit, Gleichheit, Brüderlichkeit* to *Sicherheit, Vielfalt, Solidarität* (Liberty, Equality, Fraternity to Security, Diversity, Solidarity) - had been firmly established.<sup>60</sup> It has led to an intrusion and extension of instrumentalist thinking into contemporary constitutional thought and practice,<sup>61</sup> and has influenced the discourse about public law in all its facets. Policing becomes preemptive instead of being bound to factual indicators of a danger to public safety,<sup>62</sup> and criminal law, once coined as the ‘magna charta of the criminal’, turns into *Feindstrafrecht*,<sup>63</sup> where the criminal is not a fellow citizen any more, but the enemy.

After the 9/11 attacks, this transformation from policing to a compound of ‘combat law’ gained more speed and assumed a global dimension, propelled especially

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<sup>56</sup> See U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (Frankfurt am Main: Suhrkamp 1986); in English, *Risk Society: Towards a New Modernity* (London: Sage, 1992).

<sup>57</sup> For an early account on first steps towards this fundamental change in the fundamental rights jurisprudence of the German Federal Constitutional Court, see E. Denninger, ‘Freiheitsordnung – Wertordnung – Pflichtordnung’ (1975) *Juristenzeitung* 545.

<sup>58</sup> For a critique of this terminological shift from a constitutional order that is protecting *rights* to a constitutional order that is protecting *citizens* by imposing limitations on their fundamental rights, see Denninger, *ibid.*

<sup>59</sup> J. Isensee, *Das Grundrecht auf Sicherheit. Zu den Schutzpflichten des freiheitlichen Staates* (Berlin: de Gruyter, 1983).

<sup>60</sup> E. Denninger, *Menschenrechte und Grundgesetz* (Weinheim: Belz Athenäum, 1994).

<sup>61</sup> For a similar account in the context of the UK, see I Loader and N Walker, *Civilizing Security* (Cambridge: Cambridge University Press, 2007).

<sup>62</sup> See G. Frankenberg, ‘Kritik des Bekämpfungsrechts’ (2005) 38 *Kritische Justiz* 370.

<sup>63</sup> This term literally means ‘criminal law for the enemy’. It denotes special criminal law provisions directed against individuals who do not count as fellow citizens, but as, for example, ‘unlawful combatants’. What was once coined as a critique, however, is now more and more often used in an affirmative sense, for example by Günter Jacobs, ‘Bürgerstrafrecht und Feindstrafrecht’ in Yu-hsiu Hsu (ed.), *Foundations and Limits of Criminal Law and Criminal Procedure* (Taipei 2003), 41 available online at <http://www.hrr-strafrecht.de/hrr/archiv/04-03/index.php3?seite=6>.

by policies of the European Union and its Member States,<sup>64</sup> and the US. The 'global security architecture' that has since emerged is increasingly detached from its anchoring in (popular) sovereignty and the territorial nation-state, and it becomes subject to 'security-technical rationalization', with the institutions of the nation-state being transformed step by step into a *security agency*,<sup>65</sup> situated within a network of militant security states.

Viewed from within, the militant security state can claim a high degree of legitimacy for its actions because these are directly grounded in the constitutional order. Additionally, its actions appear to be backed both by private autonomy and public autonomy, by fundamental rights and popular sovereignty alike. If the citizens can claim from the state a high degree of security because they have a right to be protected, and if the same citizens decide upon legal measures safeguarding an effective protection via their parliamentary representatives, there seems to be *no a priori* legal limit to the militant security state. From indefinite detainment, through extensive (bio) data collections on an unprecedented scale, to torture networks and from pre-emptive shootings of suspects and kidnapped or suspect passenger planes to pre-emptive wars, the security paradigm seems to trump the traditional notion of inalienable individual rights and replace them with the rule that the end justifies the means.

It is not my intention to claim that Habermas' system of rights supports this transformation to the militant security state and its consequences, or that it could be used to legitimate indefinite detainment or torture. Rather, it is held that the de-substantialization of the system of rights cannot adequately capture the transformation to the militant security state since the system of rights is designed to give only formal criteria for the extent (and limits) of a legitimate constitutional form. In this theoretical setting it is very difficult to identify normative criteria that may render it possible to call a – democratic! – practice illegitimate which balances individual liberties and a 'right to security' in an admittedly peculiar way. An example from recent constitutional practice may serve to highlight this point.

