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TOWARDS AN ETHICS OF INCLUSION - REFLECTIONS ON LAW, DEMOCRACY AND DISCOURSE IN JÜRGEN HABERMAS

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Democracy, in our time, is considered as the most legitimate form of governance that modernity has ever produced. In recent times, many attempts have been made by political tinkers to address the question of social plurality without challenging the basic tenets of democracy. The idea of discursive democracy, propounded by Habermas, is one of the prominent models of that kind. As it sounds, like other forms of deliberative democracies, it gives primacy to greater participation of all the affected sections of the society in the process of democratic will-formation. Here the idea of discourse is explained purely in terms of its publicness and it refers to a social space of public deliberation mediated by intersubjectively shared values and norms. It intends to liberate the field of human relations and interactions from regulative and repressive modes of power which may hinder the possibility of democratic deliberations and formation of consensual decisions.

The public sphere and communicative action constitute the two basic theoretical components endorsing deliberative democracy. It relies primarily on non-coercive discussions in the public sphere. Apart from other deliberative models, the concept of discursive democracy propounded by Habermas claims its preeminence as it is incorporative of pragmatic, ethical and moral questions as part of democratic discourses. This paper tries to explain how he employs a reconstructive method to bridge and refashion certain important tenets of modern legal philosophy and political theory to derive a 'discourse theory of law and democracy'. It also attempts to analyze the conditions on the basis of which he constructs a theory of discourse relying on certain *possibilities* which are claimed to be typical of liberal democratic societies. Finally this paper endeavors to examine the notion of 'procedural discourse' employed by Habermas in expounding a new paradigm of law and democracy.

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Critical Social Theory and the Invention of Political Public Sphere

Modern society, Habermas views, is marked by a critical split that took place between its material and symbolic reproductive functions (namely 'system' and 'lifeworld' respectively). The system (consisting of economy and political system) steered by the medias of money and power penetrates into the lifeworld (consisting of nuclear family and political public sphere) which is governed by intersubjectively shared values and norms. This process of 'internal colonization' results in the distortion of communicative potentialities immanent in the lifeworld and submits it to the suzerain control of bureaucratic and monetary organizations. This process takes place through the medium of law by which system normally regulates the functions of society. As a result, the property and contract laws begin to regulate monetary exchange relations on the one hand and the power medium of political system becomes bureaucratized on the other. In such contexts, modern law functions as a medium through which the system penetrates into the lifeworld; accordingly, the lifeworld is colonized internally by means of law. This, according to Habermas, is a process of 'juridification'² which makes modern law incapable of guaranteeing social integration.

The bureaucratic and legal regulations and political and privatized economic interventions results in the creation of new arenas of conflicts comprising of movements of women, radical ecologists, peace activists, gays and lesbians, local autonomy groups and various other counter cultural groups (White 1988: 123, Edwards 2004: 116). Against this background, Habermas explains civil society as a "domain of network of associations, movements and organizations that distill and transmit societal problems and its reactions into the public sphere" (Habermas 1998: 366-367). Since the civil society has become plural in nature, conflicts between competing parties could possibly be resolved through communicative means. Habermas formulates his theory of deliberative democracy solely on the basis of this fundamental assumption. For, as he believes, pluralism offers greater possibility for social interaction and recognition. To address this possible condition he develops his theory according to the standpoint of intersubjectivity which presupposes 'a prior commonality of a linguistic pre-understanding or horizon of lifeworld'.³

² Habermas subscribes the concept of 'juridification' from Kirchheimer (Rasmussen 1990: 82).

³ As Benhabib (1986: 89) elucidates, 'according to the standpoint of intersubjectivity which presuppose a context of ethico-moral relation, the perspective of human agent is constitutive of the validity and meaning of their interaction'.

Habermas finds the possibility of redemption of normative conditions in a democratic space; namely public sphere, located within the civil society. Habermas conceives public sphere to be a ‘social space’ generated in communicative action.⁴ According to him, public sphere is:

“a social phenomena just as elementary as action, actor, association, or collectivity, but it eludes the conventional sociological concept of social order...the public sphere can best be described as a networking information and points of view (i.e. opinions expressing affirmative and negative attitudes); the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified public opinions” (Habermas, 1998 : 360).

He envisages the creation of a political public sphere which is open to ‘those who are potentially affected’; as a result, it offers equality of opportunity for all sections of the society and ensures equal participation in the process of democratic deliberation. As Young (2000: 155) points out, public sphere is more important and functionally relevant than civil society because “it enables citizens to expose injustice and state and economic power and thus make the exercise of power more accountable.” As Delanthy (1999: 89) identifies, in Habermas, the public sphere lends three major functions: “firstly, to detect and identify problems, secondly, to amplify the pressure of problems and finally to thematise and furnish them with possible solutions”. In contemporary democracies, within civil society, the informal publics act as a warning system identifying and amplifying social problems.⁵ It also offers possible solutions to those problems and makes sure that the decision making bodies are taking necessary steps further. At this level, Habermas (1998: 373) asserts, “the political public sphere must act as an intermediary structure between the political system and the private sectors of the lifeworld”. Taking into account of the validity of rational discussions in public

⁴ Young (2000: 170-171) suggests that public sphere with spatial metaphors are appropriate for three major reasons. i) it helps distinguish public discourse and expression not by content or import but as differentially situated, ii) it also helps describe public discussion as a process which people enter and leave, but it goes on even when some leave, iii) and finally, it enables the theory to say that a society has one continuous public sphere without reducing those who are ‘in’ it, to common attributes or interests.”

⁵ Habermas (1998) formulates a ‘two-track model’ to elucidate the functional disparity between the informal public spheres and formal decision-making bodies. The function of the ‘civil-social periphery’ and the ‘political centre’ are distinguished on the basis of their ‘influence on deliberation’ and ‘power to decide’ respectively.

sphere he further explores how to constitute the same as the basis of modern law and democracy.

Habermas begins with the assumption that in modern, pluralistic societies, social norms can derive their validity only from reason and will of those whose decisions and interactions are supposed to be bound by them. In such a situation, it is the duty of law to satisfy the conditions of social integration without employing coercive means. Hence, he tries to offer a reconstructive approach to modern law which according to him has increasingly become coercive and falls short of moral validity.⁶ He thus argues that modern law should derive legitimacy from the democratic process of participatory will-formation. Only the rights-bearing citizens having enough communicative freedom could participate in such processes. He maintains that law is the only possible and legitimate means for society-wide normative integration: a hinge between the system and the lifeworld. Normative claims can be expressed through the language of law, and, therefore it could perform the role of a 'transformer' to protect communication networks of the lifeworld. Modern law on the contrary claims legitimacy solely on the basis of its coercive power to command obedience. Hence, discourse theory argues that modern law is in need of moral justification and it can be attained through a 'process' of discursive law making.⁷

A Reconstructive Approach to Modern Law

One major approach analyzing the traits of modern law is proposed by Max Weber. He finds modern law as a system which develops along with state and administration.⁸

⁶ According to Habermas (1998: 447), "Modern law is formed by a system of norms that are coercive, positive and so it is claimed, freedom guaranteeing. The formal properties of coercion and positivity are associated with the claim to legitimacy: the fact that norms backed by the threat of state sanction stem from the challengeable decision of a political law giver is linked with the expectation that these norms guarantee the autonomy of all legal persons equally. This expectation of legitimacy is intertwined with the facticity of making and enforcing law. This connection in turn mirrored in the ambivalent mode of legal validity".

⁷ Habermas (1998: 83-84) explains: "the procedure of democratic legislation must confront participants with the normative expectation of an orientation to the common good, because this procedure can draw its legitimating force only from a process in which citizens reach an understanding about the rules for their living together. In modern societies as well the law can fulfill the function of stabilizing behavioral expectations only if it preserves an internal connection with the socially integrating force of communicative action".

⁸ The essential features of rationality, for Weber, are based on its systemic character. He treats modern law as a professionalized one and, therefore, bound to formal procedures framed by specialized jurists (Habermas 1984: 256).

In the course of its development, it has been separated from all kinds of moral inclinations. Weber termed this process a 'negative' one as it proceeded towards the 'iron cage' (Eder 1988: 934). Habermas notes that Weber's legal positivism negates the concept of 'rational justification' that develops along with modern natural law. The main problem pertaining to law, in this context, is to answer the question as to how can legality claim legitimacy? He criticizes Weber by arguing that "the belief in legality can produce legitimacy only if we already presuppose the legitimacy of the legal order that lays down what is legal. There is no way out of this circle" (Habermas 1984: 265). This procedural legitimacy therefore upholds the command of the authority which enacts rules.⁹ To find out a new source of democratic legitimacy he offers a critique of the two major paradigms of law: the liberal and the welfare.

