

LAW IN HABERMAS'S THEORY OF COMMUNICATIVE ACTION*

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ABSTRACT

This paper outlines and reviews the legal theory of JÜRGEN HABERMAS in the context of HABERMAS's general social theory, known as the theory of communicative action. First explained are the central concepts of system in lifeworld around which HABERMAS has developed his theory of modern society. Subsequently attention is paid to the dual role of law as an institution and a medium in HABERMAS's theory, after which the latest developments of HABERMAS's legal theory are reviewed. Finally, the paper discussed the influence and criticisms of HABERMAS's perspective on law in the secondary literature.

Key words: Law; legal theory; communicative action; JÜRGEN HABERMAS; discourse theory.

Fecha de recepción: 14 de octubre de 2008
Fecha de aceptación: 17 de noviembre de 2008

* ADAPTED and modified from: DEFLEM, MATHIEU, "Introduction: Law in HABERMAS's Theory of Communicative Action". In: *Habermas, Modernity and Law*, edited by MATHIEU DEFLEM. London: Sage, 1996.

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EL DERECHO EN LA TEORÍA DE LA ACCIÓN COMUNICATIVA DE HABERMAS

RESUMEN

Este artículo perfila y revisa la teoría jurídica de JÜRGEN HABERMAS en el contexto de su teoría social general, conocida como la teoría de la acción comunicativa. En primer lugar, se explicarán los conceptos centrales de sistema en el mundo de la vida alrededor del cual HABERMAS ha desarrollado su teoría de sociedad moderna. Posteriormente, se prestará atención al papel dual de lo jurídico en la teoría de HABERMAS, como una institución y como un medio, después de que se repasen los últimos desarrollos de la teoría del derecho del autor alemán. Finalmente, el artículo discutirá la influencia y las críticas de la perspectiva jurídica de HABERMAS en la literatura secundaria.

Palabras clave: Derecho, teoría jurídica, acción comunicativa, JÜRGEN HABERMAS, teoría del discurso.

INTRODUCTION

The writings of JÜRGEN HABERMAS are widely acclaimed among the major contributions to the theoretical understanding of contemporary society, and specifically his legal theory has since recent years become a topic of growing scholarly attention. However, to date, the debate on HABERMAS and law has largely been confined to a predominantly European audience of specialists in the tradition of Critical Theory, and most discussions have taken place in moral and legal philosophy rather than in empirically oriented studies of law¹. Given the growing

1 This is not to suggest that HABERMAS's theories have not received attention in the field of legal studies outside Europe's borders. For general introductions and critical reviews of HABERMAS's approach to law, for instance, see: BRAND (BRAND, ARIE. 'Ethical Rationalization and "Juridification": HABERMAS' Critical Legal Theory', *Australian Journal of Law and Society* 4, 1987, pp. 103-27); EDER (EDER, KLAUS. 'Critique of HABERMAS' Contribution to the Sociology of Law', *Law and Society Review* 22, 1988; pp. 931-44); HAARSCHER (HAARSCHER, GUY. 'PERELMAN and HABERMAS', *Law and Philosophy* 5, 1986; pp. 331-342); MURPHY (MURPHY, W. T. 'The HABERMAS Effect: Critical Theory and Academic Law', *Current Legal Problems* 42, 1989; pp. 135-165); PREUSS (PREUSS, ULRICH K. 'Rationality Potentials of Law: Allocative, Distributive and Communicative Rationality', In: C. JOERGES and D. M. TRUBEK (eds). *Critical Legal Thought: An American-German Debate*. Baden-Baden: Nomos, 1989); RAES (RAES, KOEN. 'Legalisation, Communication and Strategy: A Critique of HABERMAS' Approach to Law', *Journal of Law and Society* 13, 1986; pp. 183-206); SCHEUERMAN (SCHEUERMAN, BILL. 'NEUMANN v. HABERMAS: The Frankfurt School and the Case of the Rule of Law', *Praxis International* 13, 1993; pp. 50-67); VAN DER

concern in the field of legal studies to interconnect broad philosophical and theoretical perspectives with empirically based research on specific social issues—an aspiration which is in fact central to HABERMAS'S work—the contributions in this paper hope to fulfill a twofold purpose.

I will in this paper briefly outline the main tenets of HABERMAS'S theory of communicative action. I limit this presentation of HABERMAS'S approach to law and society to the formulation in *The Theory of Communicative Action* and its developments until the publication of *Faktizität und Geltung*.

With his two-volume work *The Theory of Communicative Action*², HABERMAS has undoubtedly formulated an innovative and influential theory of society, but the book (as are most of HABERMAS'S writings) is by all standards not easy to read. In particular, the structure of argumentation, which seeks to develop a social theory on the basis of detailed, meta-theoretical discussions of a wide range of classical and contemporary social theories, may initially discourage potential readers from a thorough investigation of the work³. A brief presentation of HABERMAS'S general

BURG (VAN DER BURG, WIBREN. 'Jürgen Habermas on Law and Morality: Some Critical Comments', *Theory, Culture and Society* 7, 1990; pp. 105-111). HABERMAS'S theory has meanwhile also found its way into empirical research in the American law and society tradition, dealing with such diverse issues as feminist legal thought (COLE, DAVID. 'Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory', *Harvard Women's Law Journal* 8, 1985; pp. 59-91.), environmental law (NORTHEY, ROD. 'Conflicting Principles of Canadian Environmental Reform: TRUBEK and HABERMAS v. Law and Economics and the Law Reform Commission', *Dalhousie Law Journal* 11, 1988; pp. 639-662), legal interpretation (HOY, DAVID C. 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives', *Southern California Law Review* 58, 1985; pp. 135-176; MOOTZ, FRANCIS J. 'The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of GADAMER, HABERMAS, and RICOEUR', *Boston University Law Review* 68, 1988; pp. 523-617), professional roles in the legal community (DAN -COHEN, MEIR. 'Law, Community, and Communication', *Duke Law Journal* 6, 1989; pp. 1654-76), and analyses of legislation and constitutional regulations (FELDMAN, STEPHEN M. 'The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: MICHELMAN, HABERMAS, and Civic Republicanism', *Georgetown Law Journal* 81, 1993; pp. 2243-90; FELTS, ARTHUR A. and FIELDS, CHARLES B. 'Technical and Symbolic Reasoning: An Application of HABERMAS' Ideological Analysis to the Legal Arena', *Quarterly Journal of Ideology* 12, 1988; pp. 1-15; LEEDES, GARY C. 'The Discourse Ethics Alternative to RUST v. SULLIVAN', *University of Richmond Law Review* 26, 1991; pp. 87-143; SOLUM, LAWRENCE B. 'Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech', *Northwestern University Law Review* 83, 1989; pp. 54-135). On the influence of HABERMAS'S theory in Latin America, see: BOTERO, ANDRÉS. 'Aproximación al pensar filosófico de HABERMAS,' *Revista Holística Jurídica: Facultad de Derecho USB*. 2 (2003); pp. 7-36. Botero will soon publish another critical paper about HABERMAS'S influence in Latin America.

- 2 HABERMAS, JÜRGEN. *The Theory of Communicative Action, Volume 1, Reason and the Rationalization of Society*. Boston, MA: Beacon Press, 1984. HABERMAS, JÜRGEN. *The Theory of Communicative Action, Volume 2, System and Lifeworld: A Critique of Functionalist Reason*. Boston, MA: Beacon Press, 1987.
- 3 The encyclopedic nature and relative inaccessibility of HABERMAS'S work, however, have produced an enormous number of introductory essays and books intended to acquaint the readership with the basic elements of his thought. MCCARTHY'S critical summary of HABERMAS'S writings is in this regard still the

theoretical framework, therefore, may help to clarify his approach to law as well as some of the criticisms which have thus far been suggested in the literature.

I - THE THEORY OF COMMUNICATIVE ACTION: CONCEPTS AND THESES

HABERMAS's theory of communicative action fundamentally rests on a distinction between two concepts of rationality that shape knowledge to guide action⁴. First, cognitive-instrumental rationality conducts action that aims at the successful realization of privately defined goals. These action types are either instrumental, when they are directed at efficient interventions in a state of affairs in the world (e.g. through labor), or strategic, when they guide attempts to successfully influence the decisions of other actors (e.g. in relations of domination). Second, communicative rationality underlies action that is aimed at mutual understanding, conceived as a process of reaching agreement between speaking subjects to harmonize their interpretations of the world.

To avoid misunderstanding, it is important to note that HABERMAS's concept of communicative action does not assume that subjects can aim at mutual understanding only through speech-acts (i.e. language as it is used in interaction between at least two actors), or that agreement would, as an innocent prefiguration in thought, be the necessary outcome of all communicative processes. Several forms of action that are not linguistic (signs, symbols) can also be oriented to understanding, but only if they can be transferred into interactions mediated through language. Also, communicative actors' orientation to agreement does not exclude the possibility of dissent as the result of distorted or unresolved communication. HABERMAS maintains that it is only through language, under conditions of rational argumentation, that social actors can coordinate their actions in terms of an orientation to mutual understanding.

most valuable source, particularly to trace the foundations and intellectual developments of HABERMAS's earlier work (MCCARTHY, THOMAS. *The Critical Theory of JÜRGEN HABERMAS*. Cambridge, MA: MIT Press, 1978). For introductions to HABERMAS's more recent work, see BRAND (BRAND, ARIE. *The Force of Reason: An Introduction to HABERMAS' Theory of Communicative Action*. Sydney: ALLEN & UNWIN, 1990); HOLUB (HOLUB, ROBERT C. *Jürgen Habermas: Critic in the Public Sphere*. London: Routledge, 1991); INGRAM (INGRAM, DAVID. *HABERMAS and the Dialectic of Reason*. New Haven, CT: Yale University Press, 1987); RASMUSSEN (RASMUSSEN, DAVID M. *Reading HABERMAS*. Oxford: BASIL BLACKWELL, 1990); RODERICK (RODERICK, RICK. *HABERMAS and the Foundations of Critical Theory*. London: Macmillan, 1986).

4 HABERMAS, *The Theory...*, 1984, *Op. Cit.*, p. 8-22 and 168-185.

HABERMAS analyzes the conditions of rational argumentation in communicative action on the basis of a distinction between different validity claims that are implicitly or explicitly raised in speech-acts. He distinguishes the following validity claims: comprehensible and wellformed speech-acts make an objective claim to truth, a normative claim to rightness, and expressive and evaluative claims to authenticity and sincerity⁵. Different types of discourse serve to explicitly address these claims: theoretical discourse on truth; moral-practical discourse on normative rightness; and aesthetic and therapeutic critique on authenticity and sincerity⁶. On the basis of this theory of argumentation, HABERMAS develops the two-level approach of lifeworld and system.

The claims of communicative actions in everyday social life, HABERMAS argues, are often not questioned or criticized because they are raised within the contours of an undisputed, shared lifeworld⁷. The lifeworld offers the commonly accepted background knowledge within which action can be coordinated. Characteristic for the rationalization of occidental societies is that the lifeworld has differentiated along the lines of the validity claims of speech-acts. Thus, a differentiation into three performative attitudes in communicative action has been brought about: an objectivating attitude towards the outer world of events and circumstances, a normative attitude towards the social world of a community of people, and an expressive attitude towards the inner world of the subjectivity of the individual. HABERMAS's concept of the lifeworld is therefore not limited to the cultural tradition (the shared interpretations of the world) of a particular community. Next to providing a set of cultural values, the lifeworld also secures that social actors abide by the normative standards of their society (for the solidarity of social groupings), and that social actors are enabled to act as competent personalities in harmony with their social environment (identity formation).

Three structural components of the lifeworld correspond to these functions: culture, society and personality. At the level of culture, cultural reproduction relates to the transmission of interpretation schemes consensually shared by the members of a lifeworld. At the level of social interaction, social integration refers to the legitimate ordering of interpersonal relations through the coordination of actions via intersubjectively shared norms. Finally, at the level of personality, socialization processes seek to ensure that personalities with interactive capabilities are formed. Culture, society and personality are the structural components of the rationalized lifeworld. Thereby, the process of societal rationalization entails a differentiation of a once unified lifeworld into different structural domains and specialized social

5 Ibid., p. 319-328.

6 Ibid., p. 22-42.

7 HABERMAS, JÜRGEN. *The Theory...*, Volume 2, 1987, Op. Cit., pp. 119-152.

institutions. The lifeworld, then, has a twofold meaning: on the one hand, the horizon-forming contexts of culture, society and personality within which communicative action takes place, and, on the other hand, the resources of possibilities from which participants in communicative action can transmit and renew cultural knowledge, establish solidarity and build social identity.

HABERMAS's theory of social evolution takes an important turn when he argues that the action-oriented approach of the lifeworld cannot account for all the complexities of modern societies. The process of rationalization should be understood not only as a differentiation of the lifeworld as a symbolically reproduced communicative order, but also in terms of the 'material substratum' of society⁸. This twofold perspective indicates that societies have to secure the transmission of cultural values, legitimate norms and socialization processes, and, in addition, they also have to efficiently manipulate and control their environment in terms of successful interventions. HABERMAS therefore supplements the perspective of the lifeworld with a systems theory, specifically paying attention to the economic and the political system⁹.

These systems have in the course of history split off, or 'uncoupled', from the lifeworld to function independently, no longer on the basis of communicative action aimed at understanding, but in terms of the functionality of the steering of media, money and power. Actions coordinated through these steering media relieve communicative action from difficulties in reaching consensus in complex societies characterized by a range of action alternatives and, therefore, a constant threat of dissent. Actions coordinated by the steering media of money and power differ from communicative action in that they aim at the successful (cognitive-instrumental) organization of the production and exchange of goods on the basis of monetary profit (economy) and the formation of government to reach binding decisions in terms of bureaucratic efficiency (politics).

HABERMAS does not conceive the 'uncoupling' of system and lifeworld as problematic in itself. The coordination of action in systems can best be secured by steering media because they manage to relieve communicative actions from the possibility of dissent, and they can do so with a high level of productivity and efficiency. However, systems also have the capacity to penetrate back into the lifeworld. Coordination mechanisms oriented to success thereby enter into the domains of the lifeworld (culture, society and personality) that should be secured through communicative action oriented to mutual understanding if they are to remain

8 Ibid., pp. 235-282.

9 Ibid., pp. 338-343.

free from disturbances and crisis manifestations¹⁰. This process HABERMAS refers to as the colonization of the lifeworld: the communicative potentials aimed at understanding in the lifeworld are eroded in terms of the systemic imperatives of monetary and bureaucratic systems interventions.

II - LIFEWORLD, SYSTEM, AND THE RATIONALIZATION OF LAW

In *The Theory of Communicative Action*, HABERMAS develops an approach to law based on a discussion of two important developments in the process of societal rationalization. First, the separation of law from morality is crucial for the differentiation of system and lifeworld, and, second, legal processes help explain current manifestations of the systems colonization of the lifeworld in western societies.

1. Law and the differentiation of system and lifeworld

Habermas attributes to law the important role of normatively, anchoring' or institutionalizing the independent functioning of the steering media of money and power. The legal norming of money and power is central in bringing about the uncoupling of the economic and political systems from the lifeworld¹¹. Historically, the differentiation of the political system first occurred when political authority crystallized around judicial positions holding the means of force. Further processes of separation between political offices increased the complexity of political organization which fully matured in the modern state. In the framework of societies organized around the state, markets arose that were steered by the medium of money. Relieved from the indeterminacy of communicative action, the political system of the modern state set collective goals reached through binding decisions in terms of power, while the economy secured the production and distribution of goods in terms of monetary productivity. These systems are 'formally organized domains of action ... that—in the final analysis—are no longer integrated through the mechanism of mutual understanding, that sheer off from lifeworld contexts and congeal into a kind of norm-free sociality'¹².

To bring about this uncoupling of system and lifeworld, HABERMAS argues, law has to institutionalize the independence of economy and state from lifeworld

10 Ibid., pp. 318-331.

11 Ibid., pp. 164-97 and 264-282.

12 Ibid., p. 307.

structures¹³. Law is the institution that establishes the normative ‘anchoring’ of the steering media of money and power in the lifeworld. In other words, systems can operate independently from the lifeworld only when they are recoupled to the lifeworld through the legalization of their respective media. In the case of the money medium, exchange relations have to be regulated in property and contract laws, while the power medium of the political system needs to be normatively anchored by institutionalizing the organization of official positions in bureaucracies. Therefore, the differentiation of systems requires a sufficient level of rationalization of the lifeworld through a separation of law and morality, and of private and public law. The separation of law and morality is achieved at the post-conventional level of social evolution, i.e. when legal and moral representations are based on abstract principles that can be criticized, rather than on specific values that are directly tied up to concrete ethical traditions. Morality then becomes a personal matter of concrete but subjective moral-practical concerns, while law, as a social institution with external force, materializes abstract normative standards for the whole of society. The separation of private and public law corresponds to the independent functioning of the economy (e.g. contract law) and politics (e.g. tax law).

The underlying viewpoint of HABERMAS’s discussion of law as the normative legalization of the independent functioning of systems is that law can formally be conceived as an institutionalization of practical discourse on social norms¹⁴. HABERMAS acknowledges (with WEBER) that modern law in western societies is positive (expressing the will of a sovereign lawgiver), legalistic (applying to deviations from norms) and formal (what is not legally forbidden is allowed). In this sense, modern law is positivized into a functional, technical system that seems to have suspended any need for moral deliberation. However (and contrary to WEBER’s view), HABERMAS argues that law at the post-conventional level of social evolution is still based on moral principles which remain open to discussion: ‘The particular accomplishment of the positivization of the legal order consists in *displacing* problems of justification, that is, in relieving the technical administration of the law of such problems over broad expanses—but not in doing away with them’¹⁵. Modern law as a whole remains in need of justification, and can be criticized, precisely in order to unveil its systemic nature, under the abstract conditions of universalistic validity claims on normative rightness.

13 Ibid., p. 164-179.

14 HABERMAS, *The Theory...*, 1984, *Op. Cit.*, pp. 243-271.

15 Ibid., p. 261.

2. Law, juridification and the colonization of the lifeworld

The second important role HABERMAS assigns to law from the perspective of the theory of communicative action concerns the thesis of the internal colonization of the lifeworld¹⁶. HABERMAS develops this thesis in a discussion of the processes of juridification in the course of (European) history. The concept of juridification generally refers to an increase in formal law in the following ways: the expansion of positive law, i.e. more social relations become legally regulated; and the densification of law, i.e. legal regulations become more detailed. Habermas identifies four waves of juridification in the specific context of European welfare states.

The first wave of juridification took place during the formation of the absolutist bourgeois state in Europe. The sovereign's monopoly over force, and the contractual rights and obligations of private persons, were regulated to legitimize the coexistence of a strong monarchical state and a market of free enterprise. Second, the bourgeois constitutional state of the 19th century gradually regulated individual rights against the political authority of the monarch: life, liberty and property of private subjects were constitutionally guaranteed. Next, with the creation of the democratic constitutional state in the wake of the French Revolution, citizens' social rights to participate in the formation of the political order were regulated to democratize the power of the state. Finally, with the rise of the social welfare state of the 20th century, the economic system of capitalism was for the first time bridled through legislation securing individual freedoms and social rights over and against the imperatives of the free market.

The three last juridification tendencies, HABERMAS argues, indicate how lifeworld demands attempt to resist the autonomous workings of state and economy. This is achieved first by claiming individual rights against the sovereign, then by democratizing the political order, and finally by guaranteeing freedoms and rights against the economic system. HABERMAS claims that the present form of juridification in welfare states is nevertheless markedly ambivalent because each freedom guaranteed at once means a freedom taken away. HABERMAS discusses four central problems of social-welfare laws that explain this ambivalence: (1) the formal restructuring of legal interventions in the lifeworld entails an *individualization* of legal claims; (2) the conditions under which social laws apply are *formally* specified; (3) legal entitlements relate to social problems but are *bureaucratically* implemented through centralized and computerized impersonal organizations; and (4) social-welfare claims are often settled in the form of *monetary* compensations (the consumerist redefinition). The demands of the lifeworld, then, are thereby

16 HABERMAS, *The Theory...*, 1987, Op. Cit.,pp. 356-373.

transformed into imperatives of bureaucratic and monetary organizations, so that law comes to intervene in a systemic way into the social relations of everyday life. When legal regulations are observed to conform to the imperatives of state and economy, the lifeworld is also colonized, internally, by the law as medium.

HABERMAS claims that the law as medium remains bound up to the law as the institutionalized domain of practical discourse. The law as medium applies to the legal organization of economy and state, as well as to the interventions of welfare policy regulations in the informal structures of the lifeworld. As instances of the latter case, HABERMAS mentions school and family laws that manage to convert contexts of social integration over to the medium of law in terms of bureaucratic and monetary controls. These laws do not need any substantive justification but are simply a matter of functional procedure. Law as an institution, on the other hand, retains an intimate connection with morality. Legal institutions, such as constitutional and criminal law, refer to regulations that have to be normatively evaluated, and that remain in need of justification in terms of moral-practical discourse.

III - SOME PROBLEMS AND PROSPECTS OF HABERMAS'S LEGAL THEORY

HABERMAS's observations on law have inspired theory and research on law and legal processes, leading to some interesting insights on the theoretical and empirical strengths and limitations of HABERMAS's approach. I will briefly review the main issues that these critical discussions and applications have dealt with, and specifically address some of the topics that are debated in this paper.

