The Inclusion of the Other

Studies in Political Theory

On the Internal Relation between the Rule of Law and Democracy

Jürgen Habermas

edited by Ciaran Cronin and Pablo De Greiff

First published in Germany as *Die Einbeziehung des anderen. Studien zur politischen Theorie*, © 1996 by Suhrkamp Verlag, Frankfurt am Main, Germany.

First published in Great Britain in 1999 by Polity Press in association with Blackwell Publishers Ltd.

Editorial office:
Polity Press
65 Bridge Street
Cambridge CB2 1UR, UK

Marketing and production:
Blackwell Publishers Ltd
108 Cowley Road
Oxford OX4 1JF, UK

ISBN 0-7456-2155-4

A catalogue record for this book is available from the British Library.

The book was set in New Baskerville by Wellington Graphics and was printed and bound in the United States of America.

Printed on acid-free paper.

On the Internal Relation between the Rule of Law and Democracy

In academia we often mention law and politics in the same breath, yet at the same time we are accustomed to consider law, the rule of law, and democracy as subjects of different disciplines: jurisprudence deals with law, political science with democracy, and each deals with the constitutional state in its own way—jurisprudence in normative terms, political science from an empirical standpoint. The scholarly division of labor continues to operate even when legal scholars attend to law and the rule of law, on the one hand, and will-formation in the constitutional state, on the other; or when social scientists, in the role of sociologists of law, examine law and the constitutional state and, in the role of political scientists, examine the democratic process. The constitutional state and democracy appear to us as entirely separate objects. There are good reasons for this. Because political rule is always exercised in the form of law, legal systems exist where political force has not yet been domesticated by the constitutional state. And constitutional states exist where the power to govern has not yet been democratized. In short, there are legally ordered governments without constitutional institutions, and there are constitutional states without democratic constitutions. Of course, these empirical grounds for a division of labor in the academic treatment of the two subjects by no means imply that, from a normative standpoint, the constitutional state could exist without democracy.

In this paper I want to treat several aspects of this internal relation between the rule of law and democracy. This relation results from the concept of modern law itself (section 1) as well as from the fact that positive law can no longer draw its legitimacy from a higher law (section 2). Modern law is legitimated by the autonomy guaranteed equally to each citizen, and in such a way that private and public autonomy reciprocally presuppose each other (section 3). This conceptual interrelation also makes itself felt in the dialectic of legal and factual equality. It was this dialectic that first elicited the social-welfare paradigm of law as a response to the liberal understanding of law, and today this same dialectic necessitates a proceduralist self-understanding of constitutional democracy (section 4). In closing I will elucidate this proceduralist legal paradigm with the example of the feminist politics of equality (section 5).

1 Formal Properties of Modern Law

Since Locke, Rousseau, and Kant, a certain concept of law has gradually prevailed not only in philosophical thought but in the constitutional reality of Western societies. This concept is supposed to account simultaneously for both the positivity and the freedom-guaranteeing character of coercible law. The positivity of law—the fact that norms backed by the threat of state sanction stem from the changeable decisions of a political lawgiver—is bound up with the demand for legitimation. According to this demand, positively enacted law should guarantee the autonomy of all legal persons equally; and the democratic procedure of legislation should in turn satisfy this demand. In this way, an internal relation is established between the coercibility and changeability of positive law on the one hand, and a mode of lawmaking that engenders legitimacy on the other. Hence from a normative perspective there is a conceptual or internal relation—and not simply a historically, accidental relation—between law and democracy, between legal theory and democratic theory.

At first glance, the establishment of this internal relation has the look of a philosophical trick. Yet, as a matter of fact, the relation is deeply rooted in the presuppositions of our everyday practice of law.

