2 Theoretical Framework

2.1 Habermas' Discourse Theory of Law

This Section provides a general introduction to Habermas' discourse theory. The first part places discourse theory in its broader context and introduces its general outlines by presenting the discourse principle and the principle of democracy from which the theory of democracy follows. Furthermore, the relevance of discourse theory's proceduralist understanding of modern state's legitimacy and its legal positivist assumptions are discussed and how these finally lead to the importance of protecting private and public autonomy. The second part is concerned with the co-originality thesis and the system of rights. It introduces Habermas' critique of liberalism and republicanism in balancing human rights and popular sovereignty before presenting discourse theory's answer in the form of the co-originality of human rights and popular sovereignty. Lastly, the system of rights with its five categories of rights is presented.

2.1.1 General Remarks

Habermas initially presented his discourse theory of law in *Faktizität und Geltung* (1992),[31] published in English as *Between Facts and Norms* in 1996.[32] His political and legal theory is concerned with how constitu-

31 asJürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992).

32 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

tional democracies create and institutionalise democratically legitimate laws. The account discourse theory provides attempts to find middle ground between libertarianism and republicanism, since during the late 1980s and early 1990s, when Habermas was conceptualising his theory and writing *Between Facts and Norms*, there was a heated debate in political theory between the two camps. To this end, discourse theory introduced the co-originality (or equiprimordiality) of liberal rights and popular sovereignty.[33] According to Habermas, neither liberalism nor republicanism realise the true co-originality of private and public autonomy, with liberalism deeming the former more important and republicanism the latter.[34] How exactly discourse theory conceives of the co-originality of the two is discussed below. For now, it suffices to say that both are needed in a "radical democracy" as they presuppose each other. Habermas assumes that the rule of law cannot exist without such radical democracy. However, he recognises that given our present-day conditions, radical democracy needs to be made compatible with the large bureaucracy through which modern states are organised. With this in mind, discourse theory reconstructs and describes how discourse is institutionalised by political and legal systems. In this sense, the theory offers both a descriptive sociology of law and jurisprudence, as well as a theory of prescriptive normative philosophy.[35] At the heart of discourse theory lies the discourse principle which holds D: exactly those action norms are valid (legitimate) to which all possibly affected persons could agree as participants in rational discourse.

D expresses requirements for justification that are valid in a post-conventional (rationalised) lifeworld.[36] Habermas takes the social condition of a rationalised lifeworld as the premise for his analysis of modern law. Rationalisation means that cultural traditions have been secularised and lost their power to prescribe the division of labour and social norms. This leads to the fact that actions need to be coordinated

33 Finlayson and Rees (n 27).
34 Jürgen Habermas, 'Remarks on Legitimation through Human Rights' (1998) 24 Philosophy & Social Criticism 157, 159.
35 Finlayson and Rees (n 27).
36 Baxter (n 22) 68.

by citizens themselves. While communicative action is one way for a society to coordinate itself, communicative agreement is difficult to achieve and hence needs to be subsidised by law.[37] In D, action norms then are to be understood as temporally, socially, and substantively generalised behavioural expectations. Affected persons are those people whose interests are touched by the foreseeable consequences of a general practice regulated by the relevant norm. Rational discourse is understood as any attempt to reach an understanding over problematic validity claims in situations where free processing of topics and contributions, information and reasons is possible.[38]

From the general discourse principle D, Habermas derives the more specific principle of democracy, which states that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted. It is important to note that the democratic principle is independent from the moral principle, which Habermas also derives from the discourse principle. The democratic political process is viewed as autonomous and forms the sole source of legitimacy for the production of law.[39] This relates back to the rationalisation of the lifeworld, according to which the social order can no longer be based on religious or metaphysical supports.[40] According to the democratic principle, law is valid if it has been created in a legitimate way, as legitimacy is concerned with procedure and the origins of a law rather than its substantive merit.[41] Probably the most difficult aspect of the democratic principle for any imaginably functioning political system is the requirement for universal assent. When discussing this issue, Baxter states that universal assent is in fact too high a standard that would render all law illegitimate if narrowly understood. The discourse process where legitimate law can claim the assent of all citizens is to be seen as idealised