Habermas (1996) locates the specific nature of liberal paradigm in its desire to protect private interests in the domain of a self-regulating market economy. The liberal paradigm emphasizes the primacy of individual's private autonomy and the bourgeois private law safeguards its legal subjects primarily as participants in the market. Legitimacy of law from a liberal point of view is guaranteed on the basis of a principle of 'equality before law'. Nevertheless, in liberal societies, market has a spontaneous development to limiting the scope of individuals from reshaping the working of the system (Habermas 1996: 775). He criticizes the liberal paradigm by explicating its failure to overcome the threats posed by 'factual equality'. While implementing basic individual rights, liberal law applies same rights differentially to different subjects. In addition, the clear separation between the private and the public subsequently makes a clear demarcation between the realm of rights and that of democratic participation.

Contrary to liberal model, social welfarism offers opportunities to make use of legal powers to attain material equality. The logic of functioning of welfare state prevents the spontaneous development of market society. The economic domain therefore comes under the direct domination of state through planning and bureaucratic interventions. In preference to private autonomy and individual liberty, welfarism gives importance to political autonomy on the one hand and distribution of justice in social life by providing

⁹ Habermas (1984) explicates that, in '*Economy and Society*' Weber says, "...legality can be regarded as legitimate in virtue of (i) voluntary agreement among interested parties, (ii) imposition by an authority which is held to be legitimate and therefore meets with compliance." Habermas criticizes these points "...that in neither case is it legally as such produces legitimation, but either (i) rational agreement that already underlies the legal order, or (ii) the *otherwise* legitimized authority of those who impose the legal order. The transition between the 'agreed upon' and 'imposed' order are fluid." The reduction of legitimacy to legality confines it into a procedural problem."

grants and aids on the other. As Habermas (1996: 775) explains, “from this point of view, the state and private actors are involved in a zero–sum game – what the one gains in competence the other loses”. Individual’s equal liberty and justice, proclaimed by liberalism, thus become a category of discretion of state’s superior political will.

Habermas (1998: 84-104) attempts to bridge the gap between the liberal and the welfare paradigms by reformulating the relation between private and public autonomy. He has the opinion that in a plural society, both individual autonomy and private interests need to be taken care of. He observes that liberalism always imbibes an internal conflict between bourgeoisies’ need for limiting popular sovereignty and the free use of practical reason guaranteed by constitution. This, in his analysis, is augmenting the tension between private and political autonomy. To remove this tension what is required is to eliminate the disjuncture between liberalism and republicanism. In so doing he attempts to bring the Kantian notions of individual autonomy and human rights and Rousseau’s ideas of political autonomy and will-formation together (Ibid). On the one hand he shows great interest in the idea of inalienability of individual autonomy and human rights (elucidated by Kant) as fundamentals of moral life and on the other hand he warmly embraces the idea of civic autonomy (expounded by Rousseau) which fosters internal relationship between popular sovereignty and human rights.¹⁰ Taking accounts of these two models Habermas (1998: 101) opines that the core features of popular sovereignty and the Kantian idea of human rights could carefully be secured through a democratic procedure devoted to steer public sphere discourses. This notion operates as a guide especially in ordering the procedure of discourse in plural societies where competing publics exist.

Considerations on Pluralism and Discourse

In plural societies, the process of discourse has become highly complex.¹¹ In societies where multiple publics exist with competing interests, the fundamental interest of today’s radical democracy should be to explore the social and cultural roots of democracy and politically radicalize the functional system in a legitimate way

¹⁰ In republican model, Habermas points out; public sphere and civil society acquire a strategic importance that they protect the communicative power of citizen and integrate citizens into a political community.

¹¹ Discourses in a plural society, Bohman (1994: 914) elucidates, ‘include face-to-face interactions at home and work: larger meetings in various informal associations and different levels of organization throughout civil society (clubs, professional associations, unions, issue-centered movements, and the like); the dissemination of information and arguments through the public media; and the complex network of governmental institutions, agencies and decision-making bodies’.

compatible with the will of all the affected members. One of the major tensions that coexist with pluralism is to address the question; how to tame its complex network of power relations and hegemonic formations where discourses are dispersed across a variety of forms with conflicting and contradictory perspectives. This aspect has become one of the major arenas of dispute among scholars working on democracy. Some scholars perceive social plurality as a basic structure or a *necessary condition* for democracy. For instance, Ernesto Laclau and Chantal Mouffe (the proponents of radical plural democracy) conceive pluralism as something that has to be ‘celebrated and enhanced.’¹² For Mouffe (1999) social antagonisms offer a way to a ‘democratic logic of equivalence’. For, it could offer a possible means to transform the existing friend/enemy relationship in the social sphere into a new form of ‘agonistic pluralism’. This project aims at transforming democratic politics from ‘antagonistic’ relation between ‘enemies’ into agonistic relations between ‘adversaries’ (Kapoor 2002: 465).’ In this process, it is highly imperative in taking into account of the prevailing modes of power relations and its possible modes of articulations. Laclau and Mouffe (1985: 105) subscribe to the Foucauldian notion of discourse in order to analyze the same.¹³

Foucault (1972: 55) conceptualizes discourse not as a “majestically unfolding manifestations of a thinking, knowing, speaking subject, but, on the contrary, a totality, in which the dispersion of the subject and his discontinuity with himself may be determined”. He categorically declines the presence of an enlightened, rational subject of history who is capable of managing the subtleties of discourse within which he/she is located. The society of such subjects would certainly be, as Foucault establishes, subjected to the rules of the discourses that shape them. Thus according to him, ‘the disciplines may possibly be the carriers of a discourse that speaks of a rule, not the juridical rule deriving from sovereignty, but a natural rule, a norm: the code of normalization’ (1994: 44). As he states:

“in our day, it is the fact that power is exercised through both right and disciplines, that the techniques of discipline and discourses born of discipline are invading rights, and that normalizing procedures are increasingly colonizing the procedures

¹² Chantal Mouffe (1999: 18) opines that pluralism should not be seen as a mere ‘fact’ and dealing it with procedures is nothing but making differences irrelevant as well as relegating it to the public.

¹³ Laclau and Mouffe subscribe Foucault’ concept of ‘discursive formation’, governed by the ‘rules of formation’ that proffers ‘regularity in dispersion’.

of the law, that might explain the overall working of what I would call a “normalizing society”” (1997: 38-39).

As Love (1989: 278) points out, for Foucault, power relation is ‘a mode of action upon others, and ‘a society devoid of power relations can only be an abstraction’. Accordingly communication as a way of acting upon others is always implicated in power.¹⁴ Flyvbjerg (1998: 222-223) also argues: in a Foucauldian sense, Habermasian idea of ‘constitution-writing’ would not be an effective way of exposing civil society. By focusing on praxis and freedom in Foucault, he elucidates that the ideal practice of freedom is not a utopian absence of power. The practice of freedom is ultimately based on resistance and struggle, not consensus. Foucault offers no space for any grant projects of resistance, but as Dryzek (1990: 60) rightly pointed out, only for local resistance. Laclau and Mouffe also stress that the social antagonisms existing in plural societies are ineradicable. Here, what is possible is to radicalize the politics of antagonisms; not to eliminate it. As it sounds, the consensual model, therefore, would destroy ‘the political.’

In Habermas (1973: 18), discourses are ‘performances’ wherein participants engage in an act of seeking ‘to show the grounds of cognitive utterances’. Therefore, “discourse requires the virtualization of constrains on action in order to render inoperative all motives except solely that of a cooperative readiness to arrive at an understanding” or a consensual opinion binding the competing interests. Habermas (1987: 290) maintains that “Foucault ignores the development of normative structures with reference to the modern formation of power” in our times. He goes on to argue that Foucault ‘drops the threads of the legal organization of the exercise of power and of the legitimation of the order of domination’. For Habermas (1998: 162), discourses are not determined by the subject alone but on the contrary, it is the intersubjective perspective of relationship that leads the participants to such situations where “all of whose members put themselves in each individual’s situation, worldview and self understanding”. Thus he formulates the foundations of “discourse theory of law and democracy” relying on the self-legislating rational subjects constituted along with the project of western enlightenment.

¹⁴For Foucault, power has a disciplinary function and it is closely connected to democratic politics. He argues that ‘the democratization of sovereignty is itself grounded in discipline....The judicial systems...have enabled sovereignty to be democratized through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratization of sovereignty is itself grounded in mechanisms of disciplinary coercion” (Love: 1989: 278).