For in the mode of validity that attaches to law, the facticity of the state's legal enforcement is intermeshed with the legitimating force of a legislative procedure that claims to be rational in that it guarantees freedom. This is shown in the peculiar ambivalence with which the law presents itself to its addressees and expects their obedience: that is, it leaves its addressees free to approach the law in either of two ways. They can either consider norms merely as factual constraints on their freedom and take a strategic approach to the calculable consequences of possible rule-violations, or they can comply with legal statutes in a performative attitude, indeed comply out of respect for results of a common will-formation that claim legitimacy. Kant already expressed this point with his concept of "legality," which highlighted the connection between these two moments without which legal obedience cannot be reasonably expected: legal norms must be fashioned so that they can be viewed simultaneously in two ways, as coercive and as laws of freedom. These two aspects belong to our understanding of modern law: we consider the validity of a legal norm as equivalent to the explanation that the state can simultaneously guarantee factual enforcement and legitimate enactment—thus it can guarantee, on the one hand, the legality of behavior in the sense of average compliance, which can if necessary be compelled by sanctions; and, on the other hand, the legitimacy of the rule itself, which must always make it possible to comply with the norm out of respect for the law.

Of course, this immediately raises the question of how the legitimacy of rules should be grounded when the rules in question can be changed at any time by the political legislator. Constitutional norms too are changeable; and even the basic norms that the constitution itself has declared nonamendable share with all positive law the fate that they can be abrogated, say, after a change of regime. As long as one was able to fall back on a religiously or metaphysically grounded natural law, the whirlpool of temporality enveloping positive law could be held in check by morality. Situated in a hierarchy of law, temporalized positive law was supposed to remain *subordinate* to an eternally valid moral law, from which it was to receive its lasting orientations. But even aside from the fact that in pluralistic societies such integrating worldviews and collectively binding comprehensive

doctrines have in any case disintegrated, modern law, simply by virtue of its formal properties, resists the direct control of a posttraditional morality of conscience, which is, so to speak, all we have left.

2 The Complementary Relation between Positive Law and Autonomous Morality

Modern legal systems are constructed on the basis of individual rights. Such rights have the character of releasing legal persons from moral obligations in a carefully circumscribed manner. By introducing rights that concede to agents the latitude to act according to personal preferences, modern law as a whole implements the principle that whatever is not explicitly prohibited is permitted. Whereas in morality an inherent symmetry exists between rights and duties, legal duties are a consequence of entitlements, that is, they result only from statutory constraints on individual liberties. This basic conceptual privileging of rights over duties is explained by the modern concepts of the "legal person" and of the "legal community." The moral universe, which is *unlimited* in social space and historical time, includes *all natural persons* with their complex life histories; morality itself extends to the protection of the integrity of fully individuated persons (*Einzelner*). By contrast, the legal community, which is always localized in space and time, protects the integrity of its members precisely insofar as they acquire the artificial status of *rights bearers*. For this reason, the relation between law and morality is more one of complementarity than of subordination.

The same is true if one compares their relative scope. The matters that require legal regulation are at once both narrower and broader in scope than morally relevant concerns: narrower inasmuch as legal regulation has access only to external, that is, coercible, behavior, and broader inasmuch as law, as an organizational form of politics, pertains not only to the regulation of interpersonal conflicts but also to the pursuit of political goals and the implementation of policies. Hence legal regulations touch not only on moral questions in the narrow sense, but also on pragmatic and ethical questions, and on forming compromises among conflicting interests. Moreover, unlike the clearly delimited normative validity claimed by moral norms, the

legitimacy claimed by legal norms is based on various sorts of reasons. The legislative practice of justification depends on a complex network of discourses and bargaining, and not just on moral discourse.

The idea from natural law of a hierarchy of laws at different levels of dignity is misleading. Law is better understood as a functional complement to morality. As positively valid, legitimately enacted, and actionable, law can relieve the morally judging and acting person of the considerable cognitive, motivational, and organizational demands of a morality based entirely on individual conscience. Law can compensate for the weaknesses of a highly demanding morality that—if we judge from its empirical results—provides only cognitively indeterminate and motivationally unreliable results. Naturally, this does not absolve legislators and judges from the concern that the law be in harmony with morality. But legal regulations are too concrete to be legitimated solely through their compatibility with moral principles. From what, then, can positive law borrow its legitimacy, if not from a superior moral law?