The militant security state – via its parliament – may, for example, decide to sacrifice individuals and their rights and lives for the sake of the happiness of the greatest number. A contemporary example was subject of a recent decision of the German Federal Constitutional Court (FCC). The Court had to decide upon a statute that allowed for the use of military force, especially the air force, to shoot down a kidnapped passenger plane in case there were indicators that it would be used as a weapon, e.g. by steering it into a building.<sup>66</sup> The FCC held that the federal parliament lacked the competence to regulate this case in a Federal statute. Apart from this aspect, however, the Court expressly stated that the statute violates the fundamental rights of

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<sup>64</sup> Numerous 'security packages' have been enacted in all Member States of the EU. For an overview over the co-ordinated strategies of the Member States in the framework of Article 29 et seqq TEU (co-operation in criminal and judicial matters), see N. Walker, 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: Oxford University Press, 2004), 3-37.

<sup>65</sup> K. Günther, 'World Citizens between Freedom and Security' (2005) 12 *Constellations* 379, esp. at 382.

<sup>66</sup> Federal Constitutional Court, judgement of 15 February 2006, case 1 BvR 357/05. The decision can be found (in German) at [www.bverfg.de](http://www.bverfg.de).

the passengers and the crew. The reasoning of the Court, summarized in the press release, is worth citing at length. It reads as follows:

§ 14.3 of the Aviation Security Act is also not compatible with the right to life (Article 2.2 sentence 1 of the Basic Law) in conjunction with the guarantee of human dignity (Article 1.1 of the Basic Law) to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime.

The passengers and crew members who are exposed to such a mission are in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner. This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by § 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake ...

Under the applicability of Article 1.1 of the Basic Law (guarantee of human dignity) it is absolutely inconceivable to intentionally kill persons who are in such a helpless situation on the basis of a statutory authorisation. The assumption that someone boarding an aircraft as a crew member or as a passenger will presumably consent to its being shot down, and thus in his or her own killing, in the case of the aircraft becoming involved in an aerial incident is an unrealistic fiction.. Also the assessment that the persons affected are doomed anyway cannot remove from the killing of innocent people in the situation described its nature of an infringement of these people's right to dignity. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being. The opinion, which has been advanced on some occasions, that the persons who are held on board have become part of a weapon and must bear being treated as such, expresses in a virtually undisguised manner that the victims of such an incident are no longer perceived as human beings.<sup>67</sup>

The decisive aspect of this decision is not that it struck down an act of parliament, or that the Court refers to the 'inalienable rights' of the affected persons as subjects for reaching its judgement. It is the characterization of the state killing of innocent persons as 'inconceivable' that deserves closer attention. The Court links its judgment to the guarantee of human dignity as protected under Article 1.1 *Grundgesetz*. This move has far-reaching consequences since Article 79 contains self-reflexive provisions that specify the conditions under which the *Grundgesetz* can be amended or changed. The most remarkable provision is Article 79.3, which states that any amendment touching upon the principles laid down in Article 1 of the constitution is illegitimate (*unzulässig*).

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<sup>67</sup> Federal Constitutional Court, English version of the press release on the judgement of 15 February 2006, case 1 BvR 357/05, available at <http://www.bverfg.de/bverfg/cgi/pressemitteilungen/frames/bvg06-011e>. The official translation of the original press release is unfortunately not well written.

Thus, even if the formal conditions for amendment of the *Grundgesetz* as laid down in Article 79.1 and 2 were fulfilled, one can safely assume that the *Grundgesetz* would not even permit a constitutional amendment expressly supporting the use of force against kidnapped airplanes, because, according to the FCC, it would amount to *verfassungswidrigem Verfassungsrecht* (unconstitutional constitutional law).

This forceful intervention of the FCC, and especially its far-reaching consequence - that it can even claim to bind the constituent power of the German popular sovereign - may be attributed to the peculiar architecture of the German constitution. However, a number of court decisions from a variety of courts in many parts of the world, invoke similar aspects of a priori principles of common or constitutional law, principles that bind the legislator and/or the executive power of the government or president.<sup>68</sup> In essence, the courts seem to be motivated by similar concerns, namely, that the militant security state endangers the fundamentals of law,<sup>69</sup> and annuls the social contract.<sup>70</sup>

