Habermas' Discourse Ethics as the Foundation of Legitimate Laws

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Jürgen Habermas' philosophy is motivated by the desire to formulate a doctrine of action. With this in mind, I briefly explore the theory behind Habermasian discourse ethics and more importantly critically assess the practical realities of applying it to the functioning of the legal system. I use Robert Shelly's work on the subject as a vehicle for this analysis. I argue that although some moderation may be required when transposing Habermas' ideas from the abstract, such tempering remains true not only to the core of the theory itself, but also to Habermas' intentions and understanding of a complex society.

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The "Frankfurt School", as they came to be known, were an eclectic group from a range of disciplines at the forefront of articulating and exploring the disappointment felt when Marx's message had not inspired the revolution they felt the Western world so desperately needed. They sought to formulate a new form of interdisciplinary theoretical activity, the paradigm of 'critical theory' (Finlayson 2005: 2). Significantly, Critical Theory aimed to be just that: a theory which was not only theoretical in its task but practical. The Frankfurt School's work sought not only to diagnose what was wrong with contemporary society, but aimed also to remedy it (Ibid.: 4). However, Horkheimer and Adorno's The Dialectic of Enlightenment (first published 1947) was far from a declaration of the potential for such change. For them, as man sought to dominate nature through Enlightenment reason, he also dominated other men and, in turn, himself. Evidently, the first-generation Frankfurt School theorists' analysis had led to a deep form of pessimism, a belief that things simply could not change.The work of Jurgen Habermas is best understood as a direct and ongoing response to the despair of the first generation of the Frankfurt School, which he believed found its diagnosis of society in an unwarranted pessimism based on a flaw in analysis (Ibid: 8). His intellectual project returns to original Frankfurt School spirit by revealing the pragmatic intention of creating a doctrine of action. Habermas' work displays a desire for us to abandon the unproductive negativity of Horkheimer and Adorno and do something.

The article subjected to critical assessment here, Robert Shelly's "Habermas and

the Normative Foundations of a Radical Politics" (1993), is dedicated to this intention. In it, Shelly examines the way that Habermasian concepts – particularly Habermas' discourse ethics – can be used to create a normative foundation for the legitimacy of law which could subsequently be applied to present-day society. Shelly believes that the outcome of such an application is 'a conception of democracy which, in the light of present political practices, seems radical'. (Shelly 1993: 62) A radical politics is certainly what Habermas wanted; indeed it was what the earlier Frankfurt School theorists thought the world desperately needed. Furthermore, if we can use Habermas' concepts to ensure that people are truly and fairly involved in such a central part of society as the making of laws, then surely this is an ideal place to facilitate a change in society. Indeed, it may be a radical one. But although all sounds so promising, it needs to be conceivable.

Therefore, this paper will critically examine Shelly's paper with this goal in mind. In doing so it seems appropriate to follow his structure (he divides his approach into three steps, although he groups the first couple together – therefore it is reasonable to consider the paper as having two stages). In the first stage, Shelly sketches out Habermas' analysis of the normative foundations of legal authority and shows us how law's legitimacy ultimately rests on the meeting of communicative conditions. These ideas will also be revisited, although not in great detail; just enough to ground some basic understanding of the necessary components of Habermasian theory. Like Shelly's treatment, this will be a generally expository process; that is by no means to say that Habermas' central concepts do not deserve criticism, indeed they have been subjected to it by others with some success. However, purely philosophical disapprovals – such as those disparaging the soundness of his argument in the abstract – are for others to explore. The second stage of this essay, on the other hand, will engage in a much more critical examination when exploring Shelly's account. In his final section Shelly details exactly how these concepts can be transposed into reality; and it is in this movement from the abstract to the complexities of modern-day life that significant problems are encountered. At the crux of our problem of applying Habermas is the question of whether these practical difficulties can be overcome. We will argue that an application of Habermas to the politics of making laws does require some moderation of his pure theory; however, we will also find that this tempering remains Habermasian in spirit and has no negative bearing on his overall intention.

Shelly begins with a discussion of how Habermas seeks to find legitimacy in modern law. He opens this section by detailing how Habermas attempts to resolve problems with Max Weber's legal theory. For Habermas, the most significant trouble with Weber's theory is that in modern, occidental societies – which Weber characterizes as 'formal-rational' and crucially characterised by autonomous spheres of value – legitimation is grounded in a 'belief in legality'. It is not necessary here to drown ourselves in the complexities of Habermas' analysis of Weber's theory; what is important is that Habermas seeks to locate the normative foundations of legal authority in a different place, agreeing nonetheless that the inherent rationality of law is essential for its independence. Shelly

characterizes this movement in four progressive stages (Shelly 1993:65-66) but the focus here should be on the results of this reconstruction. Habermas arrives at the conclusion that the formal conditions which guarantee the legitimacy of modern law should be sought in the 'procedural conditions for rational will formation' (Ibid.: 67), not in the formal-semantic properties which various permutations of legal positivism use as the basis of legitimation.

Shelly now moves on to what these procedural conditions might entail, and it is here that it can be clarified how Habermas' discourse ethics fit into our application. For Habermas, what is central to the justification (and application) of norms is impartiality. To understand where Habermas finds this impartiality a historical picture of his theoretical development will be helpful.

In his first popular work, The Structural Transformation of the Public Sphere, Habermas began to show his interest in a communicative ideal which would later become the core normative standard for his moral-political theory. This was articulated in more detail in his Theory of Communicative Action (Bohman and Rehg 2007). The communicative ideal he established is entrenched in Habermas' discourse ethics, the very basics of which are as follows. According to Habermas, the modern world is divisible into two distinguishable zones of human activity. The "lifeworld", which consists of friends, families and peers, is the sphere of symbolic reproduction where individuals recreate their understandings of each other and themselves, as well as norms and values. However, technological advancement and the increased complexity of societies has caused the lifeworld to be colonised by a second zone, the "system", the sphere of material reproduction dominated by capitalism (Habermas 1996: 361-364). Acts of linguistic communication inevitably presuppose four validity claims: comprehensibility, truth, rightness and sincerity. The 'background consensus' between speaker and hearer in speech necessarily includes that these claims are accepted and could, if required, be justified. When this consensus is acknowledged rather than assumed, questions can be asked, and hence, a consensus on the validity of these claims could be reached between participants. Furthermore, for Habermas, this consensus can only be distinguished as genuine if this dialogue is equally open to all speakers, is unconstrained and, if the force of the better argument is the only force influencing it (Outhwaite 1994: 40). When all these conditions are fulfilled, we have Habermas' "Ideal Speech Situation".

Now back to impartiality; for Habermas this manifests itself in the fulfilment of the criteria of both his "principle of discourse ethics" and the "principle of universalization". The definitions of each (respectively abbreviated to 'D' and 'U') are given by Habermas as:

> D Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.

U All effected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone's interests (and these consequences are preferred to those of know alternative possibilities for regulation.
(Habermas, 1996, p185)

Notice that these principles echo ideas previously formulated in the Theory of Communicative Action: D tells us that norms can be valid if they are upheld in an Ideal Speech Situation. Thus, in accepting D and U (U is a derivation of D) impartiality is found because a consensually-defined normative grounds have been found. For Habermas, one can only claim to take an impartial moral point of view by engaging in real discourse with all those affected by the issue in question (Bohman and Rehg, 2007). Furthermore, in applying these principles, the process by which universality is achieved is that which creates legitimacy. This idea is worth emphasising as it is central. Habermas' approach, therefore, is procedural. Shelly details how this contrasts with the ideas of Rousseau, for whom legitimacy resides in the universalistic quality of the actual decision, that is, by determining whether it is a true reflection of the "general will". Instead, like Bernard Manin's concept of a deliberative democracy, Habermas' interest is in the consideration of how ideas of legitimacy are formed (Shelly, 1993, p69).

Now we will move on to assess whether moving this theory from the abstract to the realities of modern day society is practically possible. Shelly titles the last section of his paper "The Normative Framework for a Non-Utopian Radical Politics". What must be questioned is whether Habermas' theory is indeed non-utopian, and whether his pragmatic intent can be fulfilled. Looking critically at Shelly's application will help answer this question. Considering the criticisms articulated by Ota Weinberger (1999) will also be useful. His ideas, in being a direct response to Habermas' work on the justification of law, helpfully translate into criticisms of Shelly's paper.

It is, in fact, a criticism from Weinberger that will be considered first – indeed it is a common criticism of Habermasian discourse ethics – and one which needs to be dealt with before exploration of Shelly's final section can begin. Weinberger states that

… the notion of ideal discourses is not a good idealization. The criteria of ideal discourses-defined as power free, endless and open to all people concerned- represent and unrealistic ideal, as they do not provide an optimal treatment of the problems under consideration. There are no power free social relations… Ideal discourses are contrary to fact, they do not and cannot exist.
(Weinberger, 1999, p339)