Like morality, law too is supposed to protect the autonomy of all persons equally. Law too must prove its legitimacy under this aspect of securing freedom. Interestingly enough, though, the positive character of law forces autonomy to split up in a peculiar way, which has no parallel in morality. Moral self-determination in Kant's sense is a unified concept insofar as it demands of each person, *in propria persona*, that she obey just those norms that she herself posits according to her own impartial judgment, or according to a judgment reached in common with all other persons. However, the binding quality of legal norms does not stem solely from processes of opinion- and will-formation, but arises also from the collectively binding decisions of authorities who make and apply law. This circumstance makes it conceptually necessary to distinguish the role of authors who make (and adjudicate) law from that of addressees who are subject to established law. The autonomy that in the moral domain is all of a piece, so to speak, appears in the legal domain only in the dual form of private and public autonomy.

However, these two moments must then be mediated in such a way that the one form of autonomy does not detract from the other. Each form of autonomy, the individual liberties of the subject of

private law and the public autonomy of the citizen, makes the other form possible. This reciprocal relation is expressed by the idea that legal persons can be autonomous only insofar as they can understand themselves, in the exercise of their civic rights, as authors of just those rights which they are supposed to obey as addressees.

3 The Mediation of Popular Sovereignty and Human Rights

It is therefore not surprising that modern natural law theories have answered the legitimation question by referring, on the one hand, to the principle of *popular sovereignty* and, on the other, to the *rule of law* as guaranteed by human rights. The principle of popular sovereignty is expressed in rights of communication and participation that secure the public autonomy of citizens; the rule of law is expressed in those classical basic rights that guarantee the private autonomy of members of society. Thus the law is legitimated as an instrument for the equal protection of private and public autonomy. To be sure, political philosophy has never really been able to strike a balance between popular sovereignty and human rights, or between the "freedom of the ancients" and the "freedom of the moderns." The political autonomy of citizens is supposed to be embodied in the self-organization of a community that gives itself its laws through the sovereign will of the people. The private autonomy of citizens, on the other hand, is supposed to take the form of basic rights that guarantee the anonymous rule of law. Once the issue is set up in this way, either idea can be upheld only at the expense of the other. The intuitively plausible co-originality of both ideas falls by the wayside.

Republicanism, which goes back to Aristotle and the political humanism of the Renaissance, has always given the public autonomy of citizens priority over the prepolitical liberties of private persons. *Liberalism*, which goes back to John Locke, has invoked the danger of tyrannical majorities and postulated the priority of human rights. According to republicanism, human rights owed their legitimacy to the ethical self-understanding and sovereign self-determination achieved by a political community; in liberalism, such rights were supposed to provide, from the very start, legitimate barriers that

prevented the sovereign will of the people from encroaching on inviolable spheres of individual freedom. In their concepts of the legal person's autonomy, Rousseau and Kant certainly aimed to conceive of sovereign will and practical reason as unified in such a way that popular sovereignty and human rights would reciprocally interpret one another. But even they failed to do justice to the co-originality of the two ideas; Rousseau suggests more of a republican reading, Kant more of a liberal one. They missed the intuition they wanted to articulate: that the idea of human rights, which is expressed in the right to equal individual liberties, must neither be merely imposed on the sovereign legislator as an external barrier, nor be instrumentalized as a functional requisite for legislative goals.