Once again, it is hardly possible to find a legal or rights-based starting point for such concerns about the extending powers of the militant security state on the grounds of Habermas' system of rights. His legal philosophy is not, unlike Rawls' theory, based on the idea of a social contract, but on the discourse principle and its application to the legal form. Moral concerns, as they are strongly echoed in the decision of the FCC and translated into the legal language of Article 1.1 of the *Grundgesetz*, also have no clear position and no substantive content in the framework of the discourse theory of law; moral concerns can only indirectly influence the democratic deliberative processes via societal moral discourses held in the general public. As the category of law itself is theorized only as a historical contingency and not as a normative necessity, Habermas' theory can be used only for laments about the creeping destruction of the category of law caused by measures of the militant security state; it cannot be used as a basis for a normative critique of this tendency. It is therefore unclear what follows from the paradigmatic change from civil liberties to security for constitutional theory and practice. In the end, the system of rights appears to be too 'thin' to address the transformation to the militant security state in a satisfying manner.

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<sup>68</sup> See, e.g., the recent US Supreme Court decision in *Hamdan v. Rumsfeld et al.* ((No. 05-184; 415 F. 3d 33), dealing with the installation of military tribunals instead of ordinary courts for trials against terror suspects, or the UK House of Lords in the detention case (*A v Secretary of State for the Home Department* [2004] UKHL 56) and the torture case (*A v Secretary of State for the Home Department* [2005] UKHL 71).

<sup>69</sup> Waldron, above n.3, argues that the prohibition of torture is a legal archetype as it has become 'a sort of emblem, token, or icon of the whole' legal system, 'an archetype of the spirit of the area of law in question' (at 1722-23).

<sup>70</sup> For the argument that a general priority of security concerns over civil liberties annuls the social contract, see Günther, above n.65, at 385-386. It is interesting that Günther, who was an important co-architect of the system of rights (see BFN, above n. 2, XLIII), extensively refers in this context to Kant's republicanism, with its roots in moral theory, instead of to Habermas' discourse theory of law.

## THE DEMOCRATIC RECHTSSTAAT - A FADING CONCEPT? THE MISSING LINK IN GLOBAL LAW

While the system of rights is quite flexible with regard to the contents of private (and public) autonomy, it is very strict in another respect: it firmly connects legitimate law with the concept of popular sovereignty, embodied in the democratic principle. If the discourse theory of law was bound, at the same time, to the territorial nation state, it would be unable to offer any perspective with regard to transnational or international law. But this is not the case. Normatively, the system of rights is not limited to the nation-state model and, in theory, any group of citizens could constitute a legal order by following the necessary steps as laid down in the system of rights. In practice, however, without a global public sphere, a global citizenship, or a global parliament, for example, essential elements and preconditions for such a founding process are lacking.

On the other hand, we can *empirically* observe an ever denser juridification of international law, with an ever growing number of transnational issues, such as environmental protection and the regulation of international trade and international financial markets, being subject of intensifying international law regulations. Additionally, ‘global law without a state’,<sup>71</sup> apparently following the patterns of globalization, is on the rise. Empirical research draws our attention to the enormous amount of non-state (‘private’) regulations that shape and rule transnational business relations and international trade.

Numerous private standard-setting bodies, agreements on technical norms, and other forms of regulative activities suggest that we are observing a major shift, if not a change of paradigm, from state regulation and international law regulations to private international regulations.<sup>72</sup> At the same time, we are experiencing a major increase in ‘hybrid’ activities, namely, in co-operative international activities of national governments and private actors.<sup>73</sup> Both the tendencies of extended private governance activities and the hybridization of international actors can be summed up in the formula that ‘the new legal order is working significant transformations in governance arrangements, both locally and globally, suggesting that the distinction between the public and the private realms is becoming increasingly difficult to sustain’.<sup>74</sup> A new constitutional superstructure seems to be on the rise, driven by transnational economic constitutionalism,<sup>75</sup> though not limited to this aspect since it also comprises, for

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<sup>71</sup> G. Teubner (ed.), *Global Law Without a State* (Aldershot: Aldgate, 1987).

<sup>72</sup> Private governance regimes play a significant role in the global political economy and its juridification: see C. Cutler, *Private Power and Global Authority*, (Oxford: Oxford University Press, 2003); J. Braithwaite and P. Drahos, *Global Business Regulation*, (Cambridge: Cambridge University Press, 2000); H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Oxford: Hart, 2005).

<sup>73</sup> As a striking example, the activities of standard-setting bodies such as the International Organisation of Standardisation (ISO) might be mentioned. ISO standards are often used in national courts as *legal* benchmarks, for example, in tort cases. Another well-know example is the function of the private organisation ICANN as world administrator of web site addresses.

<sup>74</sup> Cutler, above n.72, 2.

<sup>75</sup> For a comprehensive discussion of these tendencies from interdisciplinary perspectives, see Joerges and Petersmann (eds.), above n.23.

example, the rise of a transnational security architecture, with the nation states acting as security agencies.<sup>76</sup>

It is clear from the outset that the system of rights is too dense and compact to immediately capture the constituting moments of supranational and international juridification. The idea of a necessary internal link between public and private autonomy appears to be unable to explain the emergence of supranational and transnational law outside the borders of a clearly defined institutional setting of a national (or regional, such as the EU) legal community. In theory, these regulations bear the tarnish of being illegitimate, at least if they originate outside the classical canon of international law. As a consequence, in a new, globalized environment where the execution of diffuse powers by diffuse actors blurs the line between public authority and private power, the well-ordered theory of the *democratic Rechtsstaat* seems to lose its empirical foundation *and* its persuasiveness altogether. Do we have to resign, then, and start speaking instead (again) of market powers, with its systemic imperatives, as constituent powers that programme the constitutional form? Or of an 'anonymous matrix', consisting of regulatory regimes that form the new, decentralized global power structures?<sup>77</sup>

On a different reading, however, the discourse theory of law can serve as a normative yardstick for existing regulatory structures, and as an orientation for the elaboration of new forms and institutions that may reduce the obvious democratic deficits of supranational and transnational regulation. On this theoretical basis a number of proposals have already been made that aim to enhance the legitimacy of rule-making and regulatory processes above the nation state and to preserve its legitimising force.<sup>78</sup>

## CONCLUSION

The illustrations that the discourse theory of law has been confronted with here - the rise of the militant security state as well as the emerging superstructure of a super- and transnational juridification - do not represent principled arguments against the system of rights or of the idea of a co-originality of private and public autonomy. But they do indicate that Habermas' strong emphasis on the central role of popular sovereignty and the democratic principle is in certain respects difficult to reconcile with his overall aim of easing the tension between popular sovereignty and fundamental rights.

His translation of the application of the discourse principle on the form of law seems to be – at least from the perspective of constitutional theory – too much influenced by the fear of fundamental philosophical objections against traces of

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<sup>76</sup> See Günther, above n. 65, and Walker, above n. 64.

<sup>77</sup> G. Teubner, 'The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors' (2006) 69 *Modern Law Review* 327; see also A. Fischer-Lescano and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan J. of International Law* 999.

<sup>78</sup> See, e.g., C. Joerges, 'Deliberative Supranationalism: Two Defences' (2002) 8 *European Law J.* 133; Nickel, above n.23.

substantial moral argumentation in the system of rights. Its formal structure would gain some plausibility if the system of rights would allow for at least one mildly substantiated legal position that could be invoked against excesses of majority rule, be it the marginalization of structural minorities, or the factual annulment of the social contract and the destruction of the category of law. The guarantee of human dignity (see Article 1.1 of the *Grundgesetz*, and now also the EU Charter of Fundamental Rights) could, for example, serve as a reference point in this respect, if understood in the strict sense of a protection of human beings against torture, and of structural minorities against degradation and humiliation.

In a similar vein, adjustments with regard to the normative force of the democratic principle would enhance the plausibility of the claim that law is legitimate only if it deserves recognition because of its ‘pure’ democratic origin. If transnational regulations and transnational governance are here to stay, a less idealized concept of democracy could avoid misinterpretations of the kind that the institutionalized democratic nation state is the only possible reference point for their evaluation.<sup>79</sup> This holds especially true with regard to the fact that Habermas himself correctly stresses the prominent role of civil society in public will-formation processes. An adjustment of the system of rights could therefore include, for example, an acknowledgement of the democracy-enhancing potentials of participatory structures. This would also shed light on the so far underexposed role of protests, resistance, and constitutional fights for recognition that have been an important impulse for legal and constitutional developments since the French and North American Revolutions.<sup>80</sup>

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<sup>79</sup> See the (in)famous Maastricht judgement of the German FCC, and the critique of Brun-Otto Bryde, ‘Die bundesdeutsche Volksdemokratie als Irrweg der Demokratietheorie’ (1994) 5 *Staatwissenschaften und Staatspraxis* 305.

<sup>80</sup> See A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* J. Anderson trans. (Cambridge: Polity Press, 1995), and the controversy between Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003).