The idea of considering pluralism to be a ‘sufficient condition’ of democracy is deflected in Habermas’ discourse model. Pluralism, for him, is only a ‘necessary condition’ which requires transformation so as to make the existing condition more adaptive and inclusive. What he suggests is to redirect public sphere discourses in order to convert communicative power (of the public) into administrative power. The concept of sovereignty, in Habermas, is propped up by the idea of communicative power which seems to be an antidote to Foucauldian disciplinary power. In consideration of the modes of power, domination and exclusion prevalent in a disseminated civil society, he attempts to locate the democratic deliberative space in which the competition between unequal powers are turned out to be neutralized or counterbalanced through normative regulations.¹⁵ He proposes this idea on the basis of an assumption that the “rights to unrestricted inclusion and equality are integral to liberal public sphere’s self-transformation” (1996: 429). It could be argued that he also puts forward the idea that power in a liberal social context could also be discursive and therefore alterable towards a consensual state of mutual understanding. This alternate possibility is what Habermas wants to motivate further onto a level of new democratic politics.

Discourse as a Method of Social Integration

The deliberative turn announces the renewal of democratic theory which facilitates both liberal and democratic principles in concert. It has taken different routes and twists indeed. For Dryzek (2000: 1), deliberative democracy promises democratic authenticity. In his opinion, it has its basis on communicative action in the public sphere which is ‘non coercive’ and capable of connecting the particular to the general. The communication in the public sphere here presupposes political equality and ensures that all participants in the deliberative process would have equal chance for affecting the outcome. In his analysis, the public opinion emerging out of discourses in the public sphere could certainly be translated into communicative power by means of variety of mechanisms available. However, unlike Habermas, he does not offer any kind of institutionalization of political discourses in the public sphere. Conversely, he argues that, “discursive democracy can embrace difference as well as consensus, the public sphere as well as state, transnational as well as domestic politics, and nature as well as humanity” (Dryzek: 175).

¹⁵ This, as Dryzek (1990: v-8) points out, heralds the deliberative turn in democratic theory. Dryzek says that ‘around 1990 the theory of democracy took a deliberative turn. The new model conceives discourse as a source of order and so the contestation of discourse as central to democracy.’ The new turn has its beginning from two different points; liberal constitutionalism and critical theory.

Deliberative democracy, for Young (2000: 22), is ‘a form of practical reason, where democratic process is primarily a discussion of problems, conflicts and claims of need or interest.’ She offers a critical evaluation of this model and points out the major deficiencies it carries. Firstly; the participants should accept certain premises before entering into the process of deliberation and the issues are framed within a generally accepted conceptual and normative framework. Secondly; the subject of public discussion has to be aimed at a common good. Thirdly; the assumption, held by many, that deliberations has to be occurred in a single form where interlocutors face each other directly. Lastly; a particular normative order for deliberation is not yet expounded.¹⁶ Having made these inquires, Young (2000: 50) states that ‘the normal condition of democratic debate is to be understood as a process of struggle, channeled through “political communication” that may possibly lay foundations of a ‘communicative democracy’’. She, like Dryzek, lets the arena of discourse unrestricted and open ended. She proposes a ‘decentred’ notion of public sphere espouses an enlarged communicative domain with extensive forms of communication.

In her critique of deliberative democracy, Chantal Mouffe (1999: 84) argues that the fundamental aim of this model is to secure a strong link between democracy and liberalism. She finds two different streams of this kind: the Rawlsian and the Habermasian models. Following John Rawls, Joshua Cohen puts forward a deliberative democratic model which “is rooted in the intuitive ideal of democratic association, in which the justification of terms and conditions of association proceeds through public argument and reasoning among equal citizens”.¹⁷ The procedure of democratic deliberation, for Cohen, has an inclusive and public character that appears in the form of argumentation free from internal as well as external coercion. By excluding the possibility of ‘consensus’ in opinion formation, he gives weight to majority decision, which comes out from deliberation and it will remain until the minority become the majority. The matters of deliberation are restricted to the equal interest of all.¹⁸ As it

¹⁶ The limitations she explicated are not applicable to all models. While considering the aspect of ‘unity’ she notices that some theorists conceive unity not as the starting point but as a goal of political dialogue. These models seeking ‘common good’ devaluing differences and therefore it serves as a means of exclusion. She advocates for a ‘decentred’ concept of politics and society (Young 2000: 37-47).