This is a common and frustratingly inaccurate criticism of Habermas. It is simply a fallacy to claim that Habermas is unaware of the imbalance of power in society. In the Theory of Communicative Action, it is clear that although the lifeworld and system

are analytically distinguishable, they are complex and linked in reality. There is increasing domination by the system over lifeworld rationality, as the communicative practices of the lifeworld tend to be progressively transmuted, through the influence of the steering media of money and power into system environments. This is "the colonization of the lifeworld" (Outhwaite 1996, pp. 276-277). Furthermore, Habermas never suggested that the 'Ideal Speech Situation' actually existed in its purest form. Nevertheless, the implications of the ideal vision of Habermas' model will be elucidated shortly. For now it is sufficient to note that, in order to consider the success of an application of Habermas to the law, it is not sufficient to retort with such a simplistic criticism as 'Habermas ignores the influence of power'. That said, problems clearly exist that have been caused by the system's influence on the lifeworld, and in a more nuanced form the above criticism might constitute a challenge for Habermas. To explore this further we move to back to Shelly.

In the final section of his essay, Shelly borrows from Arato and Cohen their concept of civil society, which has special relevance as it operates within an explicitly Habermasian framework (Shelly 1991, p. 73). Habermas' theory is useful in that it allows a space between the lifeworld and the system, and a way to differentiate them whilst mediating norm and reality in a manner which "undermines neither the rationality of the former, nor the complexity of the latter" (ibid, p. 73). In this 'space' between them lies civil society:

> …the arena in which, out of the incessant ebb and flow of communicative practices which comprise the lifeworld in general, some discourses gain a special efficacy through being institutionalized.
> (ibid, p. 74)

In this way, it appears that the lifeworld and the system exert influence on one and another using the gap filled by civil society. It is at this point that Shelly briefly mentions the colonization of the lifeworld, and its effects on the process of opinion formation. However, he is quick to turn attention to the practical and theoretical limits of the influence of political movements in civil society, asking us not to focus on these negative effects. But is this tactic of diversion enough? If the consensus achieved in the public sphere is even an indirect product of the system, if our discussion is not free and without coercion, and if it is not truly our decision, does it really matter whether our opinion becomes enshrined in law? The answer is, of course, somewhat of a hybrid of and compromise between the two positions – that is, between Weinberger et al.'s extreme position and Shelly's avoidance. Yes, capitalism affects individual opinion, but we can at least make use of the Ideal Speech Situation as it was intended: both as a "yardstick by which the actually existing practices can be assessed" (Shelly, 1993, p. 70), and as a framework to try and replicate. Utilised in this way, Habermas has given us a means by which to limit and recognise power imbalances, guiding us much closer to a normative ground than we were before. Furthermore, it might be added that this echoes clearly Habermas' opposition to

the pessimism found in the Dialectic of Enlightenment mentioned in the introduction to this discussion. Habermas shows us that modernity and the inescapable power imbalances it contains can be apprehended and managed, and thus need not be abandoned as Horkheimer and Adorno would have us believe.

Returning now to the theoretical and practical limits of the influence of civil society, we consider Shelly's assertion that:

> *[…] only in as much as the diverse, discursive political processes in civil society are actually efficacious can the law, whose normative logic presupposes that it is the product of such processes, claim authority.*
> (ibid, p. 74)

It remains to be considered how efficacy can be gained. The first stage in this process is surely the attainment of rights, as it is these which protect processes of discursive will-formation. Habermasian theory allows the derivation of rights from communication. In his view rights neither derive from, not are the products of, positive law. Instead they are the outcome of the united voices of those in civil society being heard, and subsequently having their ideas institutionalized. Thus, according to Shelly, coupled with gaining of rights is the creation of groups in the public sphere which can facilitate such discourse. These are the groupings that comprise civil society, such as electronic and print media, cultural journals, grass-roots political and cultural organisations and pressure groups (Shelly 1991, p. 76). A good example of this process succeeding is the Civil Rights Movement in 1960s America, where the grouped voices of equal rights activists were heard, and anti-discrimination laws were passed. Ricardo Blaug points us to how this is a clear example of the merits of discourse ethics. Racism simply cannot be defended in a discussion free from domination, as for racism to survive in such an argument would involve the silencing or exclusion of certain participants in the debate (Blaug 1994, p. 55).

However, Weinberger argues that this is not sufficient: generation of rights in this way is not enough to guarantee social and political freedom for everybody; it is not satisfactory simply to hope that the outcome of civil society's discourse will be listened to (Weinberger 1999, p. 344). But he is misinterpreting Habermas' theory, which anticipates and accounts for this kind of criticism. The rights generated here are intended to be further interpreted and extended by each respective polity according to the nature of their own specific circumstances (Bohman and Rehg 2007).