To express this intuition properly it helps to view the democratic procedure—which alone provides legitimating force to the lawmaking process in the context of social and ideological pluralism—from a discourse-theoretical standpoint. Here I assume a principle that I cannot discuss in detail, namely, that a regulation may claim legitimacy only if all those possibly affected by it could consent to it after participating in rational discourses. Now, if discourses—and bargaining processes as well, whose fairness is based on discursively grounded procedures—represent the place where a reasonable political will can develop, then the presumption of reasonability, which the democratic procedure is supposed to ground, ultimately rests on an elaborate communicative arrangement: the presumption depends on the conditions under which one can legally institutionalize the forms of communication necessary for legitimate lawmaking. In that case, the desired internal relation between human rights and popular sovereignty consists in this: human rights themselves are what satisfy the requirement that a civic practice of the public use of communicative freedom be legally institutionalized. Human rights, which make the exercise of popular sovereignty legally possible, cannot be imposed on this practice as an external constraint. Enabling conditions must not be confused with such constraints.

Naturally, this analysis is at first plausible only for those political civil rights, specifically the rights of communication and participation, that safeguard the exercise of political autonomy. It is less plausible for the classical human rights that guarantee the citizens'

private autonomy. Here we think in the first instance of the fundamental right to the greatest possible degree of equal individual liberties, though also of basic rights that constitute membership status in a state and provide the individual with comprehensive legal protection. These rights, which are meant to guarantee everyone an equal opportunity to pursue his or her private conception of the good, have an intrinsic value, or at least they are not reducible to their instrumental value for democratic will-formation. We will do justice to the intuition that the classical liberties are co-original with political rights only if we state more precisely the thesis that human rights legally enable the citizens' practice of self-determination. I turn now to this more precise statement.

4 The Relation between Private and Public Autonomy

However well-grounded human rights are, they may not be paternalistically foisted, as it were, on a sovereign. Indeed, the idea of citizens' legal autonomy demands that the addressees of law be able to understand themselves at the same time as its authors. It would contradict this idea if the democratic legislator were to discover human rights as though they were (preexisting) moral facts that one merely needs to enact as positive law. At the same time, one must also not forget that when citizens occupy the role of co-legislators they are no longer free to choose the medium in which alone they can realize their autonomy. They participate in legislation only as legal subjects; it is no longer in their power to decide which language they will make use of. The democratic idea of self-legislation *must* acquire its validity in the medium of law itself.

However, when citizens judge in the light of the discourse principle whether the law they make is legitimate, they do so under communicative presuppositions that must themselves be legally institutionalized in the form of political civil rights, and for such institutionalization to occur, the legal code as such must be available. But in order to establish this legal code it is necessary to create the status of legal persons who as bearers of individual rights belong to a voluntary association of citizens and when necessary effectively claim their rights. There is no law without the private autonomy of

legal persons in general. Consequently, without basic rights that secure the private autonomy of citizens there is also no medium for legally institutionalizing the conditions under which these citizens, as citizens of a state, can make use of their public autonomy. Thus private and public autonomy mutually presuppose each other in such a way that neither human rights nor popular sovereignty can claim primacy over its counterpart.

This mutual presupposition expresses the intuition that, on the one hand, citizens can make adequate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; but that, on the other hand, they can arrive at a consensual regulation of their private autonomy only if they make adequate use of their political autonomy as enfranchised citizens.

The internal relation between the rule of law and democracy has been concealed long enough by the competition between the legal paradigms that have been dominant up to the present. The liberal legal paradigm reckons with an economic society that is institutionalized through private law—above all through property rights and contractual freedom—and left to the spontaneous workings of the market. Such a "private law society" is tailored to the autonomy of legal subjects who as market participants more or less rationally pursue their personal life-plans. This model of society is associated with the normative expectation that social justice can be realized by guaranteeing such a negative legal status, and thus solely by delimiting spheres of individual freedom. The well-founded critique of this supposition gave rise to the social welfare model. The objection is obvious: if the free "capacity to have and acquire" is supposed to guarantee social justice, then an equality in "legal capacity" must exist. As a matter of fact, however, the growing inequalities in economic power, assets, and living conditions have increasingly destroyed the factual preconditions for an equal opportunity to make effective use of equally distributed legal powers. If the normative content of legal equality is not to be inverted, then two correctives are necessary. On the one hand, existing norms of private law must be substantively specified, and on the other, basic social rights must be introduced, rights that ground claims to a more just distribution

of socially produced wealth and to more effective protection against socially produced dangers.