37 ibid 60.
38 ibid 68–69.
39 Finlayson and Rees (n 27).
40 Baxter (n 22) 61.
41 ibid 96.

and counterfactual.[42] Furthermore, assent by all citizens might mean something weaker than univocal endorsement as Habermas agrees that the discourse principle allows room for bargaining and compromise.[43] Despite this tension, the democratic principle expresses the important notion that addressees of the law need to be and at also perceive themselves as its authors. This is the case if they show fidelity to the recognised procedure and thus have to accept its outcomes even if they do not endorse the law substantively.[44]

How does Habermas envision such a discourse process of legislation? Generally, Habermas conceives of a formal and an informal public sphere in his theory of democracy. The formal public, parliamentary, sphere consists of the trias politica: parliament (the legislature), administration (the executive), and the judiciary. Importantly parliament is understood as a public forum legally established to take decisions. The informal public sphere refers to civil society. Here, several kinds of discourse, such as moral, ethical, and pragmatic, are present. For Habermas, a functioning deliberative democracy that creates valid, i.e. legitimately produced, law is one where discourses and their results reach the formal public sphere from the informal public sphere through various channels. Thus, through the circulation of communicative power from the periphery to the centre, for example, public opinion or moral norms should find their way to the legislature where they are discussed and cast into legal form and policies. Any laws and policies should through this process be informed by public opinion and shared moral values which is why citizens view themselves as their authors and accept them. In our large and complex states, the citizens cannot be the direct authors of their laws, which is why Habermas relies on this indirect way of participation in discourses in the informal public sphere.[45] For this to be possible there need to be public spaces for political discussion. These are usually provided through an active civil

42 ibid 74.
43 ibid 75.
44 ibid 100.
45 Finlayson and Rees (n 27).

society in the form of voluntary associations that are separate from the state.[46]

As mentioned, Habermas provides a proceduralist account of legitimacy. Before moving on to discussing the system of rights and the co-originality thesis, some more words on what exactly constitutes legitimate constitutional democracies and their laws under discourse theory are in order. In his article 'Remarks on Legitimation Through Human Rights', Habermas begins with stating that

> [b]ecause the medium of state power is constituted in forms of law, political orders draw their recognition from the legitimacy claim of law. That is, law requires more than mere acceptance; besides demanding that its addressees give it de facto recognition, the law claims to *deserve* their recognition.[47]

This is to say that states are legitimated through the justifications and constructions which legitimate the law that constitutes the state. At the core of modern legal orders are individual (political and private) rights as they allow for the pursuit of personal preferences and do away with the obligation to publicly justify one's actions within what is legally permitted. This is another way in which law and morality are separated under discourse theory, as pointed out earlier. One implication of this, which is important when justifying the co-originality of private and public autonomy, is that, different from morality, legal systems are spatio-temporally limited and only protect the integrity of its members if they acquire the artificial status of bearers of individual rights.[48]

Habermas assumes that all modern states are constituted by positive law, which he understands as law that is enacted and coercive.[49] This means that in valid law 'the facticity of the state's enforcement and implementation of law [is] intertwined with the legitimacy of the purportedly rational procedure of law-making'.[50] Citizens are thus free to follow the law either because it is coercive, or because they respect it. This implies that the state needs to ensure both the legality of

46 ibid.
47 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 157.
48 ibid 158.
49 ibid 157.
50 ibid 158.

behaviour in the sense of enforced average compliance and legitimacy of the rules through their proper enactment.[51] However, the positivity of law also poses a challenge to its legitimacy in the sense that the posited rules are always changeable by the political legislator. In contrast, morally grounded laws can be considered eternally valid. With the rationalisation of the lifeworld, eternally valid morality can no longer secure law's validity in our pluralistic societies. Popular sovereignty and human rights are instead the normative perspectives through which changeable law is supposed to be legitimated. The democratic nature of popular sovereignty's procedure justifies the presumption that it leads to legitimate outcomes. Classical human rights, according to Habermas, ground an inherently legitimate rule of law as they secure citizens' life and private liberties.[52] Law's positivity is, furthermore, the reason there even exists a distinction between public and private autonomy. While law protects the equal autonomy of each person, '[t]he binding character of legal norms stems not just from the insight into what is equally good for all, but from the collectively binding decisions of authorities who make and apply the law'.[53] This necessitates a distinction between authors who make and apply the law and addressees who are subject to valid law. Hence autonomy in the legal sphere takes on the dual form of private and public, though the two of them mutually presuppose each other.[54]

2.1.2 The Co-Originality Thesis and the System of Rights

Habermas stresses the co-originality of public and private autonomy, that is of popular sovereignty and (liberal) human rights, because he deems that political philosophy has thus far failed to strike an adequate balance between the two. According to his reconstruction, republican-

51 ibid.
52 ibid 159.
53 Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Political Theory 766, 779.
54 ibid.

ism prioritises citizens' public autonomy over their private autonomy since human rights themselves are legitimated by the political community's ethical self-understanding and sovereign self-determination. Liberalism, on the other hand, treats human rights as inherently legitimate and favours them over citizens' public autonomy against the danger of a tyrannical rule of the majorities.[55] Against these two perspectives, Habermas claims that 'the idea of human rights – Kant's fundamental right to equal individual liberties – must neither be merely imposed on the sovereign legislator as an external barrier nor be instrumentalised as a functional requisite for democratic self-determination'.[56]

The co-originality of private and public autonomy follows from the principle of democracy, which states that a law may claim legitimacy only if all citizens could consent to it after participating in rational discourses. Accordingly, discourses are the place where reasonable political will can develop. This means that 'the presumption of legitimate outcomes, which the democratic procedure is supposed to justify, ultimately rests on an elaborate communicative arrangement'.[57] For Habermas this implies that the necessary forms of communication and the conditions that ensure legitimacy have to be legally institutionalised.[58]

Public autonomy generally refers to the democratic procedures of law-making, i.e. the discursive processes of opinion- and will-formation in which the sovereignty of the people becomes binding.[59] Popular sovereignty is required as it ensures that citizens can equally realise their private autonomy by engaging in the democratic process utilising their public autonomy.[60] While human rights secure private autonomy, as discussed below, these rights need to be justified and legitimated through a legislative procedure that is based on the principle of popular sovereignty.[61]

55 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 159.
56 ibid 159–160.
57 ibid 160.
58 ibid.
59 Baxter (n 22) 67.
60 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 161.
61 Baxter (n 22) 63–64.

At the same time, human rights institutionalise the communicative conditions for reasonable political will-formation. They make the exercise of popular sovereignty possible and hence cannot be imposed as external constraints (against the claims of liberalists). How human rights enable political will-formation is immediately plausible for political rights of communication and participation, but not necessarily for civil rights. On the one hand, they have intrinsic value and cannot be reduced to their instrumental value for democratic will-formation. On the other hand, since citizens participate in legislation as only legal subjects, 'the legal code as such must already be available before the communicative presuppositions of a discursive will-formation can be institutionalized in the form of civil rights'.[62] However, to create a legal code, legal persons who are bearers of individual rights and form a voluntary association of citizens are required. This is to say that 'there is no law without the private autonomy of legal persons in general'.[63] This is why, not only political rights are needed to institutionalise the conditions for the exercise of public autonomy, but also civil rights since without them, there would be no medium through which to legally institutionalise these conditions.[64] In short, 'citizens can make appropriate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent'.[65]

The idea of legitimate law, therefore, presupposes that of a legal subject as bearer of rights.[66] To develop this concept further, Habermas poses the following question: 'What basic rights must free and equal citizens mutually accord one another if they want to regulate their common life legitimately by means of positive law?'.[67] His answer is a system of rights consisting of five kinds of rights. These rights are equally distributed, mutually recognised individual liberties,[68] where

62 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 160.
63 ibid 160–161.
64 ibid 161.
65 ibid.
66 Finlayson and Rees (n 27).
67 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 160.
68 Baxter (n 22) 65.