The second (and final) step in gaining efficacy goes to the root of our question. Shelly approaches this when he examines the theoretical and practical limits of what these groups can actually achieve. Before he does this he answers two important questions, which will be reviewed quickly here. To those who ask why civil society cannot simply implement the outcomes of their discourse themselves, Shelly responds that the capacity of civil society to reflect is strong, but their ability to implement their ideas is weak. They

need the state, and on their own would be ineffective. Next, to those who may then ask why we cannot subject the state itself to the principles of communicative action, Shelly remarks that for anyone who accepts Habermasian theory this would be extremely undesirable. What this question is asking, the Habermasian would say, is effectively for the state (and the economy) to be brought into the lifeworld. To do this would dramatically reduce society's ability to cope with the complexities of modernity (Shelly 1991, pp. 76-77).

Thus, civil society simultaneously needs the state and also needs to keep it separate from itself; the system cannot be subjected to the normative logic found for the lifeworld. How is such a balance to be struck? Shelly suggestion that we should "try to exert some kind of indirect influence" (Shelly 1991, p. 77) fits nicely with Arato and Cohen's concept of a "self-limiting utopia" (Ibid.). Civil society knows its limits in that it needs the state for implementation, and so exerts its power as indirect influence. Even Weinberger seems to concur with these notions, although he does not seem to be aware of his agreement. In his discussion of the validity of laws, he notes that there are some valid forms of law-making which should not be abandoned because they do not follow Habermas' communicative ideal – giving the examples of judge-made law and the law of the EU (Weinberger 1999, pp. 348-349). He claims that this renders Habermas' theory invalid, but the Habermasian would say that the examples of the EU and judge-made law are in fact instances where the complex nature of the modern world makes it too difficult for lifeworld discourse to decide on the matter in hand, so these are areas where some power ought to be left to the state. However, they are nevertheless matters where there should also be at least some influence from the public sphere, and in the conclusion to his essay, Weinberger seems to agree:

> *Legal procedures are – or should be – exposed to discursive analysis, but not in the way that every decision making process in law is by itself a rational discourse, but indirectly and in a more complex way.*
> (ibid, p350)

The notion of indirect influence, therefore, seems to be a reasonable limit to put on the extent to which civil society can have power which affects state decision; indirect influence certainly sounds non-utopian.

However, there are overarching problems yet to be considered. Even the most sympathetic observers notice that Habermas seems to assume that the product of an engagement in power-free discourse is everyone united in a state of consensus, ready to (indirectly) assert our power on the state. Furthermore, his theory seems to assume that all affected individuals are capable of contributing in the necessary discourse, which is clearly not the case (for example what about a completely paralysed patient whose opinion would certainly be relevant in a debate about euthanasia). To answer these problems, we would need to once again temper Habermas' theory. We must say that laws are legitimate insofar

as the democratic process warrants that outcomes are reasonable products of a sufficiently inclusive deliberative process of opinion formation (Bohman and Rehg 2007).

In the final part of this discussion we must ask some questions about what conclusions can be drawn in light of this critical assessment. Firstly, we must ask ourselves whether Shelly's application has been successful. It is clear from our analysis that Habermas' theory, though possibly enough to justify law in the abstract, is lacking somewhat in complete justificatory power. We have found that implementing Habermas' theory in our highly complex and power-saturated society requires significant moderation of the core of his thesis. So much so that the influence of the lifeworld is to be 'indirect'. Indirectness taints a normative ground for justification, and Shelly himself asks Habermas for a more thorough exploration of this problem.

However, it has already been noted that Habermas never claimed that his discourse ethics could be operationalised in its purest form. We have seen that the lifeworld needs the state to implement its ideas, and that the state itself cannot be subject to the normative grounds we find in the lifeworld. Furthermore, the self-proclaimed aim of Shelly's work was not to justify the legal system, but instead to show how looking at the law with such a view would lead directly to a radical new way of conceiving democracy. After all, Critical Theory's central aim is to do something.

Shelly's application clarifies how Habermas has shown us a normative basis for action. We can abandon Horkheimer and Adorno's unproductive pessimism and start to make a change in society. Habermas wants us to reaffirm the potential of reason, and shows us how it can free us from the chains it has itself forged (Guss 1991, p. 1160). We can do this by using discourse ethics – for instance the Ideal Speech Situation, and the principles of U and D – as a "yardstick by which the actually existing practices can be assessed" (Shelly, 1993, p70). By trying to replicate Habermas' abstract theory, and at the same time recognizing the limits of our imperfect world and allowing for some compromise, we can formulate a civil society with some indirect influence, and this suggested alteration to the politics of law-making is at least a fundamental change if not in many ways radical. When we do this, men will no longer be mastering each other and themselves, but listening and talking to each other to create a more legitimate society.

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