¹⁷ See Joshua Cohen, “Deliberation and Democratic Legitimacy” [Online: Web] Accessed on 08 July 2015, URL: <http://philosophyfaculty.ucsd.edu/faculty/rarneson/JCOHENDELIBERATIVE%20DEM.pdf>

¹⁸ The deliberations are open to interpretation of needs and wants and even for changing the pre-political attitudes and preferences. See Habermas (1998: 305), quotes from Joshua Cohen (1989), ‘Deliberation and Democratic Legitimacy’ in A. Hamlin and B. Petit (Ed), *The Good Polity*, Oxford University Press: London.

suggests, Cohen's model, as Mouffe also understands, is a liberal one. The idea of 'intuitive ideal of democratic association' he suggests proposes the *innate* democratic character imbibed in liberal societies.

Following closely the Habermasian model of deliberative democracy, Benhabib (2002: 139) advocates the primacy of the plurality of public spheres consisting of "mutually overlapping networks and associations of opinion-forming as well as decisional bodies. Within these multiple and overlapping networks of publicity, different logics of reason giving, greeting, story telling and embedded speech can flourish". The multiplicity of associations, organizations and movements, in the civil society, are interlocked through public sphere deliberations. The participants in the public sphere are obliged to consider the view points of others and the deliberations should be based on the principle of impartiality. In her account, deliberative democracy ensures rationality and legitimacy of decision making through public deliberations which is capable of designing the existing institutions as well.

Quite different from many of the arguments discussed above, Habermas puts forward a two-track model of democracy in which the political division of labor is conceived by a demarcation between informal public spheres and formal decision-making bodies. On the basis of functional specializations, the weak publics do not share the decision making power. Instead, it operates within a deliberative domain of the political public sphere. He now envisages a democratic model which could potentially transform communicative power generated from the weak publics into administrative power. Hence, to sustain the democratic process occurs in the political public sphere should be converted into a procedural mode and subsequently the same should be integrated into the legal system as well. He affirms that the public sphere acts as "the impulse-generating periphery that *surrounds* the political centre: in cultivating normative reasons, it affects all parts of the political system without intending to conquer it" (Habermas 1998: 442). He postulates a discourse theory which suggests that in the political public sphere, deliberations should take place at three different levels; pragmatic, ethical and moral. In such discourses, all the possibly affected should be included in the process of democratic deliberations so as to attain mutual understanding between the actors. Matters like conflict resolutions, issue of social exclusion etc. has to undergo a discursive process of opinion formation and of mutual understanding.

In pragmatic discourses, actors assume values from empirical knowledge. And discursively justified ends are open to assessment and alternative choices based on

previously applied maxims or rules. If the orienting values themselves are problematic, the actor has to go beyond the horizon of purposive rationality (Ibid: 159-160). Ethical discourse is rooted in the “political self-understanding of a historical community” (Ibid: 160). It aims at extending the existential question of ‘I’ to a collective consciousness of ‘we’. While searching for an ‘authentic identity,’ in an intersubjectively related lifeworld, the question of ‘ought’ surpasses the level of subjective ends and subsumes to the ‘good for all’.¹⁹ Beyond the level of these two discourses, an adequate justification of politics and law must consider a further step; that of justice, which leads to the domain of moral discourse. Here the participants would explore “how we can regulate our common life in the *equal interest of all*” (Ibid: 161).” This attitude would help the concept of ‘ought’ to be seen in the light of justice. In moral discourse people are aware of their subjective positions as an imperative part of a social collective and therefore they will become ready to submit themselves to moral self-regulation. Habermas considers moral discourse to be decontextualised, strictly universal and rational. Hence, it is applicable to all standard situations. Further, it opens up the possibility of expansion of a restricted community to unlimited communicative community.

Habermas makes a clear distinction between moral questions of justice and ethical questions of self-understanding. He elaborates: “when we approach a problem as a moral question, we ask which regulation lies in the equal interest of all (or what is equally good for all). However, when dealing with ethical questions, we weigh alternatives from the perspective of individuals or collectivities that are seeking to confirm their identity and that want to know which life they should lead in the light of who they are and want to be (or what is good for me/us on the whole and in the long run)” (Habermas 1995-1996: 1484). In practical discourse, the affected parties must be aware of their goals and should realize the specificity of the context. Ethical discourse allows them to express what is distinct and unique in their arguments. The intention in promoting ethical discourse is precisely to erase the possibility of social disjuncture through ethical discourse which aims at incorporating, addressing and amplifying ‘lived experience and language of expression’ of cultural communities. Moral discourse permits the affected parties to reach at democratic consensus based on mutual understanding and wishes to endorse social integration based on universally valid norms. He declares that, “the discourse theory of law conceives constitutional

