

Limitless pluralism or single-minded authoritarianism?

Examining deliberative democracy and agonistic pluralism through Foucault's notions of power and discourse

Oskar Verholt
s4042840
Supervisor: Prof. Dr. M.L.J. Wissenburg
Word count: 18497
August 5th 2020

Thesis for obtaining a “Master of Arts” degree in philosophy
Radboud University Nijmegen

I hereby declare and assure that I, Oskar Verholt, have drafted this thesis independently, that no other sources and/or means other than those mentioned have been used and that the passages of which the text, content, or meaning originates in other works – including electronic resources – have been identified and the sources have been clearly stated.

Nijmegen, 5th August 2020

So in the end when one is doing philosophy one gets to the point where one would like just to emit an inarticulate sound.

— Ludwig Wittgenstein, *Philosophical Investigations* (1953, § 261)

Abstract

This thesis examines Jürgen Habermas' theory of deliberative democracy and Chantal Mouffe's theory of agonistic pluralism and radical democracy in light of Foucault's definitions of power. This research effort claims that both theories are not as different as Habermas and especially Mouffe argue them to be. Both have similar points of departure, both discuss a similar dichotomy in liberal democracy, and both propose a framework which cannot definitively close the door on single-minded authoritarianism. When truth is considered contingent, democracy cannot be considered necessary. Ultimately, this thesis argues that the appeal for liberal democracy could only be secured when we make the system pay, at least in terms of freedom.

Keywords: power, discourse, democratic theory, deliberative democracy, agonistic pluralism, radical democracy, Mouffe, Foucault, Habermas.

Content

- Abstract5**
- Chapter 1: Introduction7**
 - Research question10
 - The relevance of the issue to the field of Political Philosophy10
 - Methodology.....11
- Chapter 2: Michel Foucault: An Introduction..... 13**
 - On Kant: the emergence of the subject13
 - Épistèmès14
 - The doubling of Man in social sciences15
 - Foucault’s Methodology15
 - On power16
 - Sovereign power and Disciplinary power.....17
 - Sovereign and disciplinary power as embracing entities19
 - Disciplinary power and the necessity of freedom.....19
- Chapter 3: Background on Habermas and Mouffe..... 21**
 - Habermas on the social: the theory of communicative action21
 - The Lifeworld21
 - The role for the Enlightenment in Mouffe and Habermas.....23
 - Habermas - The rationalisation of the lifeworld23
 - Mouffe – The lack of grounding24
- Chapter 4: Balancing Habermas and Mouffe26**
 - Habermas: balancing private and public autonomy in a system of law26
 - Mouffe: from private and public autonomy to the concepts of liberalism and democracy.....29
 - Habermas: the development of deliberative democracy in two principles.....31
 - The democratic principle32
 - The co-originality of the legal form and the democratic principle32
 - Mouffe: the lack of collective identity and pluralism in Habermas’ deliberative democracy34
 - For an agonistic pluralism and a radical democracy.....36
- Chapter 5: Through Foucault’s perspective on power 38**
 - Deliberative democracy – sovereign power through other means?.....38
 - The bargaining process: the essential fragility of democracy39
 - Disciplinary power and the rationalisation of the lifeworld.....41
 - The inescapable paradox of democracy42
- Chapter 6: Conclusion & discussion46**
 - Towards a deliberative, pluralistic and agonistic democracy47
- Bibliography50**

Chapter 1: Introduction

The topic of democracy has been discussed continuously for centuries, and theories of democracy remain to be main subjects of research in the field of political theory. With the publication of John Rawls' *A Theory of Justice* (1999/1971) deliberative democracy entered the stage of the debate on theories of democracy. It could be argued that there is a time before and after *A Theory of Justice* in political theory: much research on democratic theory in Western political theory since its publication covers supporters and challengers of a form of deliberative democracy. In this thesis, one of those essential contemporary debates on a theory of democracy will be analysed through the works of Jürgen Habermas and Chantal Mouffe.

Jürgen Habermas developed his own theory of deliberative democracy, building on his extensive theory of communicative action. Agonistic Pluralism as developed by Chantal Mouffe could be identified as one of the main challengers of deliberative democracy. Both these authors accuse the other of fallacies in their ideas, while at the same time aiming for similar goals: both theories can be considered to legitimise and advocate liberal democracy as a form of governance. Both start their argument with an overview of the development of democracy after the Enlightenment and both reserve an important role for power and discourse in their theory formation. When diving in deep, as is done in this thesis, it will become clear that these theories are not as distinct as especially Mouffe wants us to believe they are. It will be argued that both theories, while aiming to embrace pluralism, cannot prevent the risk of running into a single-minded authoritarianism.

Jürgen Habermas' extensive framework on democratic theory and justice is based on rational consensus. His theory is rooted in the tradition of Kantian practical reason, which focuses on answering the question 'what should be done?'. According to Kant's theory, the constant reference to universalism steers our individual thoughts. Habermas states that when extensive deliberation takes place between subjects of a political system and this deliberation includes as many thoughts on a topic as possible, universal thought can be approached. For that reason, he argues that legal norms should be the result of a dialogue among the subjects of those norms. This rational deliberation has to take place in an approximation of a so-called 'ideal speech situation', in which a 'power-free' discourse (*herrschaftsfreier Diskurs*) applies. In this discourse, external power relations have to be considered irrelevant. Due to the presumed universalism of thought, consensus can be reached. (Habermas, 1984; 1981/1984)

Chantal Mouffe developed a different perspective on liberal democracy. Mouffe counters the idea of overlapping consensus based on rationality as it denies the antagonistic characteristic of 'the

political'. She identifies the idea of overlapping consensus as one of the root causes of the emergence of the populist movements we observe today. In *For a Left Populism* (2018) she states that democracy is at risk and may even be a 'phase' that has already passed in Western European societies. According to Mouffe, Western European democracies are currently in a phase of post-politics, in which dissensus on major political items cannot be staged. The emergence of the populist right movements is a reaction to the crumbling of neo-liberal hegemony which constitutes this post-politics. Meanwhile, those who represent the status quo argue that the demands put forward by the challengers are un-democratic. (Mouffe, 2018)

Habermas' theory cannot resolve this problem of contemporary democracy since he would be blind to the political "in its dimension of conflict/decision" and deliberative democrats "cannot perceive the constitutive role of antagonism in social life" (Mouffe, p. 2, 1993). Antagonism is, according to Mouffe, "inherent to every human society and that determines our very ontological condition" (1993, p. 3). In *Hegemony and Socialist Strategy* (with Ernesto Laclau, 1985), *The Return of the Political* (1993) and *The Democratic Paradox* (2005), she defines the political by using ideas of Claude Lefort, Ludwig Wittgenstein and Carl Schmitt.

Mouffe additionally argues that Habermas denies the contingency of his framework for law and democracy: in his framework there is no attention for the tension between liberalism and democracy in the concept of liberal democracy. The denial of that dichotomy can, according to Mouffe, even be considered dangerous for the survival of democracy. Challengers of the status quo are situated outside the realm of legitimate power competition where consensus is reached, and are therefore likely to employ non-democratic means for competition. Pluralism within the framework of liberal democracy is considered unviable. Mouffe warns that the identification of the political framework with its content, which is the case when this dichotomy is denied, can lead to the challenge of the framework as a whole. (Mouffe, 1993; 2005)

While Habermas argues that the liberal democratic state can facilitate a place where a power-free discourse is applicable, Mouffe denies the existence of such a discourse in the political spectrum. Mouffe considers power to be a necessary component of the political, which makes her deny the validity of Habermas' deliberative democracy. Furthermore, she states that deliberative democracy denies the pluralism that she advocates, and she argues that a combination of radical democracy and agonistic pluralism is required to accommodate the different views on democracy.

But is this really the case? How should we interpret the differences between both theories of democracy? While Mouffe argues against Habermas' legitimation of the framework of deliberative democracy in the form of a rational consensus, her alternative does not really convince as a

substantial legitimation of the preservation of democracy. This legitimation, according to Mouffe, should be found in the commonality we share about what should be regarded reasonable when discussing democracy. But, when such a commonality has to be settled and institutionalised, how can then we distinguish it from the form Habermas gives to it, except for the fact that the criterium for consensus is put aside? And, since Mouffe warns against situating challengers of the status quo outside the realm of democracy, how should we interpret this settlement of commonality in terms of power?

Especially that last question requires an examination of the role of power in both frameworks. How do the authors interpret the phenomenon of power and how do they deal with power in their theories of democracy? An author who explains power as a phenomenon with multiple appearances is Michel Foucault. His contributions on the subject of power has changed the way we think about power, especially in relation to knowledge. In short, Foucault introduces the notion of disciplinary power, which unconsciously limits and at the same time produces our knowledge and actions. It is the power which is contained in the notion of the 'normal'.

With this notion of power, the concept is defined completely differently from power of sovereignty, which can be oppressive when one does not agree with the sovereign. Foucault does not abandon this notion of sovereign power, as will be argued, but points at the embracement of both forms of power in our modern societies. Foucault's contributions to social sciences are widely acknowledged to be of great importance in today's thinking (Gary and Oksala, 2019; Patton, 2009; Simons, 1995).

While often attributed to the field of political philosophy, Foucault's work does not include a theory of the foundations of political institutions. He does, however, give us an analysis of how we should understand the concepts of both power and discourse. In this thesis, the concept of power will be defined through the analysis thereof in Foucault's works *The Order of Things* (1966/2001), *Discipline and Punish* (1975/1977), and *The History of Sexuality* (1976/2018, 1984/2018), among other works. Both the theory of deliberative democracy and the theory of agonistic pluralism will be examined in light of Foucault's theory of power and knowledge.

The argument will be made that the theories of democracy of both Habermas and Mouffe run into similar pitfalls where the power-free setting or ultimate pluralism are considered as the main focus of theory. While Habermas argues that his political framework should be considered a stage for lifeworld practice, he does not take into account the inescapable role of disciplinary power on the discursive practice between individuals. Mouffe, who accuses deliberative democrats of the denial of pluralism, notices the productive role power plays as a discourse. But the settlement of the commonality on reasonableness, which should serve as framework for the practical

institutionalisation of democracy, seems to be as contingent as Habermas'. Without instruments to guarantee the reopening of such a settlement, authoritarianism is close by.

Research question

The topic of this thesis will be the debate between Jürgen Habermas and Chantal Mouffe on liberal democracy and its fundamental attributes. This debate concerns the legitimacy of political frameworks, constitutionalism and democracy. Focus will be placed on the underlying notions of power and the opportunity to escape the influence of power. Therewith, the possibility for the propagation of pluralism in both theories will be examined. The research questions that will be answered is:

When confronted with a Foucauldian notion of discourse and power, is there a significant difference in how the liberal democratic frameworks of Jürgen Habermas and Chantal Mouffe are able to embrace pluralism?

In answering this question, this thesis will examine the possibility of a group or individual to freely challenge the constellation of power and law that is laid down in liberal democracy. How wide is the range in which an individual or group that denies the current political order can act, can utter and can deny the validity of the law imposed on them?

The relevance of the issue to the field of Political Philosophy

There probably is no need to explain the relevance of democratic theory to the field of political philosophy. Different forms of (representative) democracy have been the most discussed form of governance for decades, and there is no definitive conclusion on which framework is the 'best choice'. Neither is unchallenged which attributes are necessary for a system to be labelled democratic. There is clearly still no consensus on what democracy is about. (Cunningham, 2002)

In *Models of Democracy*, Held argues that:

[...] nearly everyone today says they are democrats no matter whether their views are on the left, centre of right. Political regimes of all kinds in, for instance, Western Europe, the Eastern bloc and Latin America claim to be democracies. Yet, what each of these regimes says and does is radically different. Democracy seems to bestow an 'aura of legitimacy' on modern political life: rules, laws, policies and decisions appear justified and appropriate when they are 'democratic'. (Held, 1987, p. 1)

In the years after the Cold War, there was an enormous confidence in the spread of Western liberal democracy. Francis Fukuyama (2006/1992) even proclaimed the 'End of History' suggesting that, in the end, the system of liberal democracy combined with a market economy would be the only political system to prevail. Liberal democracy, according to Fukuyama, would represent the final destination in the dialectic of political organisation (in a Hegelian sense). In the past decades, our

path to democracy has taken turns Fukuyama did not foresee. On the way *Zum ewigen Frieden* we now seem to have quite a distance to cover. This thesis will discuss critically the theoretical fundamentals of liberal democracies themselves by comparing competing theoretical views.

Methodology

The next chapter will start off with a birds' eye view: it will be devoted to an introduction of Foucault's position in the context of modernity, followed by an elaboration of his remarks on power and discourse. His different concepts of power and their implications are to a large extent determined by his critique of the Enlightenment, as we will discover in this chapter. While this may appear as a sideshow at first, this background will prove necessary to understand the concept of power. Foucault introduces us to the framework in which knowledge can be gathered since modernity. It is only with an accurate understanding of the contingency of knowledge systems, that we can discuss the different notions of power and discourse as developed by Habermas and Mouffe in detail.

This introduction to Foucauldian thought will be followed by a third chapter, which elaborates on how Habermas and Mouffe deal with modernity, pluralism, discourse and power. Habermas' theory of law and democracy will be preceded by elements of his theory on communicative action and discourse ethics. Furthermore, attention will be paid to both authors' reaction to the Enlightenment, a constitutive component of both theories: the Enlightenment introduced the critical approach that sprang from rationalism.

The fourth chapter will examine how both authors deal with the effects of the Enlightenment in their theories of law and democracy. Central to Habermas' theory of law and democracy is the tension between private and public autonomy. The first corresponds with the 'liberal' in liberal democracy, concerning the individual freedom to act according to one's perception of the good life. The second (public), concerns the role an individual plays in the law-giving property of the state. This property can be influenced by the individual's right of giving the law as construed in a democratic procedure.

Habermas argues that it is possible to reach consensus on the procedure through which moral norms could be uncovered. The formation of a system of law and democracy should follow the same procedure. Furthermore, the introduction of the rational discourse as a common, instead of an individual, practice, is put in position against the relativism of post-modernists.

In the same chapter, the underpinnings of Chantal Mouffe's theory of agonistic pluralism and radical democracy will be outlined. Chantal Mouffe reacts to Habermas' consensus seeking

democracy as one which is too much of a revival of the project of modernity. Mouffe argues that the political is essentially antagonistic, and that the idea of democratic practice based on a search for consensus is a denial of the role of power in politics. Furthermore, it is a denial of the natural tendency of individuals to identify themselves as a person or group against the figure of another person or group. The fourth chapter therefore examines Mouffe's arguments against deliberative democracy. Furthermore, it explicates the role of hegemony in Mouffe's theory as she developed with Ernesto Laclau in *Hegemony and Social Strategy* (1985).

In the fifth chapter, both theories of democracy will be evaluated in light of Foucault's critique of the Enlightenment and his definition of power. The extent to which Mouffe's agonistic pluralism and radical democracy is more fit for pluralism than Habermas' deliberative democracy will be reviewed. Foucault's extensive elaboration on the productive force of discourses as well as the contingency of their content will give us a third perspective on morality and the resistance to these as truth adopted phenomena. This chapter shows that the way in which Mouffe and Habermas develop their theories of democracy are similarly (un)successful in securing pluralism. The conclusion and discussion that follow in the last chapter will argue that pluralism is an undisputable attribute of a strong theory of democracy while simultaneously precluding a final settlement of such a theory. This makes that both Habermas and Mouffe run into similar pitfalls, which makes us conscious of the fragility of democracy.

Chapter 2: Michel Foucault: An Introduction

As stated above, the works of Michel Foucault do not cover a complete and coherent theory of the political. He does not offer a substantial normative political theory, nor a proposal for the institutionalisation of politics. Foucault therefore does not necessarily fit the typical description of a political theorist or political philosopher. Yet, he is often marked as one. His work changed the way of thinking about the influence of governmental practice on individuals. His most important claim was that the technologies of power had to be consciously and specifically studied. He argued that power is able to delicately control people's actions, and therefore focused on different patterns of power and where they originated. Consequently, Foucault has had a tremendous impact on the field of political theory and political philosophy. (Gutting & Oksala, 2019)

Foucault's work is in particular, as he argued himself, a critique of the present. He argued that his investigations are an attempt to explore the limits of present ways of thinking and acting, with the goal of displacing those limits. Foucault's notions of power and discourse are strongly embedded in his critique of the present as a whole and the status of knowledge in the present. Therefore, in this chapter, we will start with a summary of his epistemological remarks on knowledge. (Patton, 2009)

On Kant: the emergence of the subject

Foucault was very critical of the system of knowledge that he derived from the works of Immanuel Kant, which he argued to coincide with the philosophical event of *the Enlightenment*. He argued in *The Order of Things* (2001/1966) that before Kant, the system of knowledge was based on empirical observations. Therefore, knowledge had to correspond with the reality of the world as it was, and could be observed by our senses. Kant argued against this classic system of knowledge in which there is a sustained connection between the item as it is and the observation of it through our senses.

Kant argued that humans are in possession of universal knowledge before the event of observation. Thus, there are fundamental pieces of knowledge that are permanently established in our being through which observations are processed: this is what Kant calls *a priori* knowledge. Kant additionally argued that the thing itself (*an sich*) could not be known by the individual human. Scientific knowledge concerns the human processing of empirical observations in light of the *a priori* validity claims of the person who processes these claims. For this reason he argued that all knowledge we can validate is knowledge which has been processed in our intelligible beings: one

should consider knowledge to be organized by our minds and not directly derived from the world through our senses.

Therefore, we should conclude that reality and claims concerning reality are both embedded in the context of the person who reports it. This means that Kant gave the human individual a new place vis à vis the realm of scientific knowledge. With the epistemological claim of *a priori* knowledge, the human individual is placed at the centre of scientific knowledge. The categorisations of knowledge are no worldly categorisations but perceptions of human origin: time, space etc. The world around us is categorised, and organised, conformed with human understanding, human theory and human design. (Simons, 1995)

Épistèmès

Foucault takes this position of the human individual as a starting point for his elaboration on knowledge and its effects on the perception and demarcation of knowledge. Foucault argues that an individual lives in a certain epoch, in a certain place, and the *a priori* knowledge of this individual is bounded by this epoch and place. The knowledge derived from observations of phenomena in the world, processed through the *a priori* knowledge of that specific individual, is therefore knowledge that is embedded in time and space alike. This boundedness of knowledge to time and space also applies to Kant himself, and for that reason, to Kant's epistemology. Foucault argues that knowledge, and furthermore the theory of knowledge, rather than being universal and incontrovertibly objective, is historically contingent.

While being contingent there is some structure in the gathering of knowledge: there is a system of knowledge which is as contingent as knowledge itself, but shared by many at the same time. This system of knowledge frames new knowledge and produces new knowledge. This system of knowledge is what Foucault calls *épistèmè*. His early research mainly focuses on the historical development of systems of knowledge and their impact on knowledge producing practices. Foucault states on the concept of an *épistèmè* and his practice of research in *The Archeology of Knowledge*:

The analysis of discursive formations, of positivities, and knowledge in their relations with epistemological figures and with the sciences is what has been called, to distinguish it from other possible forms of the history of the sciences, the analysis of the episteme. This episteme may be suspected of being something like a world-view, a slice of history common to all branches of knowledge, which imposes on each one the same norms and postulates, a general stage of reason, a certain structure of thought that the men of a particular period cannot escape — a great body of legislation written once and for all by some anonymous hand. (1989/1969, p. 211)

The doubling of Man in social sciences

For Foucault, the Kantian epistemology brings forth another strange phenomenon: the doubling of the human individual in sciences where the human individual itself is the object of research. The human individual is the mediator of knowledge as the transcendental subject, and at the same time an empirical object. Foucault states that “Man, in the analytic of finitude, is a strange empirico-transcendental doublet, since he is a being such that knowledge will be attained in him of what renders all knowledge possible.” (2001/1966, p. 347).

These two positions now occupied by the human individual are irreconcilable in the eyes of Foucault: the human individual is the object of study in disciplines such as political economy, psychology and philology, while at the same time the individual serves as the mediating entity of *a priori* and empirical knowledge being a transcendental subject of this knowledge. In this position the human individual is supposed to be a rational being which is subjected to universal laws the individual gives itself, while at the same time it is supposed to be a finite being, subjected to the contingency of its epoch and place. (Simons, 1995)

Foucault’s Methodology

In his archaeologies Foucault’s main focus was on testing his hypothesis concerning the contingency of knowledge, which would result in this irreconcilable doubling of the human individual. He investigates the different systems of knowledge that have been ‘governing’ thought in a particular subject matter. He does this by evaluating a large amount of discursive footage of the topic of discussion in a certain timeframe and analyses the limits of knowledge about the topic.

Foucault argues that there are rules of thought which we obey unconsciously. These rules define the cadre which bounds the possibilities of thought in a given timeframe on a particular subject matter. These rules form that so-called system of knowledge, *épistèmè*, or discourse. By comparing these boundaries of thought or knowledge on the same subject matter across different periods of time, Foucault shows that people had different thoughts on the same topic in different epochs. He even shows that different thought on the same topic, in different epochs, have to be considered to be unthinkable in another epoch, due to the given rules of the system of knowledge. With this, he argues, the contingency of the thought system itself is shown. (Simons, 1995; Gutting & Oksala, 2019)

In his archaeologies, Foucault focused primarily on discourses with political relevance. Scientific discourses with the most political relevance are those that focus on the human individual as empirical object. He describes how political practice influences sciences of madness, medicine,

punishment and sexuality. These are the most intriguing, since these sciences oppress the opportunities of the individual: the definition of the mad person, the patient, the delinquent, and the judgment of sexuality and lust all define the 'normal' individual against the 'not-normal' individual. This defining attribute of these sciences excludes and sets apart.

In his genealogical projects, Foucault goes a step further: he argues that these discourses did not evolve into each other rationally and that the line of thought through different discourses was not uninterrupted. Instead, these discourses, and especially the limitations of their practice, contingently change from one to another abruptly. They break away from each other due to political circumstances which coincide with the formation of a new discourse. (Simons, 1995)

Genealogy could be seen as a 'next step' after archaeology in the methodology for the investigation of the same discontinuity of systems of knowledge. This methodology especially concerns the political event that leads to the adoption of a new or different episteme. As Gutting and Oksala argue: "The point of a genealogical analysis is to show that a given system of thought (itself uncovered in its essential structures by archaeology, which therefore remains part of Foucault's historiography) was the result of contingent turns of history, not the outcome of rationally inevitable trends" (2019, §3.3).

Through demonstration of the contingency of knowledge Foucault makes room for a different form of knowledge: since the knowledge itself is contingent, its form could be rethought as well. This means that 'normal', 'healthy', etc. are always to be considered merely contingent descriptions, as opposed to a natural universalist outlook in which such qualifiers are simply 'to be accepted'. In his genealogies, moreover, Foucault demonstrates that power relations are embedded in the procedures that make discourse possible. Power and knowledge constantly re-establish each other. As he argues in *Discipline and Punish*: "Power and knowledge directly imply one another... there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations" (1977/1975, p. 27).

On power

It is with the preceding in mind that we are able to fruitfully elaborate on Foucault's notion of power. He argues that power forms a pair with knowledge, which he argues to be contingent. Foucault does not intend to break down this mutual constitution of power and knowledge. Instead, he argues that we need to be conscious of the fact that the knowability of the human and social world and its governability are mutually dependent. What is known functions as a tool for governance, while governance encourages certain knowledge to be unravelled. Knowledge is

therefore necessary for power to exist: the authority of the truth is assumed for knowledge to be truth, and, moreover, it gives knowledge the power to make itself true. (Simons, 1995; Lilja & Vinthagen, 2014)

Foucault's research continues by answering the question of how this power/knowledge is eventually exercised. This approach contrasts with the common approach of normative political theory in which the limits and legitimate exercise of power are the main topic of discussion. Foucault depicts power as both constricting and constituting subjects of power. Power, as part of the binary of power and knowledge, serves as the 'limiting conditions' for the individual, which is subjected to power as well as to the knowledge of themselves. In lectures given at the *College de France* on this matter, published as *Two Lectures* (1979), Foucault argues that his research question concerning power is the following: "what rules of right are implemented by the relations of power in the production of discourses of truth?" (1979, p. 31).

Sovereign power and Disciplinary power

In Western societies and Western political thought there has been a focus on the investigation of power of monarchs and its legitimation. The tradition of authors such as Hobbes, Locke, Hume, Montesquieu, Rousseau and their heirs more or less assumes power as a phenomenon linked to sword power: the sovereign power of the monarch, and later with the emergence of democracy, the sovereignty of the state. Foucault argues that with the revitalisation of Roman law in the 18th and 19th centuries, the absolute power of the monarchy was institutionalized and secured. This legal edifice slowly evolved from monarchy to republic or democracy. But still, the juridical system is based on the appearance of the King, according to Foucault. "When it comes to the general organisation of the legal system in the West, it is essentially with the King, his rights, his power and its eventual limitations, that one is dealing" (Foucault, 1979, p. 33).

The theory of right which is concerned with this form of power is one that is meant "to fix the legitimacy of power" in two complimentary ways: by defending the monarch as an "effective embodiment of sovereignty", and by arguing that this power had to be limited to remain legitimate. (Foucault, 1979, p. 34) Thus the discourse of right has been about effacing domination intrinsic to this form of power. On one side there is legitimacy, on the other side this legitimacy results in the obligation to obey. But, Foucault wants to investigate another type of power:

Not the domination of the King in his central position, therefore, but that of his subjects in their mutual relations: not the uniform edifice of sovereignty, but the multiple forms of subjugation that have a place and function within the social organism. [...] Rights should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation. (Foucault, 1979, p. 34):

This new apparatus of power emerged in the seventeenth and eighteenth century, and has a totally different appearance from the system of sovereign power. It is the normalising power which appeared with the development of social and human sciences. The investigation of the human individual, and the distinguishing of the normal from the deviant:

This new mechanism of power is more dependent upon bodies and what they do than upon the Earth and its products. It is a mechanism of power which permits time and labor, rather than wealth and commodities, to be extracted from bodies. It is a type of power which is constantly exercised by means of surveillance rather than in a discontinuous manner by means of a system of levies or obligations distributed over time. [...] This non-sovereign power, which lies outside the form of sovereignty, is disciplinary power. Impossible to describe in the terminology of the theory of sovereignty from which it differs so radically, this disciplinary power ought by right to have led to the disappearance of the grand juridical edifice created by that theory. But in reality, the theory of sovereignty has continued not only to exist as an ideology of right, but also to provide the organizing principle of the legal codes which Europe acquired in the nineteenth century, beginning with the Napoleonic code. (Foucault, 1979, pp. 41-42)

This *disciplinary power* is embedded in the institutions and scientific discourses that are produced by society. It is the condition in which the reproduction of society is laid down: the hierarchical observation, normalising judgement, and the examination of action. The main goal in the system of power is not to avenge, but to correct deviant behaviour, or even better, to prevent it, through programmes of education, definitions of illness or madness, the prescription of treatment, etc. Any protocol and procedure meant to normalise, and with the goal to make the human being a more efficient creature in reaching its goals, can be considered disciplinary power: minimal requirements for building a property for living, making use of traffic light control when crossing a street, or lining up when boarding a plane. All deviant behaviour is to some degree considered not-normal.

Power in this form is both constrictive as well as constitutive to subjects. Foucault considers this power to be the 'limiting conditions' of the human individual. Someone is subjected to the power of a system or another individual, as well as subjected to the knowledge of themselves. The first entails power as a coercive method – the second means that individuals are limited by what they know about themselves, by how they identify themselves through their knowledge. As Foucault argues:

Discipline 'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise. [...] These are humble modalities, minor procedures, as compared with the majestic rituals of sovereignty or the great apparatuses of the state. [...] The success of disciplinary power derives no doubt from the use of simple instruments; hierarchical observations, normalizing judgement and their combination in a procedure that is specific to it, the examination. (1975/1977, p. 170)

This power is connected with discourse, the fundament of knowledge on which the power is based. In this discourse, the normal is defined implicitly:

[...] in a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterize, and constitute the social body, and these relations of power cannot themselves be

established, consolidated, nor implemented without the production, accumulation, circulation, and functioning of a discourse. There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth. (Foucault, 1979, p. 30)

It is this production of truth through which governmentality exist: by defining topics of research, generating knowledge about the exercise of power is further intensified. Foucault argues that especially in the society we are living in, the intensity and constancy of the truth-producing practice permeates all societal events. According to Foucault, “we are forced to produce the truth of power that our society demands, of which it has need, in order to function” (1979, p. 31). Our lives are drenched with truth-practices in every circumstance and in every event – our mode of living, our mode of nurturing, our mode of being a sexual being, our mode of thinking and researching: truth is being produced concerning every aspect of life.¹

Sovereign and disciplinary power as embracing entities

Foucault argues that the systems of sovereign and disciplinary power coexist and embrace each other. While he argues that we should ‘eschew’ the form of sovereign power which is still derived from the seat of the monarch, it still persists due to two reasons: firstly, the power of the monarch has always remained the object of criticism and therefore the topic of discourse. Secondly, the transition to a democratic form of statehood is a transformation of this localised power. The juridical system, additionally, has served as a possibility condition for the constitution of a public right which derives from collective sovereignty. At the same time, this collective sovereignty is “fundamentally determined by and grounded in mechanisms of disciplinary coercion” (Foucault, 1979, p. 40). There is, therefore, a heterogeneity between the public right which is derived from the system of sovereign power and the disciplinary mechanism based on knowledge.

Disciplinary power and the necessity of freedom

When discussing disciplinary power, Foucault seems to describe a form of power which is all-pervasive: every aspect of our lives is affected by this form of power. A question which logically follows then is: what freedom do we have if power influences all aspects of our being? Foucault would answer that where there is power, there is freedom: he considers that power can only be exercised over those subjects that can be considered free. With this he means that there is an

¹ Some of these truth-producing practices, mainly those relating to bodily aspects, are later distinctively defined as biopower by Foucault. This concerns mostly forms of disciplinary power that are embedded in medical and sexual knowledge. This power concerns the productivity of bodies through the health and reproduction of Man. In this thesis there will be no further attention to this distinctively defined form of power, since it has no other substantial implications for our ideas about democratic theory.

agonism at the core of each power relation: when power is exercised, there is always the ability to choose between multiple possible responses to it. When one is, through the usage of (the threat of) violence or other irresistible means, constrained to one single option of response, there is no question of power, but of force. (Lilja & Vinthagen, 2014)

Power, therefore, has to cover the possibility of resistance. This resistance can be performed by questioning power. Since power is paired with knowledge in Foucault's theory, this also means questioning the knowledge which constitutes the power. Foucault has never intended to escape or abandon power. For Foucault, freedom is the possibility to question the power that is disciplining our lives. When this possibility is denied, due to force, both power and freedom vanish with the emergence of force.

In conclusion, we can distinguish two different systems of power in Foucault's works: sovereign power and disciplinary power. Foucault argues that the two embrace each other and that the normalisation of disciplinary power works through the instruments of the juridical system. When one wants to free oneself, this embracement of powers and the knowledge constituting them have to be questioned: there needs to be a confrontation with the alternative, the 'other' possibility, the 'other' choice that can be made. This is the cadre which we will keep in mind when we examine the theories of democracy of Habermas and Mouffe in the following chapters. How do the authors deal with sovereign and disciplinary power?

Chapter 3: Background on Habermas and Mouffe

For a better understanding of the theories of democracy which Chantal Mouffe and Habermas have developed, some context is needed. For Habermas, an elementary introduction to certain concepts in his theory of communicative action is essential to recognize the tension he tries to balance in his theory of deliberative democracy. Furthermore, Habermas' and Mouffe's reaction to the Enlightenment needs to be discussed, since that is where both authors start their analysis of democratic theory and practice. According to both, the social nature underlying political practice changed since the beginning of the Enlightenment. This change resulted in the democratic revolution. Mouffe and Habermas both argue that the Enlightenment ruled out the acceptability of a substantial notion of 'the good life' in politics. Moreover, both see democracy as the form in which a stable governance can be possible despite this indeterminacy concerning the good life.

Habermas on the social: the theory of communicative action

Habermas' theory of democracy, deliberative democracy, sprouts from his theory of law and democracy as he investigated in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996/1992) and later in *The Inclusion of the Other* (1998/1996). In the third chapter of *Between Facts and Norms*, Habermas develops a reconstruction of law which builds on his theory of communicative action and expands on his discourse ethics. To understand his work on democracy a short introduction to the attributes of his theory of communicative action is necessary. (Baxter, 2011; Finlayson, 2005)

In his theory of communicative action, Habermas is trying to answer the question 'how can social order be possible?'. He argues that there are two essentially different forms of human action: communicative action and strategic/instrumental action. He concludes that social order is built on the basis of communicative action and on the concept of discourse as he describes in *The Theory of Communicative Action*. Both forms of human action have a particular social context, typical for Habermas' understanding of the social and the political.

The Lifeworld

The social context of communicative action is what Habermas defines as the 'lifeworld'. This lifeworld is the framework in which an individual performs its actions. An individual only explores a limited part of the world when compared with the horizon of the whole world. In which aspect of the world one performs his or her actions, depends on the interests of the individual.

When an individual is joined in its interest by another individual, communicative action can take place: through the matter of communicative action individuals can share their limited conception of the lifeworld. Through reaching consensus on particular interests with other participants in communicative action, the lifeworld can be broadened and one's perception of the lifeworld can change. Habermas argues that these changes can only be piecemeal, so communicative actions can only have a small impact.

The lifeworld thus functions as a "stock of shared assumptions and background knowledge, of shared reasons on the basis of which agents may reach consensus" (Finlayson, 2005, p.52). Common interest is a prerequisite for communicative action. This form of action facilitates consensus on validity claims among individuals. In this way, Habermas argues, communicative action functions against the disintegration of society.

A simple example of how the lifeworld functions can be found in a person uttering against his housemate: 'if you go to the groceries, grab some coffee'. There are quite a few assumptions on which there should be consensus for such an utterance to be valuable: coffee should be considered to be of importance to both individuals, it is a regularity that the housemate is designated to fulfil such a task, there is a similar understanding on what kind of coffee (beans/ground coffee; brand; quantity). All these assumptions are essential, but can also be discussed: maybe the economic position of the household doesn't allow for buying coffee this week, maybe the housemate argues that she is too busy to go and buy the groceries. All kinds of responses could be imagined in which the assumptions underlying such an utterance could be discussed. These discussions, performed through communicative actions, could result in a new consensus.

The system

The social context of strategic/instrumental action is what Habermas calls the 'system'. The system is divided into two 'sub-systems': the system of money and the system of power. These impose external aims on the individual, and they are necessary for the reproduction of society. In this sense Habermas' system corresponds with the productivity Foucault ascribes to disciplinary power. For Habermas, the system is the medium through which certain patterns of behaviour are urged, he refers to this as 'steering media'. As he argues, societies grow ever more complex, and the system helps society to keep up with the complexity through steering the behaviour of individuals and making the effects of actions calculatable: the costs in the system of money and the effects of power relations are predictable. The system therefore, similar to the lifeworld, provides background assumptions for actions. (Finlayson, 2005; Baxter, 1987)

Habermas argues that there is a tendency in the system to destroy the lifeworld. He refers to this as the ‘colonisation of the lifeworld’. Due to this colonisation, society becomes rather atomistic: since it is in the lifeworld that consensus is tested over the validity of utterances. When the system colonizes the lifeworld this leads to less common ground between individuals and decisions made by individuals will therefore be increasingly based on their self-interest. Habermas argues that for this reason, society slowly moves to more and more dissensus and conflict. This movement goes hand in hand with the increasing complexity of society. This increasing complexity results in a cognitive deficit for individual humans: individuals are not able to deliberate on every choice that has to be made. The medium of law can serve as a mediating factor that could be able to lighten the burden of the cognitive deficit: when acting under a legitimate law an act could be considered legitimate. Then one does not have to legitimate every single action one performs. (Baxter, 2011)

The role for the Enlightenment in Mouffe and Habermas

The Enlightenment plays an important role as pivotal point in the theory of the social which Habermas and Mouffe discuss. As will be clear, Mouffe and Habermas take different perspectives on the Enlightenment, but the main impact of the Enlightenment on the social, which for both is a form of undecidability, corresponds. While Mouffe focuses especially on the institutional change that is sparked by the Enlightenment, Habermas focuses more on the impact of social interaction, especially when considering the role of the ethical in human life.

Habermas - The rationalisation of the lifeworld

Habermas argues that one effect of the Enlightenment is the shift from the ethical to the moral. In the classical world, the ethical was considered a fundament on which one could base actions. The ethical was corresponding with notions of virtue. After the Enlightenment, this form of the ethical has been partially replaced. Habermas argues that there is an “[...] abstract demand for a conscious, self-critical appropriation, the demand that one responsibly take possession of one’s own individual, irreplaceable, and contingent life history” (Habermas, 1996/1992, p. 96). In light of this demand one needs to individually legitimize one’s own acts through the matter of rational argumentation. In many cases, he argues, the ethical cannot meet this demand.

In pre-modern times, ethical values were assumed as given necessities. These values applied as background assumptions on which individual actions were based. Since the Enlightenment these ethical values have been re-identified as ones constituting plurality: every individual is subject of an individual and unique historical background and therefore of its own ethical assumptions. The rational discourse that sprang from the Enlightenment caved this ethical discourse, since the ethical

discourse could not meet the demand of rational justification. This made the rational discourse penetrate the lifeworld: rationalisation led to a thoroughgoing practice of reflexivity of common assumptions. Assumptions which were based on the ethical before. This phenomenon is what Habermas calls the 'rationalisation of the lifeworld'. (Habermas, 1996/1992)

This rationalisation of the lifeworld, according to Habermas, resulted in an enlarging amount of debates on the matter of collective identities and the history of these identities. An ethico-political discourse emerged in which ethical assumptions became part of the political debate. Ethics therewith became a ground for dissensus instead of consensus due to the supposed necessity which was presupposed before. Habermas argues that in this light the new, more universal, moral discourse was able to emerge.

Habermas makes a clear distinction between the ethical and the moral. Where ethics contains an implicit goal – a telos – morality has none. Instead of the ethnocentrism or egocentrism concluded in ethics, morality reaches for the universal. This universality is what Habermas aims at with the development of his theory of law and democracy. The framework he develops should be able to include any individual and be a collective space for self-determination and self-realisation. The discourse of law has to serve as a mediating entity between the ethical and the moral. It should be a tool to reverse the movement to dissensus as sparked by rationalisation.

To serve as such a tool, the system of law and democracy should fulfil two necessary conditions. Firstly, it should be coercive, if needed through the possibility of imposing sanctions to those who do not obey the law. Secondly, the legitimation of the legal should not be questioned. Habermas proceeds by examining three different theories for law systems that serve as candidates for the practical fulfilment of this legitimate law system: the German civil law theory, Rousseau's republican law theory and Kantian moral right. This examination and Habermas' conclusion afterwards will be further discussed after we examined Mouffe's perspective on the Enlightenment.

Mouffe – The lack of grounding

Mouffe also points to the Enlightenment as the phenomenon in which a new and different social realm arose. This new social realm, for her, particularly originates in the French revolution. For Mouffe, the essential shift in the institutional arrangement that is attributed to the Enlightenment appears in the institutional place of power. To explain this shift she makes use of the arguments of Claude Lefort. She argues with Lefort that in pre-democratic days power was a phenomenon incorporated in the physical appearance of what Lefort calls the 'prince'. This place of power was derived from the theological-political discourse: the monarch was the earthly representation of

God, and therefore the sovereignty of its reason and law was indisputable. Power had a predefined place which was identical with the monarch. A critical note to this view of Lefort that could be made is that republics existed before the Enlightenment, in which such a theological-political discourse was much less present. For now, we follow Mouffe's line of argumentation (Laclau & Mouffe, 1985; Mouffe, 1993)

The democratic revolution, which Mouffe especially identifies with the French revolution, overthrew this metaphysical background in the physical appearance of the monarch: with the installation of democratic institutions, society lost its 'markers of certainty' (Lefort, 1988). As this democratic revolution sprouted from the phenomenon of the Enlightenment, the idea of universalism in the form of rationalism is inherent to the revolution's attributes. Since the revolution, any certainty in the form of the reference to a transcendent order is not possible anymore: such a reference would deny the equality of individuals which is inherent in the universalism.

Furthermore, Mouffe argues that due to this rationalism, competition in a democratic order cannot be grounded: in the modern political environment of democracy the values of law, power and knowledge are constantly subject to challenge. A similarity with Habermas can be noticed: both authors argue that rationalism is an attribute of the Enlightenment and that due to this rationalism a constant critical approach is adopted. This status given to this rationalism will be the main point of contestation between Mouffe and Habermas. To understand this contestation the dichotomy identified by both in the concept of liberal democracy has to be examined, which will be the main topic of the next chapter.

Chapter 4: Balancing Habermas and Mouffe

As argued in the introduction, Habermas and Mouffe deviate on the theoretical and practical form of democracy that should be considered desirable and can be justified in light of the social and political nature of the human kind. This chapter will proceed with their understanding of the main tension that underlies the nature of liberal democracy. This dichotomy exists in the concepts of liberalism and democracy which both authors seek to unite. For Habermas this results in an elaboration on private versus public autonomy, which correspond with the concepts of liberalism and democracy in Mouffe's works. For Habermas, this dichotomy should be balanced in an ideal institutionalisation of democracy. An institutionalisation in the form of a system of law and democracy which is merely procedural.

Mouffe argues for the incompatibility of liberalism and democracy and argues with Schmitt and Wittgenstein that an ideal and final settlement of the dichotomy is undesirable. Both Habermas and Mouffe seemingly recognize similar difficulties in theorizing democracy in relation to this dichotomy, but both advocate a different solution. Habermas' discourse principle and democratic principle, resulting in his proposal for five essential sets of basic rights will be contrasted with the contextualism Mouffe derives from the late Wittgenstein.

Habermas: balancing private and public autonomy in a system of law

Habermas is conscious of the threat of authoritarianism and his system of law and democracy is therefore based on the principle that “[...] law too is supposed to protect the autonomy of all persons equally” (Habermas, 1998/1996). But he argues that the system of law needs to be more than the creation of a safe haven for every subject, providing them with a legal personal space in which they can live and manoeuvre. The system of law has to function as the background which lightens the burden of the fastening social world: a legitimate system of law can relieve individuals from constantly reaching consensus through the form of communicative action. Habermas considers the system of law to be a solution for the cognitive deficit humans are confronted with, as discussed in the previous chapter. For law to function, it has to be considered legitimate, and it has to protect the autonomy of the individual. (Baxter, 2011)

To find the prerequisites of such a law system Habermas examines existing theories of law: German civil law theory, and the theories of Immanuel Kant and Jean-Jacques Rousseau. In this investigation he notices that there is a constant tension between private and public autonomy. The German civil law theory he examines, mainly focuses on the former: everyone should be treated in the same manner. The legal statute makes explicit the right given to every individual, in which all

should treat all others as equals. Therefore any subject of law is treated in a universal way: anyone has the same rights and therefore a similar space to manoeuvre and choose their own path in life. This is what we will recognize in Mouffe's argument as 'liberalism'.

In this system, Habermas argues, private autonomy is perfectly insured, but there is a lack of public autonomy. The system does not contain a procedure that legitimizes its content. For Habermas, such a legitimation concerns the possibility of the lifeworld to penetrate the law system through communicative action. Therefore, the German civil law system is regarded as paradoxical: while every individual is granted the same set of rights, there is no reference for the universality of these rights and the way in which these rights could be changed by the subjects within the peaceful realm of the law.

Rousseau's account focuses mainly on this so-called public autonomy with his reference to the general will. This general will should reflect the will of the people: the exercise of individual political autonomy is the fundament for equal liberties for all. Here, an internal connection between both the sovereignty of the people and human rights is established. But the common will is established as pre-given. Habermas argues that Rousseau's proposal lacks a procedure of opinion- and will-formation in which the individual can accept certain laws for its own reasoning. Such a common-will is established as pre-given necessity, and is therefore built on an ethical and particularistic fundament. This proposal lacks the private autonomy in which the individual is free to question the common will.

In Kant's theory of law, Habermas observes some awareness of both private and public autonomy. Kant derives private autonomy from universal morality: individual rights are secured through mutual recognition of every other individual and their rights among all. These universal rights are perceived to be linked to the concept of public autonomy or popular sovereignty by the means of the explication of positive law. But for Habermas it is not clear how these two relate in Kant's system of law. If there is a normativity presupposed in the universal law of morality, that restricts communicative action concerning its content. Therefore such a universal morality as Kant derives from his categorical imperative prevents subjects of the law to be its authors. For this reason Habermas argues that this theory cannot ensure public autonomy enough.

Habermas states that the focus of liberalism or private autonomy within a constitution concerns the self-determination of the individual. The main focus of republicanism or public autonomy within a constitution is instead the self-realisation of the individual in the community. These two concepts compete with each other: the former is based on a universal perception of morality, while the latter is more concerned with ethical notions of the common will. In Habermas' reconstruction

of the system of law he wants to make this tension visible before he proposes his solution. He argues that:

Liberals invoke the danger of a “tyranny of the majority” and postulate the priority of human rights that guarantee the pre-political liberties of the individual and set limits on the sovereign will of the political legislator. The proponents of a civic republicanism, on the contrary, emphasize the intrinsic, non-instrumentalizable value of civic self-organisation, so that human rights have a binding character for a political community only as elements of their own consciously appropriated tradition. [...] In the one case, the moral-cognitive moment predominates, in the other, the ethical-volitional.” (1996/1992, p. 100)

Habermas argues that both Kant and Rousseau did not succeed in the understanding of the complementarity of these two traditions. This is not very surprising, since both thinkers are inspirational for the traditions of liberalism and republicanism themselves. For Kant, certain rights are universal for any human being. These human rights are considered to be pre-political and non-negotiable: they cannot be subject to the penetration of the lifeworld through the matter of communicative action. Rousseau, instead, argues for peoples’ sovereignty, but the content of the common will is therein presupposed: this concerns an ethical completion of the content of the system of right.

Habermas argues that both visions are necessary to understand contemporary constitutional democracies. His main problem with the perception of Kant is that in this perception humans are referred to as rather atomistic and estranged individuals. Habermas denies this imaginary. Individual rights are instead inspired by the reciprocal recognition of all subjects under the law. Rather than being merely each other’s competitors in society with human rights as the extreme boundaries of self-realisation, Habermas argues that human rights result from a motivation in the human individual to mutually grant each other a certain minimal protection from others. This is a gesture that springs from a natural form of cooperation, according to Habermas. The support of private autonomy is not only concerned with securing one’s own freedom. This securing also facilitates the freedom of all other individuals in society. (Verholt, 2019) Habermas argues that a discursive process of opinion- and will-formation has to function as the bridge between both the liberal and republican discourses:

If the rational will can take shape only in the individual subject, then the individual’s moral autonomy must reach through the political autonomy of the united will of all in order to secure the private autonomy of each in advance via natural law. If the rational will can take shape only in the macro-subject of a people or nations, then political autonomy must be understood as the self-conscious realisation of the ethical substance of a concrete community; and private autonomy is protected from the overpowering force of political autonomy only by the non-discriminatory form of general laws. Both conceptions miss the legitimating force of a discursive process of opinion- and will-formation, in which the illocutionary binding forces of a use of language oriented to mutual understanding serve to bring reason and will together - and lead to convincing positions to which all individuals can agree without coercion. [...] Consequently, the sought-for internal relation between popular sovereignty and human rights consists in the fact that the system of rights states precisely the conditions under which the forms of communication necessary for the genesis of legitimate law can be legally institutionalized. The system of rights can be reduced neither to a moral

reading of human rights nor to an ethical reading of popular sovereignty, because the private autonomy of citizens must neither be set above, nor made subordinate to, their political autonomy. (Habermas, 1996/1992, pp. 103-104)

As we saw, due to the rationalisation of the lifeworld, historical ethical notions on 'the good life' are questioned. Law has to function, according to Habermas, as a new system of background assumptions which replaces these ethical notions. This system has to be legitimate, since only then it is able to relieve members of society of the cognitive deficit they experience due to the rationalisation of the lifeworld. This legitimation is only possible, Habermas argues, if the system of law sprouts from a procedure of democratic self-determination.

Mouffe: from private and public autonomy to the concepts of liberalism and democracy

Habermas argues, as discussed, that both private and public autonomy are to be balanced in a system of law and democracy. Mouffe reacts to the same dichotomy of private and public autonomy, which she argues to be inherent in liberal democracy. In her works, she points at the precarious relation between the concepts of liberalism and democracy in liberal democracy, by analysing Carl Schmitt's arguments against the institutionalisation of liberal democracy. For Schmitt, liberalism means that anyone can choose their own path in life to pursue happiness. This can be considered to be similar to Habermas' definition of private autonomy.

Schmitt argues that democracy denies the variety of paths, which is desired in liberalism. Democracy can only work, he argues, when there is homogeneity on the most important matters discussed in the political arena. This is what he concerns democracy to be about: the identity between the governed with the governing body. For him, democracy thus is no more than majority rule. He therefore argues that the only way to rescue democracy from liberalism is to domesticate issues on which the opinion in society is not homogeneous. Mouffe argues on this point that this domestication, the exclusion of highly political topics from the political podium, is what happened in Western European states in the last decades. (Mouffe, 1993). But especially these topics on which a conflict is experienced, are the ones that can be characterized as 'political'. She defines this political as follows: "by 'the political' I mean the dimension of antagonism which I take to be constitutive of human societies [...]" (Mouffe, 2005, p. 9).

Schmitt argues that due to liberalism and the domestication of highly political issues, democracy is doomed to fail in a society in which pluralism exists on critical topics. Topics which are domesticated will always become subject to an intensification of the democratic demand: the will of the majority has to be carried out, or otherwise the democratic procedure will be bypassed by

the demos. For Schmitt this is no reason to reject the idea of democracy, he rather rejects the idea of liberalism, and thus pluralism, and preaches homogeneity within a state.

Mouffe takes a stance against this argument of Schmitt and defends democracy. She states that Schmitt has a pre-modern view on political theory, consisting mainly of secularized theological concepts. Therefore, he sees liberalism as an obstacle for democratic homogeneity and rejects the pluralism it trumpets. For Schmitt, the only possible plurality can exist between different states. Mouffe instead, does not want to totally reject liberalism in this form of the individual choice for different paths through life, as Schmitt does. Since the democratic revolution, pluralism is a fact of life, and therefore political issues have to get a podium within the system of liberal democracy:

In societies where the democratic revolution has taken place and which are, by that token, exposed to what Claude Lefort refers to as 'the dissolution of the markers of certainty', it is necessary to rethink democratic politics in such a way that space is allowed for pluralism and individual freedom. The democratic logic of the identity of government and governed cannot alone guarantee respect for human rights. In conditions where one can no longer speak of the people as if it were a unified and homogenous entity with a single general will, it is only by virtue of its articulation to political liberalism that the logic of popular sovereignty can avoid descending into tyranny. (Mouffe, 1993, p. 122)

We therefore need a form of political liberalism: a possibility to choose and enhance different paths in life. In the above she points at a dichotomy, similar to what Habermas does in *Between Facts and Norms* (1996/1992). She argues that popular sovereignty could descend into tyranny if it concerns the implementation of the will of the majority. This has to be avoided. Habermas defends the same pluralism when arguing against Rousseau that public autonomy cannot be based on an ethico-political discourse since it would make the penetration of the consensus through communicative action impossible.

Therefore, Mouffe argues in this passage in line with Habermas that some form of private autonomy or liberalism has to be included in the system that we should enhance. The tyranny of the majority corresponds with the tyranny of the common will Habermas rejected when discussing Rousseau. For Mouffe, it is furthermore essential that liberalism should not result in the domestication of highly political issues which Schmitt points at. For her it is essential that highly political issues are eminently staged on the political podium: "The liberal belief that the general interest is a product of the free play of private interests, and that a rational consensus can be arrived at on the basis of free discussion must necessarily render liberalism blind to the political phenomenon" (1993, p.123).

Mouffe argues that liberals take the individual as the only point of departure for the development of a theory of democracy, which undermines the collective identity needed for the functioning of democracy. This corresponds with the arguments Habermas submits when discussing Kant's

theory of law. Mouffe argues that when the importance of collective identity is not taken into account the risk exists that the democratic procedure will be bypassed. Therefore a 'commonality' has to be formulated which reflects the collective identity of the society and which functions as the institutional balance between the individual autonomy embodied in liberalism and the public autonomy embodied in democracy.

Habermas: the development of deliberative democracy in two principles

Up to this point, both authors still seem to follow routes towards a broadly similar system of democracy. Habermas tries to include the dichotomy of liberalism and democracy in the system of rights he constructs. Mouffe argues that the private autonomy in the form of liberalism should not predominate in the democratic constellation, and therefore a commonality should reflect both liberalism and democracy.

Habermas develops the discourse principle as a theoretical gatekeeper in the system of law and democracy, which is above all a theoretical system. This principle should secure the balance between private and public autonomy. Habermas links the answering of the question of the institutionalisation of democracy to the development of this guiding moral principle. Moral and legal questions refer to the same problems of interpersonal relationships, he argues. Where morality in a post-traditional perspective represents only a form of cultural knowledge that is provided by the rational discursive process, law, in addition, has a binding character at the individual level. Law is both a symbolic system and a system of action. Law functions as a mediating entity between the collective will-formation resulting out of communicative action that takes place under public autonomy, and the individual rationale leading to instrumental and strategic action. To test the legitimacy of the norms laid down in the system of law, Habermas formulates the Discourse principle (D):

Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses. (1996/1992, p. 107)

Of great importance to the discourse principle is the notion of rational discourses, about which he understands that they:

[...] should include any attempt to reach an understanding over problematic validity claims insofar as this takes place under conditions of communication that enable the free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations. The expression also refers indirectly to bargaining processes insofar as these are regulated by discursively grounded procedures. (1996/1992, p. 107)

Thus, persons should be able to reach consensus about validity claims to understand each other and to deliberate on political matters. If no consensus can be reached about these validity claims,

the action norms are not valid. In Habermas' system of law and democracy consensus functions as the ultimate mediating point of reference to balance private and public autonomy.

The democratic principle

The legitimacy of action norms can be tested using the discourse principle, but to be effective in larger and more complex societies, a translation into legal code is needed. The way in which this should happen is based on the democratic principle Habermas develops later on and derives from the discourse principle. That principle structures the performative meaning of the practice of self-determination in such a way that it should lead to legitimate laws as an outcome. Where the discourse principle can be used in any circumstance, the democratic principle must steer the production of legal norms in accordance with the discourse principle. Habermas formulates the democratic principle as follows:

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. (1996/1992, p. 110)

This principle secures the place for every individual in which he or she is given the opportunity to participate among all others in the concerned community in the process of producing legislation. It ensures everybody of the communicative presuppositions which are to be guaranteed, and furthermore, the assent of every participant is necessary for legislation to be valid. The democratic principle is tailored to the system of rights which should institutionalise the framework in which rational political will-formation will get its place. Only through the insurance of the freedom of the associated legal persons can a legitimate common will be produced.

That common will regulates the interpersonal contact of people and relieves the individual as a moral agent of the cognitive burden of constantly forming an individual moral judgement. Through the enforcement of the law, individuals will be prudent in the rejection of the law by acting against it: intrinsic motivation to live according to the law, therefore, is not necessary. The institutionalisation of law means that the goals of law are satisfied when individuals outwardly conform to the rules of law, even though there is no fundamental issue about how this conformity would arise.

The co-originality of the legal form and the democratic principle

In *Between Facts and Norms* Habermas proposes five sets of rights that can meet the criterium he laid down in this discourse principle. These, he argues, are the essentials of a system of positive law that can secure individual liberties in such a way that the liberty of one is not incompatible with the liberty of another. This latter is what he concerns to be the core task of law. Habermas states that:

“This system should contain precisely the basic rights that citizens must mutually grant one another if they want to legitimately regulate their life in common by means of positive law” (1996/1992, p. 118). It should thus provide for the most extensive set of rights that could meet this requirements. (Verholt, 2019)

This basic framework should, as in a social-contract theory, be developed from the perspective of a non-participant. The actor’s own self-interest is thereby mediated through the ‘obligatory contexts of a shared background’. Private autonomy and communicative freedom will be guaranteed in the bargaining process. Communicative freedom means that individuals have the freedom to engage with others in an effort to reach understanding by responding to the utterances of other individuals and ‘concomitantly raised validity claims’. Therefore, at least the reciprocally raised validity claims should be understood by each other in order to make the communicative freedom accessible. When private autonomy is concerned, the mutual understanding of validity is not necessary, since an actor acts in its own private space. Therefore, the actor can ‘drop out’ of communicative action in the realm of private autonomy. (Habermas, 1996/1992).

As we saw in the Kantian perception, law is to be understood as an instrument that is constructed to immunise these persons under private autonomy against the impact of communicative freedom. This package of rights should be formed in such a way that each person’s rights are compatible with any other individual’s rights. “The liberty of each is supposed to be compatible with equal liberty for all, in accordance with universal law.” (Habermas, 1996/1992, p. 120)

In Kant, this law theory is subordinated to morality, since the *categorical imperative* is presupposed, and positive law can only be legitimate when it passes the universalisation test. This subordination is “a move incompatible with the idea of an autonomy realized in the *medium of law itself*” (Habermas, 1996/1992, p. 120). For Habermas, instead, subjects of the law should also be able to see themselves as the authors of it. There is, according to his argument, no sense in backing it up with a universal moral imperative which should be executed by the legislator.

When basing a law system on a universal moral imperative that derives from the legislator’s execution of that same imperative, this affects the recognition of people of the law’s legitimacy. Habermas argues that it is: “only participation in the practice of *politically autonomous* law-making that makes it possible for the addressees of law to have a correct understanding of the legal order as created by themselves” (1996/1992, p. 121). In the public space, however, “only those reasons count that all the participating parties together find acceptable” (1996/1992, p. 119). Legitimate law should not destroy the rational motives to obey the law: on the basis of personal insight, the law should be intrinsically recognised as legitimate by those who are subject of it. Law must offer

those subjects the communicative freedom to exercise their communicative action with each other based on that law. Therefore, Habermas argues that the discourse principle is indifferent vis-à-vis morality and law.

Central in the principle of democracy is the mutual penetration of the discourse principle and the legal form, which is arrived at in two steps. First, the application of the discourse principle to the general rights to liberties, such as liberal human rights. Second, the institutionalisation of the conditions for a discursive exercise of political autonomy. This political autonomy makes private autonomy a result of the legal shape achieved through discursive exercise. The legal form and the democratic principle are to be conceived as co-originally constituted. In this perspective we cannot think of one without the other.

Mouffe: the lack of collective identity and pluralism in Habermas' deliberative democracy

Mouffe criticizes Habermas' theory of deliberative democracy as being too much based on individualism. Mouffe argues that Habermas sees rationalism as the point of departure for the development of a liberal democratic institutionalisation. She argues that this rationalism, empowered through communicative action, can only result in an unchangeable notion of morality which Habermas tries to escape from. Citizenship in Habermas' theory of democracy is mainly a legal status which totally bypasses the essentiality of the formation of collective identities. Through the introduction of the moral framework which builds on Habermas' discourse ethics, deliberative democracy leads to the necessary elimination of pluralism. (Mouffe, 2000)

Since the democratic revolution, which Mouffe especially associates with the French revolution, there is no need for political theory to function as a fundament for institutions of democracy as Habermas' political theory is one of. Mouffe argues that the existence of these institutions are mere contingencies. The rationalism in the theory of deliberative democracy tries to find necessities for democracy which are illusionary, she argues. Instead:

We must, therefore, detach ethical pluralism and political liberalism from the discourse of rationalism in order to reformulate modernity's ideal of 'self-assertion' without recourse to what present themselves as the universal dictates of reason. In this way, it will be possible to detach from the problematic of individualism a crucial notion like that of the individual and re-think it in a wholly other terrain. (1993, p. 124)

Mouffe wants to defend the spirit of liberal democracy, but only by accepting its contingency:

What I am proposing is that adherence to the political principles of the liberal democratic regime should be considered as the basis of homogeneity required for democratic equality. The principles in question are those of liberty and equality and it is clear that they can give rise to multiple interpretations and that no-one can pretend to possess the 'correct' interpretation. It is, therefore, essential to establish a certain number of

mechanisms and procedures for arriving at decisions and for determining the will of the state within the framework of a debate on the interpretation of these principles. (Mouffe, 1993, p. 130)

She rejects the value of the universalism and rationalism that accompanied the Enlightenment and the democratic revolution. Universalism is supported by those who support the idea of a universal truth independent of the historical and/or cultural context of the political: universalists therefore formulate only one answer to the question of what is the true political institutionalisation.

Mouffe argues instead that such a universalism is invalid and uses the arguments of the late Wittgenstein to defend a form of contextualism against it. She argues with Wittgenstein that we are all embedded in a certain 'language game' in which our individual background is totally relevant: the outcome of every deliberative practice refers to the language game we are in. Thus the rationalism that Habermas presupposes in his discourse principle cannot exist as an impartial discourse that is mastered by every individual in this world. Instead Mouffe argues based on the works of Richard Rorty that calling someone irrational in the context of a difference of opinion about anything: "is not to say that she is not making proper use of her mental faculties. It is only to say that she does not seem to share enough beliefs and desires with one to make conversation with her on the disputed point fruitful" (Rorty, 1997, p. 19 in Mouffe, 2000, p. 65)

This does not necessarily lead to an 'anything goes' perspective on ideas of political systems: "What it requires is envisaging a *plurality* of legitimate answers to the question of what is the just political order" (Mouffe 2000, p. 62). The problem with the supposed rationality which she argues to ground Habermas' theory of deliberative democracy is that it enhances universalism, and that rationalism as universalism excludes other possibilities as irrational. For Mouffe, the rationality of a certain proposal is therefore no valuable criterium for accepting it: rationality is embedded in the language game an individual takes part in and therefore it is contingent.

Such a 'language game' is not just a rational agreement based on opinions, but it is more than that: a form of life. Mouffe states that (2000, p. 68) "It is because they are inscribed in shared forms of life and agreements in judgements that procedures can be accepted and followed." This corresponds with the way in which Foucault argues systems of power and knowledge to function. Therefore, according to Mouffe, the system of law which Habermas proposes cannot be defended by rational arguments. Instead, it should be considered as inseparable from the forms of life Habermas adheres to. In line with this thought there cannot be a difference between procedural rules and forms of life. Procedural justice presupposes values that are based on such a form of life. Therefore procedural justice is itself inscribed in a particular language game and necessarily bound by the context of the individual. Mouffe argues that:

This last point is very important, since it forces us to acknowledge something that the dominant liberal model is unable to recognize, namely, that a liberal-democratic conception of justice and liberal-democratic institutions require a democratic ethos in order to function properly and maintain themselves. This is, for instance, precisely what Habermas's discourse theory of procedural democracy is unable to grasp because of the sharp distinction that Habermas wants to draw between moral-practical discourses and ethical-practical discourses. (2000, p. 69)

For an agonistic pluralism and a radical democracy

Since rational discourse is embedded in the context in which it is used, it has to be considered contingent. Therefore Mouffe suggests that liberal democracy should meet different requirements from the criterium of rationality found in Habermas' work. In *The Democratic Paradox* (2000) and *The Return of the Political* (1993) she refers to the idea of a radical and plural democracy, as she developed with Ernesto Laclau in *Hegemony and Socialist Strategy* (1985), as a viable alternative to deliberative democracy. In this alternative, the plurality of identities are all validated in these different identities themselves. These do not need any universal grounding as Habermas aims for. This means that a new reality of democracy should not only be fit for plurality, but should also be radical according to Laclau and Mouffe:

This gives us a theoretical terrain on the basis of which the notion of *radical and plural democracy* - which will be central to our argument from this point on - finds the first conditions under which it can be apprehended. Only if it is accepted that the subject positions cannot be led back to a positive and unitary founding principal - only then can pluralism be considered radical. Pluralism is *radical* only to the extent that each term of this plurality of identities finds within itself the principle of its own validity, without this having to be sought in a transcendent or underlying positive ground for the hierarchy of meaning of them all and the source and guarantee of their legitimacy. And this radical pluralism is *democratic* to the extent that the autoconstitutivity of each one of its terms is the result of displacements of the egalitarian imaginary. Hence, the project for a radical and plural democracy, *in a primary sense*, is nothing other than the struggle for a maximum autonomization of spheres on the basis of the generalization of the equivalential-egalitarian logic. 1985, pp. 150-151

In this radical democracy the domestication of political issues should be undone. Mouffe and Laclau (1985, p.157) state that this domestication leads to a "depoliticisation of fundamental decisions, at the economic level as well as at social and political levels." Their alternative constitutes a shift in the constant tension between liberty and democracy, towards the side of democracy and public autonomy. Mouffe argues that:

What we need to do is precisely what Schmitt does not do: once we have recognized that the unity of the people is the result of a political construction, we need to explore all the logical possibilities that a political articulation entails. Once the identity of the people - or rather, its multiple possible identities - is envisaged on the mode of a political articulation, it is important to stress that if it is to be a real *political* articulation, not merely the acknowledgement of empirical differences, such an identity of the people must be seen as the *result* of the political process of hegemonic articulation. (2000, pp. 55 -56)

Mouffe argues against Schmitt, who states that the only possible pluralism can exist between different states. Instead, for Mouffe, the incorporation of this conflict into democracy is where this antagonism turns into agonism, and enemies turn into adversaries. She is aware of the fact that in

such a democracy of commonality there will be an ineradicable tension between the attributes of liberalism and democracy: she welcomes this agonistic pluralism. The different opinions on the settlement of this tension are essentially political, and this political nature is what Habermas' reference to rationality denies.

Mouffe argues that the institutionalisation of a commonality in which the tension between liberalism and democracy is settled, implies a moment of closure needed to constitute 'the people'. (Mouffe, 2000) She thereby accepts that such a closure entails the crystallisation of power relations, but that the commonality itself should afterwards be kept contestable:

When we accept that every consensus exists as a temporary result of a provisional hegemony, as a stabilization of power and that always entails some form of exclusion we can begin to envisage the nature of a democratic public sphere in a different way. Mouffe (1999, p. 756)

The nature of the democratic public sphere is one in which plural views are trying to claim their righteousness. But what is right, is embedded in one's context, and therefore none of the beliefs will be exclusively right. Mouffe's main claim is that Habermas does not account for this form of pluralism due to his reference to rationalism and universalism. The next chapter will show how these different theories should be evaluated in light of Foucault's ideas on power. Could their frameworks prevent society to decay into some form of authoritarianism? Could one be regarded as the better solution?

Chapter 5: Through Foucault's perspective on power

Where Habermas argues that a system of law and democracy needs consensus as a prerequisite for the institutionalisation of governance, Mouffe takes a different approach. Mouffe argues that the empty place of power should remain empty. A unification of the social which is able to fill the empty place of power is a threat to pluralism, since such a unification is guided through an hegemonic discourse. In *Hegemony and Socialist Strategy* (1985) Mouffe and Laclau explicitly warn for the authoritarianism that could sprout from the definitive settlement of such an hegemonic discourse. Pluralism has to be incorporated into the system of democracy, instead of the consensus advocated by Habermas.

Mouffe argues that rationalism is such a hegemonic threat. Taking rationality as point of reference puts democracy at risk. It could lead to the pushing away of other voices as being irrational. In this last chapter the frameworks of both Habermas and Mouffe will be analysed in light of the notions of power which have been examined in the second chapter on the work of Foucault. The discussion will focus on how power is constituted in the theories of both Mouffe and Habermas: do they refer particularly to forms of power that can be understood to be similar to the sovereign and disciplinary notion of power as described by Foucault? Do they concern power to be coercive? How would resistance be possible in their systems of democracy?

Deliberative democracy – sovereign power through other means?

The sections above discussed the similarity in the works of Habermas and Mouffe concerning the recognition of a tension between the two essential attributes of a liberal democracy: liberalism and democracy. Habermas argues that a compromise has to be reached between these two opposing attributes in a system of law and democracy. A compromise between the collective identity formed through public autonomy and the individual living space secured through private autonomy. Deliberative democracy is the compromise he advocates. Deliberative democracy changes the nature of power by to the subordination of power to the process of inclusive deliberation. This deliberative process is connected to what he calls a rationalized lifeworld. In this lifeworld individuals can create mutual understanding on certain topics: validity claims can be exchanged and one's horizon of background assumptions can be broadened. When we employ a rational approach on political issues, consensus on such issues can be reached through a similar process.

When examining Habermas' theory from a Foucauldian perspective, it becomes clear that Habermas mainly addresses the power Foucault typifies as 'sovereign' power. Habermas' theory of law and democracy is one institutionalizing the power that historically is derived from the position

of the monarch. As Habermas argues himself, a prerequisite of a system of law and democracy is that it is coercive. Furthermore, its legitimation should not be questioned. This legitimacy question is one which neatly fits the discourse of sovereign power Foucault discussed in his ‘Two Lectures’ (1979). Instead of the Monarch, Habermas defends the discourse principle and the democratic principle he derives from it, as the effective embodiment of sovereignty. These principles serve as the means that guarantee the legitimacy of the order.

The rationality that is presupposed in the discourse principle aims to contribute to the resolution of discrepancies between incompatible validity claims. At least, that is what Mouffe argues, and what she rejects. As we read in the introduction of Foucault’s ideas on the concept of truth and knowledge, such an attribute of rationality is rejected by Foucault. Foucault argues that the systems of thought, the *épistèmès*, are contingent matters that do not rationally evolve into each other. They are bound to the epoch and place of development, and ‘break away’ from each other by the occurrence of political events. No discourse or ‘rational discourse’ is able to overcome the incommensurability of these discourses. This is one of the main points Foucault makes in his genealogies.

Foucault would not necessarily reject the idea of consensus on validity claims as a theoretically viable solution for the establishment of some form of law system, but he would argue that the substance of the outcome of such a system would be (not far from) empty. If, on highly political issues, separate positions can be based on totally different systems of knowledge, and thus on incommensurable validity claims (or ‘background assumptions’), reaching consensus over these validity claims will be very unlikely. Therefore a law system based on the matter of only consensus concerning validity claims would be rather lean.

The bargaining process: the essential fragility of democracy

If we closely examine Habermas’ argument, the resolving of differences to reach consensus over validity claims is only one of two characteristics he attributes to this rational discourse: he also argues on the matter of rational discourse that “The expression also refers indirectly to bargaining processes insofar as these are regulated by discursively grounded procedures.” (1996/1992, p. 107). This latter point is essential in understanding Habermas’ framework.

Consensus on the validity of action norms does not necessarily presuppose the full recognition of other people's background assumptions. After all, the validity claims behind a certain political position should not per se be endorsed by all parties in reaching consensus. Based on different knowledge systems situated in a different epoch and/or place, consensus in the form of

compromise can be reached through the process of bargaining. In such a consensus, parties, while acknowledging the action norms laid down in a system of law, can very well disagree on the background assumptions against which they decide to accept these norms. For example, a Christian and an atheist could agree on the simple action norm which forbids killing a human individual in times of peace, except in the case when the individual is a viable and direct threat to one's own life. They both have different reasons to accept this norm: God's will versus the belief in the validity of universal morality, for example. Both could accept that a third person will be armed to enforce compliance with this action norm, the coercive component Habermas argues to be essential for a system of law and democracy.

In such a situation, the rational discourse does not exclude pluralism on the basis of background assumptions, as Mouffe argues it to be. Understood as a bargaining process, it even embraces pluralism. But the fact is that it also limits the content of the bargaining process: only consensus can be reached on those actions norms that are not incommensurable with the background assumptions of a point of view. If one has a background assumption which demands a corresponding action norm that is incommensurable with the background assumption of someone else, this brings Habermas' system of law and democracy into trouble.

The essential prerequisite of the discursiveness of the bargaining disqualifies the use of force as Foucault defines it. Therein the freedom of subjects of the coercive system is guaranteed. But this essentiality of discursiveness is also where the fragility of Habermas' system of law and democracy is perfectly visible. When the action norm considered above is demanded by backgrounds assumptions of certain individuals which are incommensurable with background assumptions of other individuals a stalemate appears in the bargaining process.

An example of such a case is the highly political topic of abortion: one group argues it to be essentially a woman's right of being able to abort (under circumstances) an unborn and demands that society as such should facilitate this right (position A). Another group argues instead that it is its duty to protect unborn lives and to prevent abortions to take place under any circumstance (position B). Any position backed by the law system is incommensurable with the background assumptions of the opposing position: there is no neutral position when backing position A or B. But also a third position (C), while seemingly neutral, is incommensurable with the background assumptions of position A and B: the position of not reaching consensus, and not approving a certain action norm, is incommensurable to the background assumptions of both groups.

In such a situation the only way in which the system of law and democracy can be contained is when for both parties the interest for staying member of the society and not violating the rights of

others is higher than the interest in separation and violent resistance (or violently suppressing one party with the means of (illegitimate) sovereign power). Habermas recognizes this problematic in *The Postnational Constellation* stating that:

Taking the long view, the only kind of democratic process that will count as legitimate, and that will be able to provide its citizens with solidarity, will be one that succeeds in an appropriate allocation and a fair distribution of rights. But to remain a source of solidarity, the status of citizenship has to maintain a use-value: it has to *pay* to be a citizen, in the currency of social, ecological, and cultural rights as well. (2001/1998, p. 77)

The willingness to remain a member of a certain society, and to effectuate solidarity to other members of society, is in the end the essential condition for a democratic state to survive. Habermas acknowledges that rationality is not the only thriving force behind the survival of a democratic state: if democracy was based on a universal rational discourse, then a situation in which it does *not* pay to be a citizen, could not exist. The existence of a peaceful democratic state therefore, is the result of the compatibility of different contingent background assumptions based on different contingent systems of knowledge. And that existence is not taken for granted by Habermas:

Certainly, the democratic process has to be stabilized through its results for it to have any hopes of securing the solidarity of citizens against the internal forces that threaten to blow a society apart. And the democratic process can defuse the danger of a collapse of solidarity only if it fulfils recognized standards of social justice. (2001/1998, p. 76)

Disciplinary power and the rationalisation of the lifeworld

With these words on the internal forces within society that could blow the same society apart in *The Postnational Constellation* (1998/2001), it can be concluded that the strong separation Habermas made in earlier work between communicative and strategic action is somewhat overestimated. Although not explicitly, Habermas does address disciplinary power in his theory of communicative action when he states that the 'system', the other social realm beside the lifeworld, is the medium through which the constant reproduction of patterns of behaviour is urged. The system (of money and 'power') is necessary for the reproduction of society by imposing external aims on the individual, and can therefore be considered similar to Foucault's notion of disciplinary power: it is mainly steering the reproduction of society. Habermas seems to theoretically prevent the system (in the form of the sub-systems of power and money) to colonize the system of law since he argues that the political podium should be the realm of communicative action. It is only through communicative action, which concerns "the free processing of topics and contributions, information and reasons in the public space" (Habermas, 1996/1992, p. 107) that actions norms for the system of law and democracy should be developed.

But, when closely examining Foucault's notion of disciplinary power and Habermas' later work in *The Postnational Constellation* just discussed, this distinction Habermas makes can be no more than a theoretical distinction which is unsustainable in political practice: it is a distinction without difference. Habermas states that the amount of knowledge/truth that is produced, and the impact this has on the functioning of the human individual in society is too large for the individual to sufficiently process: this is the cognitive deficit of the human species discussed earlier. Habermas himself acknowledges this when he refers to the phenomenon of the 'rationalisation of the lifeworld'. Normalisation, which Foucault concerns disciplinary power to be, is in the end what Habermas wants to achieve with the system of law and democracy: it should help in overcoming the cognitive deficit human individuals experience. This makes disciplinary power, or normalisation, or Habermas' 'system' eminently part of the deliberation on political issues.

For Foucault, this disciplinary power is inescapable and therefore it is impossible to exclude it from the realm of politics. It could be resisted, but therefore this power has to be presupposed in the system of law and democracy already. And, when some form of disciplinary power is part of the basic background assumptions of anyone, as it is in Foucault's notion, it necessarily exists in the realm of politics. But, when the discourse principle is guiding the law-making process, and this principle in itself is the 'normal', then the enforcement of a specific normal through the means of violence by the state could be prevented due to its prerequisite of consensus and discursivity.

The inescapable paradox of democracy

Chantal Mouffe argues against Habermas that deliberative democracy unacknowledges the contingency of the rational discourse that is approved. This rational discourse should not be considered to be a power-free discourse, since the dichotomy can be settled through this discourse because of its status as hegemonic discourse. She furthermore argues that the institutionalisation of law and democracy through the means of the discourse principle and democratic principle is no more than one possible settlement of the dichotomy between liberalism and democracy among many others. For Mouffe, the formulation of such a substantial theory on which political institutionalisation can be grounded, should not be the concern of political theorists. She argues instead that the main focus of political theory should be on the contingency of these political institutions and the conflict between plural perceptions of how the institutionalisation of liberal democracy should be implemented.

This is what she tries to explicate in different works throughout her oeuvre. With reference to Wittgenstein, Mouffe argues that Habermas' contribution does not contain necessities but instead is inscribed in his own particular 'form of life', and therefore should be considered contingent. The

alternative she proposes can be found in the form of radical democracy and agonistic pluralism. These alternatives embrace pluralism on the matter of the institutionalisation of the political order. Essential for radical democracy is that the plural notions only identify within themselves the principle of their validity. Therefore, there is no need for them to refer to a transcendental ground, which she argues to be the case in deliberative democracy. (Laclau & Mouffe, 1985) It is easy to recognize that Foucault would embrace such an acknowledgement of the contingency of knowledge and a perception of 'what democracy should look like', which is what he approves of in his genealogies.

Mouffe argues that this contextualism does not prevent an institutionalisation of the political in the form of liberal democracy: we should only be conscious of the contingency of such an institutionalisation. A form of liberal democracy should be based on what she calls a 'commonality' that can be shared by those approving the democratic order. This commonality reflects the collective identity of the society, therefore the institutionalisation of such a commonality presupposes a 'closure'. This is what she argues to be the paradox of liberal democracy:

The logic of democracy does indeed imply a moment of closure which is required by the very process of constituting the 'people'. This cannot be avoided, even in a liberal-democratic model; it can only be negotiated differently. But this in turn can be done only if this closure, and the paradox it implies, are acknowledged. (2000, p.40)

It is the acknowledgement of the paradox of this closure, combined with the acknowledgement of the contingency of any settlement of the dichotomy between liberalism and democracy, that defines agonistic pluralism. The acknowledgement of the paradox is needed to ensure the contestability of the closure.

But this point of closure, which Mouffe advocates as necessary, is problematic in light of Foucault's definition of power. Since in the moment of this closure, a contingent balance of liberalism and democracy is institutionalized. A commonality which underlies such a balance is either based on a certain consensus or on exclusion. When it is based on consensus that means that it is confronted with the similar difficulties as discussed above in the light of Habermas's discourse principle, namely that it would be rather lean and in need of compromise. Mouffe instead argues that it is this consensus which is already inscribed in a particular view on liberal democracy, and therefore she denies the value of such a consensus in her critique on Habermas.

The only other option to settle this commonality, if no consensus can be reached, is based on exclusion: the institutionalisation will be based on a particular perception of how liberal democracy should be institutionalised, which is not supported by all affected individuals. But when the content of the settlement is based on exclusion, it will be confronted with another problem in light of

Foucault's ideas on power. Mouffe would not deny that a liberal democracy is in need of a system that can be coercive to protect the 'commonality' which is institutionalised. If she would, there could be no enforcement of law and therefore such a system of law and democracy would be a completely empty shell. But the recognition of an enforcing component in democracy also means that in this system some form of sovereign power still has to be part of it. When the formulation of a commonality is not based on consensus, then it is based on a rather ethical perception of how the dichotomy between liberalism and democracy has to be (temporarily) settled. Ethical here refers to the definition of Habermas discussed earlier.

When based on consensus, the contestation of the order that is agreed upon which emanates from the democratic paradox, could be theoretically ensured for everyone, and pluralism could be incorporated. But when this commonality is based on a particular and ethical notion on how to settle it, ensuring its contestation is highly questionable: when a group or opinion is excluded in the formation of this commonality, then the institutionalisation of the system of law and democracy also leads to the enforcement of a form of normalisation that excludes the same group or opinion. Mouffe argues that the appeal to consensus in deliberative democracy is misleading, since deliberative democracy defends a particular notion of liberal democracy. But logically it seems even harder to argue that a settlement of this balance of liberalism and democracy inscribed in a particular notion over which no consensus could be reached would be less limiting for those who are 'excluded'. Especially due to the attribute of law enforcement that originates in the idea of a rule of law.

Another problem with Mouffe's alternative of agonistic pluralism concerns the 'closure' that is needed for the institutionalisation of the commonality. Even if this commonality can be approved by all subjects of the system of law and democracy, this is always a particular notion of 'commonality' bound to time and space. Mouffe argues that the contestation of this commonality has to be possible after its settlements, but fails to provide the tools that can be used to contest it. This implies difficulties with the incorporation of immigrants and new-born ideas (or humans) in such a society.

Mouffe and Laclau warn against the unification of the social since that could occupy the 'empty place of power' with the risk of authoritarianism. But, their framework does not contain an instrument that secures the reopening of this technical settlement of power based on the formulation of a 'commonality' for the incorporation of new individuals or ideas. With this examination of deliberative democracy and the combination of agonistic pluralism and radical

democracy in light of Foucault's definitions of power, we can wrap the above up in a brief conclusion.