'categories of rights devoted to private autonomy respond to the "liberal" side of the liberal/republican divide, and the categories of rights that secure public or civic autonomy respond to the "republican" side'.[69] It is important to note that the system of rights does not elaborate any specific rights. Instead, it describes unsaturated kinds of rights that will need to be elaborated by the citizens in a given democratic political system using their political autonomy. Thus, the political process of establishing a specific system of rights for a legal community is left, as much as is possible, to the citizens as the discourse theory of democratic legitimacy is strictly procedural rather than substantive.[70] Moreover, for the rights to be effective legal rights they require legal institutionalisation, which should also be determined by engaging citizens' political autonomy.[71]

The system of rights comprises the following five categories of rights:[72]

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.
2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.
4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.
5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current

69 ibid 129.
70 Finlayson and Rees (n 27).
71 Baxter (n 22) 72.
72 Habermas, *Between Facts and Norms* (n 32) 122–123.

circumstances make it necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).

Generally speaking, categories 1–3 are civil rights that arise from the application of the discourse principle to the form of law and define citizens' private autonomy.[73] They form the 'necessary basis for an association of citizens that has definite social boundaries and whose members mutually recognize one another as bearers of actionable individual rights'.[74] Categories 4 and 5 are political and social rights that secure practically and materially enabling conditions ensuring the effectiveness of the first three categories of rights.[75] The first category of rights follows from the idea that people would not agree upon unequal rights in the rational discourse that discourse theory presupposes. Moreover, they would allow each other the greatest possible liberty without encroaching on someone else's.[76] The second and third category of rights follow from the first one since legal personality entails membership in a legal community and the actionability of rights. Thus, category two encompasses citizenship rules, as well as rules on immigration and emigration. Category 3 mainly requires the availability of legal remedies for violations of individual rights.[77]

The last two categories represent the perspective of participants in democratic law-making,[78] or of citizens who recognize one another as mutual authors of the law.[79] In contrast, the first three categories contain principles from the perspective of nonparticipants,[80] or from the perspective of participants who expect to act as addressees of the law.[81] Category 4 sets out the process through which the other categories and itself can be elaborated and how legal norms can be created. Here the

73 Finlayson and Rees (n 27).
74 Habermas, 'Constitutional Democracy' (n 53) 777.
75 Finlayson and Rees (n 27).
76 Baxter (n 22) 70.
77 ibid 71–72.
78 ibid 74.
79 Habermas, 'Constitutional Democracy' (n 53) 777.
80 Baxter (n 22) 74.
81 Habermas, 'Constitutional Democracy' (n 53) 777.

co-originality of private and public autonomy is again evident in that citizens can secure their private autonomy by engaging their public autonomy and the use of their public autonomy is guided by the rights from the first three categories which establish private autonomy.[82] The last category of rights, category 5, refers to social rights that might be typical for welfare states. Different from the other categories which are absolutely justified in themselves, category 5 is justified only relatively to the other four categories of rights. Thus, social and ecological rights are only justified to the extent that they are necessary to guarantee the exercise of the other kinds of rights.[83]

2.2 Judicial Review in Discourse Theory

The following Section is concerned with the role discourse theory attributes to judicial review, and under which circumstances it is considered legitimate. To understand the overall place of the judiciary and that of judicial review in discourse theory's conception of the state, first the general principles of the constitutional state [Rechtsstaat] are outlined. Second, the role of the judiciary and the concept of a discourse of application will be introduced. Finally, the discussion turns to constitutional adjudication und the question of how judicial review is considered legitimate.

2.2.1 The Constitutional State [Rechtsstaat]

The account of the constitutional state that discourse theory offers is concerned with the institutions, procedures, and mechanisms that are required for legitimately actualising the abstract categories of rights set out in the system of rights through positive law. The principles of the

82 Baxter (n 22) 72–73.
83 ibid 75.

constitutional state thus set out the kind of arrangement that needs to be defined in positive law for a legal order to be legitimate.[84]

In his reconstruction of the constitutional state, Habermas states that law and political power are internally linked in two ways. First, the validity of legal norms requires adequate law enforcement, as discussed above. This means, for example, that rights ought to be enforced through courts with sanctions applied by state-personnel to give effect to judgements if necessary.[85] Second, the two are linked in the legislative process as legitimate law-making requires a democratic process which is set with the help of governmental power and where the executive power implements enacted laws.[86] Thus, in a constitutional state law presupposes political power and political power presupposes law – the two are reciprocal.[87]

Since Habermas assumes a complex modern state that is reliant on the integrative achievements of law for his theory,[88] he introduces the concept of administrative power as a second power next to communicative power, i.e. the motivating force of discursively produced shared beliefs.[89] As has been noted, the source of legitimate law is citizens' communicative power. However, in assuming a complex society, Habermas acknowledges that a bureaucratic state is needed since using rational discourse as the only means of producing law would only work, if at all, in a very small homogenous society with a high degree of popular participation.[90] Baxter termed administrative power the "counter concept to communicative power" since it does not entail communicative action or discourse but is developed within formal bureaucratic organisations as the steering medium of a self-regulating administrative system.[91] Because administrative power does not involve

84 ibid 82.
85 ibid 83.
86 ibid.
87 ibid.
88 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 164.
89 Habermas, *Between Facts and Norms* (n 32) 147.
90 Finlayson and Rees (n 27).
91 Baxter (n 22) 86–87.

discourse, it should be tied to the law-making power of citizens' communicative power in both its generation and application.[92] However, Habermas also states that the administrative power has a self-steering mechanism that should not be interfered with.[93] Though Baxter adds to this point that

> the administrative system cannot be entirely "self-steering", on Habermas's premises, because [...] [l]egitimate law, on Habermas's view, is both the product of democratic lawmaking and the mechanism that defines the structures of official command and obedience that Habermas calls "administrative power". Law, in other words, is a mechanism for effecting, and regulating, what Habermas calls the "conversion of communicative into administrative power".[94]

To this end, the constitutional state under discourse theory entails common institutions tasked with constraining the official use of power: an independent and impartial judiciary bound by the rule of law, legal controls over the state administration, and the separation of powers.[95]

2.2.2 The Role of the Judiciary

Generally, the role of the judiciary is limited to the application of existing legal norms to individual cases.[96] This follows from discourse theory's positivistic understanding of law, whereby legal norms enacted by representative bodies are at the centre of modern law. However, this discourse theoretical conception of the judiciary's proper function still leaves room for the claim that most norms are inherently indeterminate because they do not specify in detail and in advance the exact situations to which they apply. This results in several norms being potentially applicable to a certain case. Through discourses of application, courts must therefore determine which valid norm is most appropriately ap-

92 ibid 83.
93 Habermas, *Between Facts and Norms* (n 32) 150.
94 Baxter (n 22) 88.
95 ibid.
96 Habermas, *Between Facts and Norms* (n 32) 172.

plied in a given context.[97] The legitimacy requirement prescribes that courts should carry out the application of law with regard to rational external justifications, i.e. the reasons that justified the norm when it was enacted.[98] The certainty requirement asks of the courts to act in consistency with the institutional history and at the same time mandates that judicial decisions can be points of connection for future ones.[99]

One key concept for the functioning of the judiciary as understood by discourse theory, is the difference between discourses of justification and discourses of application. The two discourses follow different argumentative logics and fulfil different purposes. Discourse of justification are what the legislature is engaged in when discursively justifying legal norms in their enactment. To this end, they might draw on all kinds of reasons and discourses: moral, ethical, and pragmatic.[100] Discourses of application are concerned with applying general norms to particular circumstances in the most appropriate way and as such they are the specialty of the courts.[101] To be precise, courts are not allowed to engage in discourses of justification. Habermas presents two reasons for this. First, courts' institutional set up lacks a democratic warrant. Only the parties to the dispute and the impartial judge are involved before a court, but not the citizenry at large through public discourse.[102] Second, since courts already have the coercive power of the state at their disposal to enforce judgements, they could command administrative power untied to the communicative power of democratic discourses if they were able to engage in discourses of justification and thereby enact law.[103]

One can pose the question whether the distinction between application and justification is truly as clear as discourse theory seems to

97 Baxter (n 22) 110–111.
98 ibid 107.
99 ibid.
100 Habermas, *Between Facts and Norms* (n 32) 192.
101 Baxter (n 22) 91, 94.
102 ibid 103; Habermas, *Between Facts and Norms* (n 32) 172.
103 Baxter (n 22) 103; Habermas, *Between Facts and Norms* (n 32) 172.

presume it to be.[104] Habermas already acknowledges that the discourse-theoretical understanding might have to be relativised and states that

> [t]o the extent that legal programs are in need of further specification by the courts – because decisions in the grey area between legislation and adjudication tend to devolve on the judiciary, all provisos notwithstanding – juristic discourses of application must be visibly supplemented by elements taken from discourses of justification.[105]

A more specific proposal to address the issue of legal indeterminacy presented by Kuhli and Günther (2011) is discussed below as a possible framework to view courts' decisions in climate change matters without the existence of explicit climate rights.

2.2.3 Constitutional Adjudication

The aspect of constitutional adjudication this thesis is most interest in, is the constitutional review of legislation. While constitutional review is sometimes viewed critically especially based on arguments making reference to separation of powers, discourse theory states that the separation of powers does not, in principle, preclude constitutional review.[106] According to Zurn, Habermas offers two distinct considerations why judicial review is not paternalistic. The first relates to the fact that discourse theory views courts as being engaged in discourses of application.[107] From the fact that courts are precluded from engaging in discourses of justification, it follows that also constitutional courts must restrict themselves to applying basic rights.[108] Indeed, also constitutional review can be understood as engaging in a discourse of application. Rather than applying a regular statute to a factual situation, consti-

104 Baxter (n 22) 104.
105 Habermas, *Between Facts and Norms* (n 32) 439.
106 ibid 120.
107 Zurn (n 28) 437. It should be noted that Zurn finds neither consideration convincing against the charge of judicial paternalism. However, this can be disregarded for the moment as they are nonetheless insightful for understanding the discourse-theoretical conception of judicial review.
108 Baxter (n 22) 121.

tutional courts determine whether higher level constitutional norms are applicable (as they should be) to ordinary legal norms when conducting constitutional review.[109] The second consideration why constitutional review is not paternalistic is grounded on an understanding of the separation of governmental powers along the lines of specialised discursive functions. According to this thought, the judiciary holds particular institutional competence to deal with legal discourses of application as are required by the exercise of constitutional review.[110]

Habermas presents a "proceduralist account" of constitutional adjudication, which he develops, again, in contrast to his conception of the liberal and republican approach. The role discourse theory ascribes to constitutional adjudication, and especially constitutional review, is procedural in the sense that it should act as a guardian of the procedural preconditions for legitimate democratic law-making. This is to say, 'the constitutional court should keep watch over just that system of rights that makes citizens' private and public autonomy equally possible'.[111] Habermas elaborates that

> abstract judicial review should refer primarily to the conditions for the democratic genesis of laws. More specifically, it must start by examining the communication structures of a public sphere subverted by the power of the mass media; go on to consider the actual chances that divergent and marginal voices will be heard and that formally equal rights of participation will be effectively exercised; and conclude with the equal parliamentary representation of all the currently relevant groups, interest positions, and value orientations. Here it must also refer to the range of issues, arguments and problems, values and interests that find their way into parliamentary deliberation and are considered in the justification of approved norms.[112]

Zurn elaborates that the task of guaranteeing the procedural fairness and openness of democratic processes involves

> keeping open the channels of political change, guaranteeing that individuals' civil, membership, legal, political, and social rights are respected,

109 Zurn (n 28) 432–433.
110 ibid 438.
111 Habermas, *Between Facts and Norms* (n 32) 263.
112 ibid 265.

> scrutinizing the constitutional quality and propriety of the reasons justifying governmental action, and ensuring that the channels of influence from independent, civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers.[113]

Habermas' limited discussions suggest being in favour of a 'rather bold constitutional adjudication'.[114] He, for example, rejects limiting constitutional courts' analysis to purely formal equality, their task is not only to guard against infringements of equal liberties by the state. Rather, constitutional courts should also be attentive towards the risks that concentrated social and economic power pose to private and public autonomy, as he views growing power concentrations as the most relevant development in social circumstances.[115] However, it remains unclear in *Between Facts and Norms* to what extent a constitutional court may rely on disparities of social and economic power that influence the divergence between full and actual participation to invalidate, rewrite, or refuse to apply law.[116]

Nevertheless, the "boldness" of the approach Habermas recommends should not be overstated either. For example, discourse theory views the constitution as a project that is to be developed not just by the courts, but also by the legislature and the citizens at large. The courts certainly are not the only ones that can or should be engaged in constitutional interpretation.[117] Moreover, the system of rights the constitutional court should keep watch over, is, as discussed above, unsaturated until democratic law-making defines the abstract categories for a given society. This means that constitutional courts are limited to enforcing existing legal norms, just as the regular judiciary is also limited to discourses of application. While constitutional courts, on Habermas' account, should watch over the system of rights, they are bound to the system of rights that has been previously elaborated

113 Zurn (n 28) 436.
114 Habermas, *Between Facts and Norms* (n 32) 280.
115 Baxter (n 22) 130, 137.
116 ibid 137.
117 ibid 142.

through the democratic process.[118] Here it should be born in mind that the democratic process for elaborating and justifying constitutional norms is different from the democratic process to be followed for ordinary legal norms. While the proper actors for the latter are those actors with ordinary legislative powers, for constitutional norms it is the citizenry as a whole in their special configuration as a constitutional assembly, or at least a special configuration of the legislature.[119] Because the resolution of constitutional controversies should be justified before the electorate at large, judicial interference is particularly problematic in this case.

This relates to what Habermas terms the problem of "value jurisprudence". This problem arises when constitutional courts view the constitution not as a system of rules that is structured by principles but as a concrete order of values.[120] This view, where principles express values that need to be balanced if principles compete, is a conceptual error, according to Habermas, in short, because values recommend while principles command.[121] 'Values are "teleological", reflect "intersubjectively shared preferences", and are only "relatively binding", while principles are "deontological" and "absolutely binding"'.[122] While values can form part of the law and of constitutional provisions they do so through discourses of justification which courts, including constitutional courts, ought not to engage in.[123] Certainly, the problem of delineating between the two discourses especially in cases of vague legal provisions, as is often the case with constitutional provisions expressing basic rights, obtains here as well. Nonetheless, Habermas holds that legal principles may not be treated by constitutional courts as mere values that can simply be balanced. This would let the courts act as a legislative body whose proper task it in fact is to balance between different values and

118 ibid 145–146.
119 Zurn (n 28) 552.
120 Habermas, *Between Facts and Norms* (n 32) 254.
121 Baxter (n 22) 121.
122 ibid.
123 ibid.

preferences expressed in a pluralistic society.[124] While a constitutional court

> reopens the package of reasons that legitimated legislative decisions so that it might mobilize them for a coherent ruling on the individual case in agreement with existing principles of law; it may not, however, use these reasons in an implicitly legislative manner that directly elaborates and develops the system of rights.[125]

124 ibid 125.

125 Habermas, *Between Facts and Norms* (n 32) 262.