¹⁹ Habermas (1998: 161) explains, “[i]n pragmatic discourse, we test the expediency of strategies under the presupposition that we know what we want. In ethical-political discourse, we reassure ourselves of a configuration of values under the presupposition that we do not yet know what we really want”.

democracy as institutionalizing – by way of legitimate law (and hence by also guaranteeing private autonomy) – the procedure and communicative presuppositions for a discursive opinion– and will–formation that in turn makes possible (the exercise of political autonomy and) legitimate law making” (Habermas 1998: 437). The act of participation in public sphere deliberations is now defined as political actions or what he calls “deliberative politics” (Habermas 1998: 298).

In an attempt to formulate a normative theory of democracy, Habermas proposes certain procedural conditions of discourse. The proceduralist model accepts democratic institutions existing in liberal societies: free and fair election, equal right to vote, parliamentary bodies etc. It also incorporates the ethical notion of republicanism that offers a greater participation in the process of opinion and will-formation. The whole system is characterized by its openness to procedurally defined rational deliberations which take place in the informal domain of public spheres as well as in the democratic institutional structures.²⁰ He explains:

“The intersection of two different procedures – legal and administrative – shows that the universe of law can open itself from the inside, as it were, to argumentation processes through which pragmatic, ethical and moral reasons find their way into the language of law without either inhibiting the argumentation game or rupturing the legal code...Procedural norms regulate participation and the distribution of roles in discursive processes of opinion – and will – formation; they limit the spectrum of admissible topics, questions and arguments; and they link argumentation to decision making. In this way the instrument of law is reflexively deployed so that discourses for making and applying law can be socially expected in specific places and specific times” (Habermas 1998:178).

Here, as it shows, the process of procedurally regulated decision/law making process turns out to be the basis of democratic legitimacy. In place of the idea of unlimited communicative freedom and unrestricted public sphere deliberations he proposes a procedurally regulated discursive context of communication and also shows the

²⁰ Habermas (1998a: 250) elucidates: “Notwithstanding this discursive rationalization, only the political system itself can “act.” It is a subsystem specialized for collectively binding decisions, whereas the communicative structures of the public sphere comprise a far-flung network of sensors that respond to the pressure of society-wide problems and stimulate influential opinions. The public opinion which is worked up via democratic procedures into communicative power cannot itself “rule” but can only channel the use of administrative power in specific directions”.

possibility of transgression of communicative potential inherent therein. Here procedure turns out to be what resists coercive power and domination or that which ignites communicative power of the marginalized. It is through the proceduralization of communicative freedom Habermas envisages the creation of a constitutional democracy.

Conclusion

What defines the Habermasian discourse model is its normative inclination as well as its strive for social integration. The exposition of a possibility of normative restructuring of the existing liberal societies is one of the critical contributions of this approach. The political public sphere is located as the prime locus of deliberation and action. However, since it aims at transferring communicative power into administrative power by means of procedurally regulated opinion–and will–formation, politics turns out to be pragmatic and legalized. The practice of freedom therefore is not located in resistance or struggles which seek ‘transformative’ ends. Conversely, in a liberal political culture where plural and divergent interests prevail, he relocates the practice of freedom in contexts of consensus building where only ‘reconstructive’ means are desired. When he speaks of ‘procedurally regulated discourse’ he does not intend to repress communicative freedom of those who engage in public deliberations. Instead, he tries to equate or associate the notion of procedure with freedom. It is only when discourses among conflicting parties (both strong and weak) are regulated through pragmatic, ethical and moral principles equality of participation would be secured from threats of exclusion and domination. Procedure now becomes a necessary precondition for democratic engagement aiming at collective will–formation. This *regulated* freedom is considered as a binding of socially expected law. He thus invents the process of lawmaking as an inalienable part of society’s political and normative reproduction. This elaboration of the possibility of alternative potential of power (which is capable of being (re)directed towards normative ends) but envisages a one–dimensional mode of operation which already presupposes its feasible goals. The discursive process directed towards a consensual state of mutual understanding also implies the possibility of regulation and reduction of dissent and difference. The formation of an integrated social milieu according to this view is viable only through the subversion of politics of radical dissent.

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