Chapter 6: Conclusion & discussion

Habermas and Mouffe are not able to close the door on single-minded authoritarianism when examined through Foucault's definitions of power. If a certain group is able to gain enough disciplinary power (truth/hegemonic discourse) as well as sovereign power to fill the 'empty place of power', authoritarianism can only be averted through the fact that a certain form of pluralism is part of the content of the 'hegemonic discourse' of this system of knowledge. When this pluralism is not part of this hegemonic discourse, then there is no freedom in the form of resistance possible for certain subjects of the law. Since that law is not intrinsically accepted by those excluded, it is enforced upon them. In Mouffe's theory this fragility is recognized through acknowledging the democratic paradox, while Habermas' condition of discursiveness concerns a similar appeal to fragility as discussed above. For both, the dichotomy of liberalism and democracy lies at the base of their theory of democracy, and for both the survival of liberal democracy in a plural world can only be ensured through acknowledging the fragility of a settlement of this dichotomy. This fragility originates in pluralism as the undeniable attribute of humanity since the Enlightenment.

The conclusion therefore has to be that Foucault would approve neither or either of these two theories of liberal democracy. A simple answer to the research question "When confronted with a Foucauldian notion of discourse and power, is there a significant difference in how the liberal democratic frameworks of Jürgen Habermas and Chantal Mouffe are able to embrace pluralism?" is therefore: no.

Both theories are not able to design an institutionalisation of liberal democracy in a way that definitively ensures the possibility of its own contestation and prevent the embracing of so-called sovereign power with disciplinary power. In Habermas' theory of law and democracy, the main problem that Foucault would identify lies in his assumption of the social on which he builds his framework. Habermas cannot sufficiently account for disciplinary power as constituting the individual and society. The isolation of communicative action from the influence of disciplinary power cannot be squared with Foucault's perception of this form of power which is constitutive for the human individual.

Mouffe acknowledges a form of power which shows many similarities with this disciplinary form of power and builds her theory of democracy on it. But in the end, Mouffe struggles with the explication of an alternative to deliberative democracy that would be better able to settle the dichotomy between liberalism and democracy in light of the unhindered pluralism she advocates. The 'closure' she describes is based on the formation of a 'commonality' which is not a form of

consensus. This needs to be coupled to a convincing mechanism through which that closure can be challenged to prevent it from being the final and undisputable embracement of sovereign with disciplinary power.

In the end, the theories show many similarities: both embrace a form of pluralism and advocate the (re)negotiation of the settlement of liberalism and democracy (private and public autonomy in Habermas). This corresponds with the ability to question power, which is how Foucault defines resistance. And more importantly, this is what Foucault defines to be the realm of freedom: the presence of power which can be resisted and is not enforced by violence. Both Mouffe and Habermas argue that public autonomy, or the definition of the political community, has to be constituted in the settlement of the system of democracy. Both also argue that this definition should not violate a private space to manoeuvre for every individual.

While Mouffe argues differently, Habermas could not be accused of the denial of pluralism concerning validity claims or background assumptions. Instead, both Habermas and Mouffe argue for the negotiation of some form of commonality, although they do this in theoretically diverse constellations. In Mouffe this negotiation is based on reasonableness, and for Habermas this concerns the negotiations of the largest amount of rights that the subjects of the law system could mutually grant to each other. Both also clearly argue that this settlement in the end is contingent: forces within the institutionalisation could blow up society when the outcome of the process doesn't *pay*.

Towards a deliberative, pluralistic and agonistic democracy

Habermas' and Mouffe's theories also address similarly dynamics of the social. While it cannot be argued that Foucault would prefer one of them over the other, his definitions of power and theory of knowledge have been helpful to compare these two theories in this thesis. It can be argued that a future theory of democracy should recognize at least the following facets that derive from the social dynamics discussed. Hopefully, this similarity can be recognized by both defenders of deliberative democracy and agonistic pluralism, so that the debate on a theory of democracy is able to transcend the debate of these two ways of thinking.

First, there has to be a recognition of the impact of Enlightenment in the acceptance of plurality due to the lacking of metaphysical ground. The rational discourse which sprouts from the Enlightenment introduced an indeterminacy on the notion of truth and knowledge. The introduction of the form of rationality we know today led to a thoroughgoing practice of reflexivity of common assumptions. These common assumptions are referred to in different ways by the

authors discussed: hegemonic discourse (Mouffe & Laclau), disciplinary power (Foucault) or the 'system' (Habermas). Freedom is the ability of the individual to question these common assumptions.

Second, a theory of liberal democracy should incorporate this freedom of questioning common assumptions. Thereby it has to be recognized that within such a theory, rationality is not the overarching discourse that unravels all puzzles and could lead to consensus: it is instead the presupposed discourse on which a liberal democracy is built, and which makes the timeless settlement of a system of law and democracy impossible. Liberal democracy should consist of a constant renegotiation of the settlement of the balance of liberalism on one side and democracy on the other.

This constant renegotiation is only possible if the settlement of the balance of liberalism and democracy is based on the common assumption that this settlement itself is not definitive, which should be considered the third essential attribute of a theory of democracy. This is the democratic paradox Mouffe approves. Therefore, the system of law and democracy should include the necessary elements which make this settlement deniable and gives individuals the freedom to challenge it. In the vocabulary Foucault uses, this means that it should not be the case that sovereign and disciplinary power embrace each other in this settlement. If the settlement of the balance of liberalism and democracy, which in a sudden time in a sudden place is labelled as the 'common assumption' or 'commonality', is enforced by sovereign power, then freedom of those challenging the status quo is neglected. Then pluralism is denied, and then the discourse underlying the social context of liberal democracy, the rational discourse, is not acknowledged.

Therefore, the main paradox concerns the coercive aspect of a rule of law. It is the paradox of wanting a form of liberal democracy without being able to ensure it through enforcement. Because an unsophisticated enforcement leads to the abandonment of pluralism which might develop over time, due to the appearance of new knowledge systems. This is the fragility which is necessarily presupposed and which is discussed with the attribute of discursivity in Habermas' discourse principle above. This tension between discursivity, or non-coerciveness, and coerciveness in a theory of liberal democracy is what is essentially the main paradox. This should be the main topic for those evaluating liberal democracy in the future.

To conclude, a point which is insurmountable. If the line of argument that is followed in this thesis is accepted, then one of the most important conclusions should be that we should not take liberal democracy for granted. If it is as fragile as is argued above, and it is as valuable as most of us think it is, then we need it to pay for those who are subject of it. Only if the value of a form of liberal

democracy stays part of our common assumptions, which are presumed to be contingent, and discursivity defines our primary mode of conflict, it can survive as our mode of cooperation. This will only be the case when liberal democracy works for us as subject: this will only be the case when it 'pays' in terms of freedom and welfare.

Bibliography

- Baynes, K. (2009). 'Habermas', in Boucher, D. and Kelly, P. (eds), *Political Thinkers: From Socrates to the Present* (Oxford: Oxford University Press), pp. 537 - 553.
- Baxter, H. (1987). System and Life-World in Habermas's "Theory of Communicative Action". *Theory and Society*. Vol. 16 (1), pp. 39-86.
- Baxter, H. (2011). *Habermas. The Discourse Theory of Law and Democracy*. Stanford: Stanford University Press.
- Cunningham, F. (2002). *Theories of Democracy. A Critical Introduction*. Abingdon: Routledge.
- Finlayson, M. (2005). *Habermas. A Very Short Introduction*. New York: Oxford University Press
- Foucault, M. (1977). *Discipline and Punish. The Birth of the Prison*. Translated by Alan Sheridan. Originally published in 1975. London: Penguin Books.
- Foucault, M. (1979). "Two Lectures" In *Critique and Power. Recasting the Foucault/Habermas Debate*, edited by Michael Kelly (pp. 17 – 46). Massachusetts: Massachusetts Institute of Technology.
- Foucault, M. (2001). *The Order of Things*. Translated by Tavistock Publications. Originally published in 1966. London: Routledge.
- Foucault, M. (2006). *History of Madness*. Translated by Routledge. Originally published in 1961. London: Routledge.
- Foucault, M. (2018). *The History of Sexuality (3 vol.)*. Translated by Robert Hurley. Originally published in 1976 and 1984. New York: Pantheon Books.
- Fukuyama, F. (2006). *The End of History and the Last Man*. Originally published in 1992. New York: Free Press.
- Gutting, G. & Oksala, J. (2019). Michel Foucault. *The Stanford Encyclopedia of Philosophy* (Spring 2019 Edition), Edward N. Zalta (ed.). Retrieved on the 23rd of March 2020 from: <https://plato.stanford.edu/archives/spr2019/entries/foucault/>
- Habermas, J. (1984): *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*. Frankfurt/M.: Suhrkamp.
- Habermas, J. (1984). *Theory of Communicative Action, Volume 1. Reason and rationalization of society*. Translated by Beacon Press. Originally published in 1981. Boston: Beacon Press.

- Habermas, J. (1991). *Moral consciousness and communicative action*. Translated by Lenhardt, C. and Weber-Nicholsen, S., originally published in 1983. Cambridge: MIT Press.
- Habermas, J. (1996). *Between Facts and Norms*. Contributions to a Discourse Theory of Law and Democracy. Translated by Rehg, W.. Originally published in 1992. Massachusetts: Massachusetts Institute of Technology.
- Habermas, J. (1998). *The Inclusion of the Other. Studies in Political Theory*, translated and edited by Cronin, C. and De Greiff, P., originally published in 1996. Cambridge: Polity Press.
- Habermas, J. (2001). *The Postnational Constellation*. Translated by Pensky, M.. Originally published in 1998. Cambridge: Polity Press.
- Held, D. (1987). *Models of Democracy*. Oxford: Polity Press.
- King, M. (2009). *Clarifying the Foucault-Habermas debate. Morality, ethics, and 'normative foundations'*. *Philosophy & Social Criticism*. Vol. 35, no. 3, pp. 287 – 314.
- Laclau, E., Mouffe, C. (1985). *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*. New York: Verso.
- Lefort, C. (1988). *Democracy and Political Theory*. Translated by Macey, D. Originally published in 1986. Cambridge: Polity Press.
- Lilja, M. & Vinthagen S. (2014). Sovereign power, disciplinary power and biopower: resisting what power with what resistance? *Journal of Political Power*. Vol. 7, pp. 107 – 126.
- Martin, R. (2009). 'Rawls', in Boucher, D. and Kelly, P. (eds), *Political Thinkers: From Socrates to the Present* (Oxford: Oxford University Press), pp. 554 – 574.
- Mouffe, C. (1993). *The Return of the Political*. New York: Verso.
- Mouffe, C. (1999). Deliberative Democracy? or Agonistic Pluralism? *Social Research*. Vol. 66, No. 3, pp. 745 – 758.
- Mouffe, C. (2000). *The Democratic Paradox*. New York: Verso.
- Mouffe, C. (2005). *On The Political*. New York: Verso.
- Mouffe, C. (2018). *For a Left Populism*. New York: Verso.
- Patton, P. (2009). 'Foucault', in Boucher, D. and Kelly, P. (eds), *Political Thinkers: From Socrates to the Present* (Oxford: Oxford University Press), pp. 575 - 595.

- Rawls, J. (1999). *A Theory of Justice*. Originally published in 1971. Oxford: Oxford University Press.
- Rorty, R. (1997) 'Justice as a Larger Loyalty', in R. Bontekoe and M. Stepaniants (eds), *Justice and Democracy: Cross Cultural Perspectives* (Honolulu: University of Hawaii Press), pp. 9-22.
- Schmitt, C. (1985). *The Crisis of Parliamentary Democracy*. Translated by Kennedy, E.. Originally published in 1923. Massachusetts: Cambridge University Press
- Schmitt, C. (2007). *The Concept of the Political*. Translated by Schwab, G. Originally published in 1932. Chicago: University of Chicago Press.
- Simons, J. (1995). *Foucault & The Political*. London: Routledge.
- Smith, A. (2006). *Political Philosophy. A Beginners' Guide for Students and Politicians*. Cambridge: Polity Press.
- Verholt, O. (2019). *Filling the gap of Habermas' postnational constellation*. (Master's thesis, Radboud University, Nijmegen, The Netherlands). Retrieved on the 25th of June 2020 from: <https://theses.ubn.ru.nl/handle/123456789/8405>