In the meantime, of course, this *materialization* of law has in turn created the unintended side effects of welfare paternalism. Clearly, efforts to compensate for actual living conditions and power positions must not lead to "normalizing" interventions of a sort that once again restrict the presumptive beneficiaries' pursuit of an autonomous life-project. The further development of the dialectic of legal and factual equality has shown that both legal paradigms are equally committed to the productivist image of an economic society based on industrial capitalism. This society is supposed to function in such a way that the expectation of social justice can be satisfied by securing each individual's private pursut of his or her conception of the good life. The only dispute between the two paradigms concerns whether private autonomy can be guaranteed directly by negative liberties *(Freiheitsrechte)*, or whether on the contrary the conditions for private autonomy must be secured through the provision of welfare entitlements. In both cases, however, the internal relation between private and public autonomy drops out of the picture.

5 An Example: The Feminist Politics of Equality

In closing, I want to examine the feminist politics of equality to show that policies and legal strategies oscillate helplessly between the conventional paradigms as long as they remain limited to securing private autonomy and disregard how the individual rights of private persons are related to the public autonomy of citizens engaged in lawmaking. For, in the final analysis, private legal subjects cannot enjoy even equal individual liberties if they themselves do not jointly exercise their civic autonomy in order to specify clearly which interests and standards are justified, and to agree on the relevant respects that determine when like cases should be treated alike and different cases differently.

Initially, the goal of liberal policies was to uncouple the acquisition of status from gender identity and to guarantee to women equal opportunities in the competition for jobs, social recognition, educa-

tion, political power, etc., regardless of the outcome. However, the formal equality that was partially achieved merely made more obvious the ways in which women were *in fact* treated unequally. Social welfare politics responded, especially in the areas of social, labor, and family law, by passing special regulations relating, for example, to pregnancy and child care, or to social hardship in the case of divorce. In the meantime feminist critique has targeted not only the unredeemed demands, but also the ambivalent consequences of successfully implemented welfare programs—for example, the higher risk of women losing their jobs as a result of compensatory regulations, the over-representation of women in lower wage brackets, the problematic issue of "what is in the child's best interests," and in general the progressive feminization of poverty. From a legal standpoint, one reason for this reflexively generated discrimination is found in the overgeneralized classifications used to label disadvantaged situations and disadvantaged groups of persons, because these "false" classifications lead to "normalizing" interventions into how people conduct their lives, interventions that transform what was intended as compensation for damages into new forms of discrimination. Thus instead of guaranteeing liberty, such overprotection stifles it. In areas of law that are of concern to feminism, welfare paternalism takes on a literal meaning to the extent that legislation and adjudication are oriented by traditional patterns of interpretation and thus serve to buttress existing stereotypes of sexual identity.

The classification of gender-specific roles and differences touches on fundamental levels of a society's cultural self-understanding. Radical feminism has only now made us aware of the fallible character of this self-understanding, an understanding that is essentially contested and in need of revision. It rightly insists that the appropriate interpretation of needs and criteria be a matter of public debate in the political public sphere. It is here that citizens must clarify the aspects that determine which differences between the experiences and living situations of (specific groups of) men and women are relevant for an equal opportunity to exercise individual liberties. Thus, this struggle for the equal status of women is a particularly good example of the need for a change of the legal paradigm.

The dispute between the two received paradigms—whether the autonomy of legal persons is better secured through individual liberties for private competition or through publicly guaranteed entitlements for clients of welfare bureaucracies—is superseded by a *proceduralist conception of law.* According to this conception, the democratic process must secure private and public autonomy at the same time: the individual rights that are meant to guarantee to women the autonomy to pursue their lives in the private sphere cannot even be adequately formulated unless the affected persons themselves first articulate and justify in public debate those aspects that are relevant to equal or unequal treatment in typical cases. The private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy.