DISCOURSE ETHICS AND LIBERAL POLITICAL CULTURE

Alexander Seran
Atma Jaya Catolic University, Indonesia

Abstract

Discourse ethics and the liberal political culture reciprocally presuppose each other as laws need to be legitimized through discourse in a democracy. Habermas' discourse ethics attempts to provide a practical solution to the problems of the legitimation of normative claims in pluralistc societies. It does this by understanding deliberative democracy as being situated within the life-world of its participants. through which the consensus of validity claims can be carried out. This understanding of the role of discourse ethics will be applied to the situation in Indonesia and the Philippines.

INTRODUCTION

The concept of deliberative democracy involves governmental system bound by the rule of law. Discourse ethics will be discussed in this article as an ethics of communicative action. Discourse ethics and the liberal political culture presuppose each other as laws are legitimized through discourse. So the combination of discourse ethics and the liberal political culture situate deliberative democracy in the life-world in which a consensus of validity claims can be made to redeem normative claims in pluralistic societies.

Liberal and republican democracies focus on the individual person as actors but only to lesser extent consider the social person. This is the reason why Habermas develops a theory of deliberative democracy to enhance the meaning of the social person and the process of legitimizing universal laws through discourse ethics.

What discourse ethics is and how it is employed as a program of philosophical justification of norms will be placed in the first section.

Discourse ethics as a post-conventional morality will be discussed in the next section. The third section will consider the relation deliberative democracy to legal discourse. The fourth section is a discussion on the reciprocal influence between discourse ethics and a political liberal culture through which a phenomenology of political experience will be presented to show the challenge of discourse ethics in promoting deliberative democratic laws. The fifth and last section will consider the limitation of discourse ethics.

1. DISCOURSE ETHICS

Habermas defines the meaning of discourse ethics as a discourse theory of morality.[1] It follows from his accounts of discourse ethics as a program of philosophical justification.[2] The relationship between a program of philosophical justification and a discourse theory of morality is that the former places a high premium on discourse ethics as a program of an ethics of communicative action that must be applied by the latter as the principle (D) that redeems normative claims (U) into validity of norms as legitimized laws. My own understanding of Habermas's discourse ethics emphasizes the redemption of various forms of normative claims of a plurality of life-worlds.

The definition of discourse ethics as a discourse theory of morality indicates the influence of Kant's and Hegel's philosophies. Through Hegel's critique on Kant's morality, Habermas places a new emphasis on the relation of a universalistic morality with a concrete ethical life. Thus, through discourse ethics we can see morality in the concrete problems of life. This is one of the major tasks of philosophy, namely to use rationality as a safeguard in a pluralistic world called modernity. Discourse ethics can be understood in this perspective as a procedure of philosophical justification of valid norms in which various normative claims of individuals, group, communities are granted an equal hearing in periods of conflict. The aim of resolving moral conflicts through discourse ethics is not to indicate which moral claims are better than the other others, but rather to give each the chance to test his/her argument in a practical discourse. This practical discourse is a procedure of testing competing argu-

ments of all affected participants to arrive at a validity claims. The result of discourse ethics is not the determination of rules of behavior but contesting the rationality of valid norms to maintain respect for various spheres of private values. In this sense, positive laws must be redeemed by discourse in such a way to protect various spheres of private values in the life-world under the principle of equality before the law.

Habermas presents eight theses concerning discourse ethics.[3] His aim is to promote discourse ethics as an ethics of communicative action by which validity claims of norms are made central to a discussion of deliberative democracy in contemporary pluralistic societies. This begins with a consideration of moral phenomena in the life-world.

1.1. Discourse Ethics and the Moral Phenomena in the Life-world

Habermas's point of departure is moral phenomena in the life-world. He is continuing a project of philosophers beginning with Kant of a cognitive ethics where only universal norms can be considered valid. Yet he revises this approach. A moral norm can be universal, only if tested by all affected participants in a practical discourse. For Habermas, moral norms must be validated through a procedure of argumentation. In other words, it must be a result of practical discourse rather than a result of a subjective consciousness. A subjective consciousness is monological. Although an individual may think of a universal norm, it does not necessarily follow that it can be applied universally unless there is a discourse to test its validity claim. For Habermas, a norm can be universally applied only if it is universally recognized and approved by all concerned. He seeks a rational testing moral norms in moral phenomena and derives validity claims from the communicative structure of the life-world.

Habermas develops discourse ethics as a rational theory of morality to respond to the attacks of the con-cognitive ethical theories. This means that moral phenomena are not irrational. These non-cognitive theories rely primarily on two arguments. First, the fact that dispute about basic moral principles ordinarily do not issue in agreement. Second, normative propositions are to be true along with intuitionist lines or in terms of either the classical idea of natural law or an ethics of material value as in intuitionism and analysis of semantics.[4] First argument refers to Alan

R. White's subjectivist ethics and G. E. Moore's objectivist ethics. Moral statements depend on the subject who is uttering it. Although when someone is coming to do something means that he/she has a good reason to do it but his position of so doing is subjective then it is open to criticism whether it is true or false. As a subjectivist claim, moral statement does not result from testing arguments. In contrast, Moore refers moral truth to something objective that is an unnatural property. For example, "right or good" or "red or yellow" that can become predicates of something. Saying that "it is good" is analogous with "That is yellow" although the former is higher than the latter in terms of morality. Second argument refers moral truth to intuitions in such a way that moral truth cannot be verified or falsified. They cannot be tested in the same way with descriptive statements. R. M. Hare plays the central role of this kind of argument. By combining imperativist and descriptivist, he places moral statements on the speaker to impose norms to the hearers. The core claim of moral truth lies in the semantic analysis of expressions and sentences. This argument makes his claim of moral truth as a kind of rational decision. The aforementioned non-cognitive ethical accounts are, to some extent, expressions of skepticisms concerning moral truth. They do not treat moral statements as a problem of true and false and therefore ignore rational accountability concerning moral phenomena to which a discourse theory of morality is tasked to take place. Habermas makes use of P. F. Strawson's essay on *Freedom and Resentment* (1974) although the essay is concerned with a different theme (MCCA, 109n.5). Habermas notices that Strawson's essay places an emphasis on the rationality of moral phenomenon which is suitable to adopt in developing a discourse theory of morality. Based on the phenomenology of moral phenomena, a discourse theory of morality can be developed both as rational and practical attempts in order to solve the pathology of modern consciousness. A theory of morality of this kind must be based on communicative reason rather than on the subjective reason thus both non-cognitive ethics and purposive rationality must be rejected. Through a linguistic analysis of phenomenology of the moral, Strawson's essay opens the eyes of the emotivists and empiricists in their role as moral skeptic to their own everyday moral intuitions that are rational at all. Strawson sums up that based on, for example, resentment as a moral phenomenon is treated on a rational basis

like to forgive or to excuse is based on a good reason not a mere emotion. Thus, Strawson shows that moral problems must be decided on the following considerations. First, the world of moral phenomena can be grasped only on the performative attitude of participants in interaction. Second, resentment and personal emotional responses in general point to suprapersonal standards for judging norms and commands. Third, the moral-practical justification of a mode of action aims at an aspect different from the feeling-neutral assessment of means-ends relations even when such assessment is made from the point of view of the general welfare. Fourth and last, feeling seems to have a similar function for the moral justification of action as sense perceptions have for the theoretical justification of facts (MCCA, 50). Although Strawson's account of moral-practical justification is not all that discourse ethics tries to appeal as a program of philosophical justification, it becomes an indication that moral truth must be developed from communicative structure of the life-world. This affirms that Habermas attempts to ground discourse ethics as a rule of argumentation by which validity claims are achieved in communicative action. It means that validity claims appear in the plural context of the life-world. Actors make three different claims to validity in their speech acts as they come to an agreement with one another about something. Those claims are *claims to truth* which refer to something in the objective world, *claims to rightness* refer to something in the shared social world, and *claims to truthfulness* refer to something in the subjective world. What is of interest to us is the second type, the claim of rightness and validity of norms in which one actor seeks rationally to motivate another to accept what is offered in the speech acts as the better argument.

Stephen Toulmin's *Examination of the Place of Reason in Ethics* (1950) affirms Strawson's account of the rationality of moral phenomena of which discourse ethics is considered a specific form. Toulmin's theory of reason in ethics comprises both practice and reason. He refers to Strawson's moral phenomenon that there is a parallel between feelings and perceptions in everyday life experience. It is not incidentally that if "X ought to do Y" implies that "X has good reasons to do Y". Thus, questions and choices between norms admit truth and falsity. It follows that to conceive the objectivity of moral phenomena is to agree that some moral statements are true.[6] In Toulmin's examination of reason, he places

discourse ethics as a specific form of argumentation in making validity claims through practical discourse. His project is to establish a kind of argument or reasoning that is proper for us to accept in support of moral decisions. He abandons the semantic analysis of moral expressions which are speaker-centered, focusing instead of consent-based decision as the method of universalization in which normative propositions are justified. This becomes the criteria that motivate us to recognize demands as moral obligations.[7]

1.2. Principles and Presuppositions Discourse Ethics

The main principle of discourse ethics is the universalization principle whereby conflicts of normative claims are understood to be settled in a practical discourse through consensus. The universalization principle is also called a *bridging principle* because it is used as a method or a procedure that relates conflicting normative claims to be redeemed by a validity claims that are universally acceptable to all concerned. Normative claims refer to various spheres of private worldviews in the life-world that in social interactions sometimes lead to conflict. Discourse ethics is realized in practical discourse as a procedure of testing arguments by which consensus is settled on the basis of the better argument. As the better argument, consensus is considered the communicative imperative that redeems narrow and one-sided claims of moral truth. The concept of the better argument is obviously influenced by Kant's categorical imperative but not understood and employed in the same way. As a communicative imperative, the better argument is the moral point of view which is universally considered valid to all concerned.

Based on this bridging principle, Habermas distinguishes the principle (U) from the principle (D). Habermas enumerates that every valid norm has to fulfill the following condition:

> (U) All affected can accept the consequences and the side effects its general observance can be anticipated to have for the satisfaction of everyone's (and these consequences are preferred to those of known alternative possibilities for regulation.[8]

> Universal principle (U) is distinguished from discourse principle (D) which stipulates the basic idea of moral theory (theoretical discourse) but does not form part of a logic of argumentation (practical discourse).
> (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.[9] (MCCA, 66).

The principle (D) is the assertion that the philosopher as a moral theorist ultimately seeks to justify, and already presupposes principle U. From here one can see that Habermas's discourse ethics deals with a rule of argumentation rather than testing normative claims. The aim is to turn normative claims into validity claims through argumentation. Discourse ethics does not provide substantive guidelines for generating justified norms but provides a procedure for testing the validity of norms. This is because discourse ethics cannot be applied to test normative claims of the other's beliefs and cultural values. Habermas is correct to consider discourse ethics as a rule of argumentation to allow for impartiality rather than to ensure impartial consideration of all affected interests by placing the moral judge into a fictitious original position where differences of power are eliminated, equal freedoms for all are guaranteed, but the individual is left in a condition of ignorance with regard to the position he might occupy in a future of social order. In Kant, the individual justifies the basic norms on his own. In Rawls validity claims are not based on the will formation but on a theory of justice. Further misunderstanding of the principle of universalization is presented in Kurt Baier's, Bernard Gert's, and Marcus Singer's theories stating that moral norms are valid if the are teachable, publicly defended, and which ensure equality. But it is not the case in fact that something is teachable followed necessarily that it is valid. It is also necessarily not the case that the adoption of a norm by every other individual in comparable situation is sufficient to be conceived as the warrant of impartiality in the processes of judging. Habermas is more convinced that the generalizability of valid norms must deserve recognition by all concerned. The universal principles cannot be an achievement of a monological judgment but rather a result of a universal discourse in which every participant must play an ideal role taking in judging so that through

a universal exchange of roles participants come to a consensus about valid norms.

In order to prove that the universalization can work for legitimizing norms, Habermas proposes arguments of universal pragmatics and performative contradiction. The term universal pragmatics is generally understood as the general presuppositions of communication, that is, the general presuppositions of communicative action because it refers to the type of action that aims to reach mutual understanding. Habermas says,

> ….anyone acting communicatively must, in performing any speech-action, raise universal validity claims and suppose that they can be vindicated. Insofar as he wants to participate in a process of reaching understanding, he cannot avoid raising the following–and indeed precisely the following–validity claim. He claims to be uttering something understandably; giving the hearer something to understand; making himself thereby understandable; and coming to an understanding with one another.[10]

Anyone enters into discourse must admit that there is a universalization principle. Denying that there is no universalization principle is a contradiction because the act of denying is the performing of a universalization process. In saying that no universal claim of truth can be attained through dialogue, one is performing a dialogue to attain a valid claim that there is no universal truth through dialogue. In other words, valid claim must result form discourse cannot be denied. Universal pragmatics as the rules of discourse ethics is distinguished from Karl-Otto Apel's transcendental pragmatics. Apel distinguishes two parts of ethics parallel to two forms of communications community. His part A of ethics is referred to universal norms that are "always already" moving the ideal community of communication. Without these norms, the universaliztion of situational norms that is his part B of ethics in a concrete community of communication is impossible. As a result, Apel's discourse ethics sketches a regulative ideal to transform an actual communication community. Thus, his discourse ethics becomes an ethics of responsibility rather than an ethics of communicative action. The communicative action as "always already"

the natural attitude of the life-world is decided as moral norm through a linguistic analysis that makes Apel's method of discourse no longer the cooperative search of truth through arguments in actual community of communication. The "always already" given is the self-consciousness that affirms communicative action as the transcendental concept to which situational norms are required to conform. Thus, validity claims are not based on the assertoric meaning of a proposition, but rather a confirmation of what is always already prescribed as universal norm.[11] Apel's discourse ethics is an expression of decisionism based on pragmatic analysis of semiotics rather than an expression of testing arguments to motivate the redemption of normative claims concerning various spheres of worldviews in actual life-world. In this way, discourse ethics as an ethics of principles sketches a regulative ideal that does not correspond to a historical utopia but nevertheless projects an asymptotic transformation in history of actual communication community. This shows that Apel accounts of a substantial ethics in his part A of discourse ethics while Habermas defends a formalist ethics to redeem normative claims through arguments in a concrete-life world. Habermas does not attempt to make concrete community of communication through an ideal model. He rather aims to redeem a concrete community of communication from within. He blames Apel's transcendental pragmatics of discourse ethics as an ethnocentric fallacy because the arguments undermine the potentials of emancipation within the concrete-life worlds due to his category of ethics part B. Habermas enumerates R. Alexy's rules of discourse in order to reaffirm his concept of universal pragmatics to be raised within the concrete life-worlds as universal presuppositions of discourse ethics. Habermas emphasizes that only in the concrete life-world laws are legitimized by argumentation that is free from any compulsion whether internal or external of a practical discourse. This means that laws are legitimized only if the following presuppositions are fulfilled.

> (3.1) Every subject with the competence to speak and act is allowed to take part in discourse.
>
> (3.2) a. Everyone is allowed to question any assertion whatever.
>
> b. Everyone is allowed to introduce any assertion

whatever into discourse.

c. Everyone is allowed to express his attitudes, desires, and needs.

(3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (3.1) and (3.2).[12]

One may question Habermas's universal pragmatics in that it allows participation only to those who are competent to speak. But what of those who have physical and social handicaps in presenting their agenda in a practical discourse? Certainly this is the question that confronts Habermas's model of discourse ethics with the real needs of contemporary societies. By placing a high premium on argumentation, Habermas respects participation in a higher level compared to participation in traditional models of democracy. If participation is defined by the principle of the better argument then it is not limited to what is equally good for all members of a community that share a homogenous cultural values.[13] Discourse ethics indicates that the violations of universal human rights can be settled on the basis of argumentation by which all human beings as rational beings can participate in solidarity to protect the dignity of human persons based on validity claims.

2. DISCOURSE ETHICS AS A POST-CONVENTIONAL ETHICS

Based on the presuppositions as the rules of argumentation, discourse ethics is based on action theory that aims to justify norms. Rules for testing principles are the procedures that integrate speaker and world perspectives of validity claims. The idea of the validity claim is an ideal concept of authority that motivates everyone to play an ideal role taking in justifying norms. The concept of authority is understood as the autonomy of social actors in their role as participants in competing validity claims through a practical discourse.

The concept of authority as autonomy is an expression of post-conventional ethics that grants the ideal validity claim to be decided in a cooperative search of truth by all individuals as members of a society.

This is considered the suitable mode of democratic procedure to shift previous contruction of validity claims from the privileged political institutions. Previous validity claims are based on practical reason whether they are universal claims of morality or the recognition of various forms of concrete ethical life. Discourse ethics as a post-conventional ethics aims to redeem previous claims of validity that separates morality from concrete ethical life. Discourse ethics as the post-conventional morality is adapted to deliberative democratic procedure to relate morality with concrete life-worlds through validity claim of norms in which both liberal and republican democratic procedures can be redeemed.

I wish to assert that Habermas's attempts to provide a procedure of argumentation to redeem Kant's categorical imperative and Hegel's concept of the ethical life. Kant's concept of categorical imperative is based on the individual freewill to act according to the subject's mental disposition letting the consequences be what they may. This is certainly the imperative of morality to which laws are subsumed.[14] The moral imperative requires an autonomous will for an action to be deemed categorical rather than hypothetical.[15] Autonomy, therefore, is the supreme principle of morality. Without autonomy, justice as the principle of self-legislation cannot prevail in laws as imperatives.[16]

Hegel's critique on Kant's ethics is that it is too formalist in such a way that ethics addresses moral duty in abstract and thus runs pure convictions as impotence "ought" towards concrete social life.[17] Since the categorical imperative requires that the moral agent abstracted from the concrete contents of duties and maxims, its application necessarily leads to tautological judgments. The term tautological judgments are expressions of subjective consciousness originated from and backed to the subject. As a result, valid judgment is insensitive to real-life conditions that are in need of solution. The categorical imperative as a moral "ought" faces a problem of how the "ought" that results in subjective consciousness can be realized in concrete life-world. If the categorical imperative is considered pure conviction, how it affects the rest of human beings. Hegel does not deny there is moral *ought* but it must be placed in the recognition of various spheres of ethical worldviews in society in which reason and sanctions are treated from the perspective of serving the higher ends rather than as a pure postulate of practical reason. The term practical

reason refers to the individual freewill that expresses rational being as autonomous person. Hegel admits rationality in the service of the good life of the people in their communities rather than as the self-assurance of a subjective consciousness.

Although Hegel's critique of Kant's categorical imperative paves the way to include opinions as rules of the universalization process, it still remains obedient to an idea of objective reason that can only exist in the State. Hegel fails to redeem Kant's categorical imperative to respond to the issue of the good life because Kant deals only with the problem of right or just action on how universal principles can guide actions. Universal reason does not serve to justify laws in terms of principles worthy of recognition. Kant constructs a deontological ethics rather than a teleological ethics to enable human persons not to achieve the higher ends of his life in society but to merely become autonomous; a self-legislator. The imperative of this autonomous law is "Act only according to that maxim by which you can at the same time will that it should become a universal law".

Discourse ethics is somehow a reconstruction of the relationship between morality and concrete ethical life through which communicative reason is placed as the postulate in justifying universal laws. The imperative of communicative reason is "Only those norms may claim to be valid that could meet with the consent of all affected in their role as participants in a practical discourse". From this perspective, we can see that Habermas retains the categorical imperative to some extent while scaling it down to a rational procedure of universalization of validity claims.[18] Habermas demonstrates in discourse ethics the continuity of rational accounts of justification of laws in society and shows that deliberative democracy can be more reliable to universalize validity of laws through practical discourse rather than the liberal and republican democracies that claim universal laws in terms of practical reason.

3. DISCOURSE ETHICS AND LEGAL DISCOURSE

As a post-conventional ethics, discourse ethics can be applied as legal discourse to enhance modern constitutional systems. Legal discourse

is the specific application of discourse ethics concerning validity claims of law. In this regard, we have to discuss discourse ethics as both justification and application of justified norms and apply it into legal discourse of justification and application of legitimized laws.

3.1. Justification and Application of Norms

Moral and ethical discourses separate justification of norms from their applications. Both Kant and Hegel deal with this dichotomy between justification and application of norms. Kant emphasizes the justification of norms beyond its application or its relation to the concrete life. Kant places justified judgments of moral norms in the realm of intelligible world comprising duty and free will and this intelligible world radically separated from the phenomenal world. The justified moral norms are monological in the sense that they are the results of individual reflections which are prior understanding among a plurality of empirical egos. Justified norms are facts of pure reason and thus the "ought" of moral norms is a matter a priori. By contrast, Hegel develops an ethics of recognition and thus emphasizes the application of justified norms in the realm of concrete life comprising inclinations, subjective motives, political and social institutions. Justified norms become abstract universalism of the "ought" if they are not made in the concrete life recognizing the plurality of ethical life.

Discourse ethics is distinguished from Kant's formalist ethics and Hegel's substantive ethical life. Discourse ethics comprises justification and its application and treat them as reciprocally presupposing each other. The issue is not whether justified norms must have the grammatical form of universal sentences or whether one can will that a contested norm gains binding force under given conditions. The content of discourse ethics is both justification and application of justified norms. This means that moral principles are generated not by philosophers but by actors in a practical discourse. The conflicts of action that come to be morally judged and consensually resolved grow out of everyday life. Actors as participants find the conflicts that need resolution through argumentation that actors themselves are considered the testers of justified norms that have to be applied. Justified norms are validity claims that are rationally moti-

vated and redeemed conflicting normative claims on the basis of the better argument that all actors as participants can agree upon. In discourse ethics, justified norms are not the results of a monological approach which assumes a prior understanding of a subjective consciousness but the results of intersubjectively mounted public discourse. Discourse ethics improves Kant's formalist ethics and Hegel's substantive ethics through which the principle (U) is derived from the universal presupposition of argumentation.[19] Justification and application of justified norms is Habermas's synthesis of Kant's formalist ethics and Hegel's substantive ethics. From this perspective, Habermas develops his theory of legal discourse from discourse ethics that is rooted in the life-world.

3.2. Justification and Application of Legal Norms

Legal discourse is strongly related to but distinguished from legal procedure. Legal discourse constitutes an argumentative procedure to determine how law should be justified or made to embody the interests of its subjects. Although justification of legal norms refers to law, legal discourse is extrajudicial. It means legal discourse takes place in the extended life-world, the public sphere. As the specific expression of communicative action, legal discourse entails deliberation through which validity claims of law are formulated to rationally motivate and redeem normative claims in lawmaking. Legal discourse does not aim to produce legal norms but to influence positive lawmaking processes.[20]

Legal discourse is distinguished from moral and ethical discourses. Moral discourse aims to formulate justification of moral norms while ethical discourse aims to formulate mutual recognition. Legal discourse as the specific application of discourse ethics aims to provide validity claims of law through a procedure of argumentation. Moral justification and ethical recognition are normative claims and thus cannot be claimed valid norms to ground positive laws. Legal discourse avoids moralistic interpretations of the law from the perspective of moralist and ethical justifications.

Habermas does not deny moral and ethical claims through which interpersonal relationships can be legitimately ordered and actions coordinated but these are no longer adequate in contemporary societies for

seeking universal laws. Western traditions of liberal and republican constitutional systems are based on cultural knowledge in which universal laws are legitimized by individual rights and political institutions. In contemporary societies, universal laws must be determined through a deliberative process that provides validity claims to make laws have binding force. In the perspective of deliberative democracy, legal discourse is understood as deliberative democratic procedure through which justification and application are needed in raising validity claims of legal norms.

Justificatory discourse serves as a theoretic justification of norms to be applied in lawmaking. A theoretic justification of legal norms is understood as a discussion through which validity claims of legal norms lead to rational outcomes in lawmaking. Validity claims of legal norms are realized by political legislature in legislation and the judiciary in adjudication can be seen if they take into consideration that the addressees must be treated as free and equal members of a legal community.[21] The discourse of application refers to the criteria of validity claim to determine law enforcement. If legal norms represent the reasonable expectations of members of the legal community then laws are respected and as a result the deviant behavior can be avoided.[22] In legal discourse, both legal authorities and citizens are involved in the process of defining the criteria for judging whether the justification and application of law by legal authorities is lawful or unlawful.

Although Habermas tries to apply discourse ethics in lawmaking, there is still a gap between legal discourse and legal procedure in terms of the domains and social actors. The theory of legal discourse aims to extend the life-world to include political public sphere in which laws are based on validity claims formulated through public discourses. Legal discourse and legal institutionalization presupposes each other in terms of democratic lawmaking. Legal discourse provides validity claims through rational procedures to redeem a rationally unmotivated termination of argumentation in legal institutionalization. Legal discourse secures both freedom in the choice of topics and inclusion of the best information and reason through universal and equal access to argumentation to exclude every kind of coercion other than that of the better argument, so that all motives except that of the cooperative search for truth are neutralized.[23]

We can conclude that legal discourse and legal institutionalization

presuppose pragmatic reasons. These explain that legal institutionalization cannot be understood without legal discourse unless legal institutionalization arises from the real needs of society. If legal institutionalization will effectively respond to the needs of society, it must take universal presuppositions of the pragmatic, the ethical, and the moral into account. If so, then the legislative cannot but includes legal discourse as well as employment of practical reason to provide validity claims that legitimize legal norms. The openness of legal institutionalization to include diverse perspectives also shows that the rightness of legal decisions is ultimately measured by how well the legislative decision process satisfies the communicative conditions of argumentation. This is clear to us that Habermas's model of legal discourse in legislative process is a specific application of discourse ethics.[24] This application of discourse ethics in the legislative process is responded by objections in terms of legal theorists. First, the specific constraints in the forensic action of parties in court seemingly prohibit one from using the standards of legal discourse to assess courtroom proceedings in any way. The parties are not committed to the cooperative search for truth, and thus can pursue their interests in the favorable outcome by advancing arguments that are likely to merit consensus. Second, the indeterminacy of legal discourse poses a problem because the presuppositions and procedures required in any proper process of argumentation are not selective enough to necessitate a single right decision. Third, it is clear that discursively grounded legal decisions cannot be "right" in the same sense as valid moral judgment. The rationality of legal discourse thus is that it is determined by statute and is relative to the rationality of legislation. Fourth, and finally, there is a distinction within moral-practical discourse between justification and application and legal discourse as a special case of moral discourses of application. This relieves legal discourse from the problem of justification and makes its presupposed validity of norms passed by political legislature.

Habermas's responses to the objections of legal discourse remain as a discourse theory of morality. His aim is to provide validity claims for legislative processes and not to enlist objective rules of conduct. First, he says that each participant participates in a trial, regardless of his or her motives, and contributes to a discourse that, from the judge's perspective, facilitates the search for an impartial judgment. This perspective alone,

however, is constitutive for grounding the decision.[25] Second, Habermas contends that legal discourse is free and open to all so that every participant can freely speak out their concerns and confront others' perspectives on how to arrive at a common definition of a problem. Thus, in contrast to mere imperatives, legal discourse carries an internal force, which is motivating power that is independent from both external threats "brought about by the absence of discourse" and the will of a participant that dominates the discourse. It is not set to justify presupposed norms as mere imperatives. Unlike moral discourse, legal discourse is held to test, based on competing arguments, why norms can be accepted as universalized moral principles. Thus, it does not simply constitute procedural principles and maxims of interpretation which have been generated from actual practice and systematized in textbooks in order to specify the universal requirements for moral-practical discourses in view of their connection with the existing law. Third, Habermas notes that the validity claims in legal discourse can be understood as moral principles that are based on better insights achieved through discourse. Here, the moral principles are not inferior to the statute but are qualitatively different from it and thus may help in reforming the latter.[24] Fourth, and finally, he maintains that legal discourse cannot be identical with morally legislative reason because, given the operation of various forms of perspectives, there will be an inevitable difficulty in having validity claims of norms. This is precisely why legislation cannot rely on moral reason but on communicative reason.

Legal discourse does not intend to ensure the statutes but to justify validity claims whether statutes are generated as binding norms through argumentation among citizens and legal authorities. The universal presuppositions of validity claim are conditioned by a political liberal culture.

4. DISCOURSE ETHICS AND THE POLITICAL LIBERAL CULTURE

Discourse ethics as expressed in legal discourse of justification and application allows for the operation of political liberal culture in a

modern pluralistic society. And it is founded upon the communicative structure of the life-world. The political liberal culture refers to the communicative action which is always-already operating in the life-world. When the life-world is controlled by the State and the capitalist economy in decision-making processes, discourse ethics can be used to re-establish the communicative action for a political liberal culture to work in modern societies. This re-establishment requires citizens and legal authorities to engage in communicative processes that generate public opinion and will formation, thereby ensuring maximum impact on the policymaking process.

The political liberal culture becomes the locus of discourse ethics where solutions to social problems are rationally discussed with due consideration for the plurality of interests. To speak of the political liberal culture is then to recognize the interrelatedness of freedom and law through discourse ethics. Law refers to duty–"What should I do?–while freedom refers to validity claims of duty–"Why should I obey?" The interrelatedness of law and freedom thus keeps social interactions grounded in the validity norms of action. It makes participative decision-making possible, since everyone is required to take part in validating what one ought to do. The quest for truth starts with the assumption that all are equal, therefore, no one has the monopoly of truth.

The force of influence through discourse can generate mutual trust, which is essential in the process of public opinion and will formation. In effect, solid social groups are formed, which if properly mobilized, can wield a strong social influence on parliamentary bodies, administrative agencies, and courts to fulfill their respective responsibilities accordingly. Political influence, if supported by public opinion, can turn into social power generated by the communicative exchanges among citizens, the State, and the economy. Social power in the public sphere is the expression of a higher-level of intersubjectivity among citizens. It gains its strength from the process of arriving at a mutual understanding of what is equally good for all.

According to Habermas, we call a culture politically "liberal" the extent that culture operates through relations of reciprocal recognition-including among members of different identity-groups. These relations of recognition, reaching beyond subcultural boundaries, are promoted only

indirectly, and not directly, by means of politics and law.[27]

Liberalism and republicanism fail to establish a universal concept of law through discourse engaging citizens and legal authorities because they base their validity claims of law merely on moral and ethical principles. Given their emphasis on moral and ethical principles of legitimacy, liberalism and republicanism fail to achieve democratic legitimacy where decision-making is validated by mutual agreement held in an actual discourse. A political liberal culture is therefore institutionalized in democratic constitutional States that guarantee a wide range of political rights and that establish a judicial system to mediate claims between various individuals or groups or between individuals and groups and the State. The political liberal culture presupposes basic law and principles of discourse ethics.

Basic law or the Constitution is required to ensure basic rights, first of which is the right to the greatest possible measure of equal individual liberties. This pertains particularly to the right of citizens to become members of voluntary associations of consociates under law, and the right of citizens to individual legal protection. These rights are also referred to as the private autonomy of legal subjects in the sense that they reciprocally recognize each other's rights before the law. The second involves basic rights to equal opportunities to participate in the process of opinion and will formation, in which citizens exercise their political autonomy and through which they generate legitimate law. These embody the rights of individual liberties and political autonomy which enable citizens to expand their various rights and duties in accordance with constitutional and political development. And the third constitutes basic rights to living conditions that have social, technological, and ecological safeguards. According to Habermas, these basic rights are absolutely justified categories that any constitutional liberal political culture should maintain as civic rights.[28] (BFN, 122-23).

The principle of discourse ethics can assume the shape of the principle of democracy through the medium of law only insofar as the discourse principle and the legal medium interpenetrate and develop into a system of rights that brings private and public autonomy into a relation of mutual presupposition. By securing both private and public autonomy in a balanced manner, the system of rights neutralizes the tension between

facticity and validity, which are understood as the positivity and the legitimacy of enacted laws.[29]

The significance of law in a liberal political culture lies in the provision of constitutional guarantees for ordinary citizens to participate in democratic lawmaking processes. This entails equalizing educational opportunities for citizens from all walks of life to respond to the condition of the political public sphere.[30]

By "law", Habermas means modern enacted law which claims to be legitimate in terms of its possible justification as well as binding in its interpretation and enforcement. Unlike liberal and republican laws that are based on post-conventional morality, modern positive law does not just represent a type of cultural knowledge but also constitutes an important core of institutional orders. Law embodies two things, a system of knowledge and a system of action. It is a text that contains legal propositions and interpretations and at the same time a complex of normatively regulated actions.[31] With this concept of law, Habermas supposes a condition of liberal political culture where this type of law can be developed through discourse among legal authorities and ordinary citizens. He believes that only in a liberal political culture discourse can modern positive law be enacted as formal law.

When positive law is formulated as formal law, the system of rights explicates the conditions under which people can unite in an association of free and equal citizens. Correspondingly, the liberal political culture expresses how people intuitively understand the system of rights in their specific historical life contexts.[32] This concept of law is distinguished from the system theory of law, which divides politics and law into different closed systems and analyzes the political process essentially from the perspective of a self-programming administration. It promotes what the system theories lack, and that is the mutual translation of the validity claims of law through discourse between legal authorities and ordinary citizens.[33] (BFN, 335).

Patterns of the liberal political culture consist of resonant and autonomous public spheres anchored in the voluntary associations of citizens. Here, citizens are organized, mobilized, and empowered protecting them from being manipulated by political and economic power. As members of voluntary associations, they seek to (1) prevent the formation of

indoctrinated masses who are vulnerable to the manipulation of populist leaders, (2) pull together the scattered critical potentials of a public through the mass media that can have a political influence on institutionalized opinion and will formation, and (3) pursue political movements, such as civil disobedience that aims to strengthen constitutionally regulated ways of circulating power in the political system.[34] Once people develop solidarity, they become the social power vis-a-vis political and economic power in decision-making processes.

The concept of deliberative democracy is practiced through organized citizens as they voice their concerns and promote the general interest in lawmaking. They shape the public opinion through public discourse, which functions as the sounding board of people's complaints to rethink and change irrelevant laws and make them responsive to the realities of the times.

The more the people are organized, the more social movements can be formed and strengthened to change the mechanism of oppression in authoritarian regimes. Examples of these are the social movements that ended the dictatorships of Mr. Marcos in the Philippines and of Mr. Soeharto in Indonesia.

Under the authoritarian rule of Mr. Marcos, the role of parliament was abolished and the essence of public hearing to the lawmaking process was negated.[35] In instances where some bills were drafted to be enacted into laws, the said laws only served to mediate the imposition of the authoritarian will of those in power. For instance, Mr. Marcos declared Martial Law to justify the enforcement of his presidential decrees. The parliament and the judiciary were structurally and operationally made subservient to the president, making him govern without any accountability or checks and balances. The authoritarian ruler's imposition of Martial Law forced people into subservience and involuntary acceptance of the ideology of power that defined the imperatives of national development and national survival. This was perceived as a national crisis that propelled the first People Power Revolution (called EDSA I), leading to the downfall of Mr. Marcos. In Indonesia, the people for several years tolerated restrictive lawmaking practices under the authoritarian rule of Soeharto. The judiciary then did not function as an objective and independent judicial body. Soetjipto[36] emphasized the gap between law and

democracy, noting the power abuses of judges. The political regime's control over the judicial system was apparent in the failure of the Supreme Court to impose its will on the presidency. Soeharto even admitted having interfered in the actions of the courts in order to protect himself and his family from conviction for crimes of monopolizing several large business conglomerates in the country. Soetjipto concluded that giving the president the absolute power to rule as the head of the nation-state was a gross violation of the Basic Law of Indonesia.

Not surprisingly, these practices of power abuse and dictatorship bring out the skeptic in both social scientists and legal scholars. As empiricists, the former teach us about powerless ideas that always look foolish in the face of political interests. As pragmatists, the latter teach us about the hardened conflicts that can be resolved only with the support of a substantial state power. Habermas promoted the discourse-theoretic approach involving a procedural rationality that shifts the conditions of lawmaking from a one-sided affair of the State to institutionalized processes of deliberation involving all societal elements as legal co-authors.[37] Through discourse, he says, rational political opinion and will formation can be achieved. As mediating agents of citizens, voluntary associations form free associations as a counterpart to the State and the economy in seeking laws that are equally beneficial to all.

5. LIMITATIONS OF DISCOURSE ETHICS

Albrecht Wellmer raised a crucial problem of the relationship between justification and application or the relationship between rationality and morality whether there is not a sufficient reason to determine what ought one to do merely based on a single claim of rationality generated in discourse. For Wellmer, an ambiguous solution will arise from a decision of moral problems based on the rule of universal presupposition (U) because we are not sure about coercions and side effects of applying the rationality of a generalized behavioral expectations to do justice to all involved in a given situation.

Habermas admits that discourse ethics as a proceduralist argument may end up with a utopian character concerning question of those

who cannot speak and act. To this question Habermas still makes sense of discourse ethics that in a complexity of moral problems in which we live. Firstly we need to clarify what is the real problem through testing arguments by which we have good reasons for action planning. Secondly, there is a misunderstanding of discourse ethics as a formalist ethics parallel with Kant's categorical imperative that separates justification of norms from its application. Discourse ethics has learned from this mistake and makes a careful distinction between validity–or justice–of norms and correctness of singular judgments that prescribe some particular action on the basis of valid norm. Discourse ethics analytically admits that the right thing to do in the given circumstances cannot be decided by a single act of justification --or within the boundaries of a single kind of argumentation–calls for a two–stage process of argument consisting of justification followed by application of norms.[38] This can be of greater help in facing the problem and thereby to refute skepticism.

What discourse ethics cannot do is to make any kind of substantive contribution because it is not a substantive ethics. It deals with grounding decision of conflicting moral claims on validity claim raised through argumentation. Discourse ethics shows that a consensus can be rationally acceptable to conflicting parties on the basis of validity claims.

In terms of legal procedure, discourse ethics cannot be seen as a procedure of establishing the rules of law. Legal discourse as a specific application of discourse ethics remains as seeking validity claims to motivate lawmaking processes to embody the general interests of all in positive laws. One can fail to apply legal discourse as legal procedure in the legislative processes. Legal discourse is an expression of participating citizens in influencing political institutions in decision-making processes. This is possible if constitutional system provides legal guarantees for people participation through freedom of expression, assembly, petition, and criminal procedure that listens before it condemns. Legal discourse presupposes a liberal political culture.

Endnotes

[1]Jürgen Habermas, *Justification and Application: Remarks on Discourse*

Ethics. Translated by Ciaran Cronin. Cambridge: The MIT Press, 1993, p.vii.

[2]Jürgen Habermas, *Moral Consciousness and Communicative Action.* Translated by Christian Lenhardt and Shierry Weber Nicholsen. Cambridge, Mass: MIT Press, 1991, p.43ff.

[3]Ibid., p.45ff.

[4]Ibid., p.56.

[5]Ibid., p.45.

[6]Ibid., p.51.

[7]Ibid., p.57.

[8]Ibid., p.65.

[9]Ibid., p.66.

[10]Jürgen Habermas, *Communication and the Evolution of Society.* Translated by Thomas McCarthy. Boston: Beacon Press, 1979, p.2.

[11]*Moral Consciousness and.*..Op.cit., p.88.

[12]Ibid., p.89.

[13]Ibid., p.68.

[14]Immanuel Kant, *Grounding for the Metaphysics of Morals,* trans. by James W. Elington (Cambridge: Hackett Publishing Company, 1981), p.43.

[15]Ibid., p.vii.

[16]Immanuel Kant, *Critique of Pure Reason* (Indianapolis: Hackett Publishing Co. Inc, 1996), 436, 436-40, 444-45, 449-50.

[17]*Moral Consciousness* and …Op. cit., pp.195-6.

[18]Ibid., p.196.

[19]Ibid., p.204.

[20]Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.* Translated by William Rehg. Cambridge: Polity Press, 1996, pp.178-9.

[21]Ibid., p.414.

[22]Ibid., p.116.

[23]Ibid., p.229.

[24]Ibid., p.230.

[25]Ibid., p.231.

[26]Ibid., p.232.

[27]*Critique of Pure*…Op.cit., p.15.

[28]*Between Facts* and…Op.cit., pp.122-3.

[29]Ibid., pp.128-9.

[30]Ibid., p.76.

[31]Ibid., p.79.

[32]Ibid., p.184.

[33]Ibid., p.335.

[34]Ibid., p.382.

[35]Jose J. Magadia, *State-Society Dynamics Policy Making in a Restored Democracy* (Quezon City: Ateneo de Manila University Press, 2003), p.26.

[36]Adi Andojo Soetjipto, "Legal Reform and Challenges in Indonesia" in Chris Manning and Peter van Diermen, eds. *Indonesia in Transition: Social Aspects of Reformasi and Crisis* (Singapore: Institute of Southeast Asian Studies, 2000), p.270.

[37]*Between Facts and…*Op.cit., pp.461-2.

[38]*Justification and…*Op.cit., pp.35-6.

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