The theme which has inspired most debate in relation to HABERMAS's conception of law is his formulation of the ethics of discourse¹⁷. With this moral-philosophical proposition, HABERMAS has explicated how the procedural conception of morality

17 The ethics of discourse first elaborated by HABERMAS (HABERMAS, JÜRGEN. *Moral Consciousness and Communicative Action*. Cambridge, MA: MIT Press, 1990. pp. 43-115) has recently been clarified in relation to its critics (HABERMAS, Jürgen. *Justification and Application: Remarks on Discourse Ethics*. Cambridge, MA: MIT Press, 1993). For helpful summary statements of HABERMAS's moral philosophy, see FERRARA (FERRARA, ALESSANDRO. 'A Critique of HABERMAS' Diskursethik', *Telos* 64, 1986; pp. 45-74); HELLER (HELLER, AGNES. 'The Discourse Ethics of HABERMAS: Critique and Appraisal', *Thesis Eleven* 10/11, 1984-5; p. 5-17); RASMUSSEN (RASMUSSEN, *Reading HABERMAS, Op. Cit.*, pp. 56-74); TUORI (TUORI, KAARLO. 'Discourse Ethics and the Legitimacy of Law', *Ratio Juris* 2, 1989; pp. 125-43). For discussions on the value and limitations of Habermas's proposals, see the commentaries in BENHABIB and DALLMAYR (BENHABIB, SEYLA and DALLMAYR, FRED (eds.). *The Communicative Ethics Controversy*. Cambridge, MA: MIT Press, 1990); KELLY (KELLY, MICHAEL (ed.). *Hermeneutics and Critical Theory in Ethics and Politics*. Cambridge, MA: MIT Press, 1990); RASMUSSEN (RASMUSSEN, DAVID M. (ed.) *Universalism vs. Communitarianism: Contemporary Debates in Ethics*. Cambridge, MA: MIT Press, 1990).

can be conceived. In *The Theory of Communicative Action*, HABERMAS argues that modern law, rather than having rationalized into a completely functional entity, remains in need of moral justification in terms of a practical discourse on the rightness of norms. The question, then, is how this discourse can be conceived to assure rational argumentation? HABERMAS argues that from a post-metaphysical perspective, philosophy can no longer pretend to offer undisputed, rationally justified, right moral norms (as the substantive foundation of legal norms). Rather, philosophical investigations can at best outline the rational conditions of the procedure under which norms can, and should, be grounded by people in the context of their lifeworlds. The principle of the ethics of discourse therefore states: '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'¹⁸. While HABERMAS realizes that any such discourse on norms can only unfold within the boundaries of specific ethical lifeworlds, he nevertheless maintains that the suggested principle is strictly procedural and in this sense universally applicable.

Discussions on HABERMAS's ethics of discourse have mostly concerned its procedural status, rather than its association with law. Some authors, for instance, have argued that HABERMAS's moral philosophy does in fact contain substantive values¹⁹. Notions of democracy, autonomy and equality are taken up in HABERMAS's theory, but only implicitly, which may have led him to underestimate the possibly distorting influence of concrete lifeworlds in which practical discourse can take place. On the other hand, it has also been suggested that HABERMAS does not develop a true moral theory, and that his formalistic proposition is normatively 'empty'²⁰.

18 HABERMAS, *Moral Consciousness...*, *Op. Cit.*, p. 66.

19 The critique that HABERMAS's ethics of discourse does contain substantive normative propositions, despite its strictly procedural aspirations, has been suggested by BENHABIB (BENHABIB, SEYLA. 'In the Shadow of ARISTOTLE and HEGEL: Communicative Ethics and Current Controversies in Practical Philosophy', in M. KELLY (ed.) *Hermeneutics and Critical Theory in Ethics and Politics*. Cambridge, MA: MIT Press, 1990); KELLY (KELLY, MICHAEL. 'MacIntyre, HABERMAS and Philosophical Ethics', In: M. KELLY (ed.) *Hermeneutics and Critical Theory in Ethics and Politics*. Cambridge, MA: MIT Press, 1990); TUORI (TUORI, Discourse Ethics..., *Op. Cit.*, pp. 125-43).

20 The indecisively formalistic nature of, and the difficulties in applying, HABERMAS's moral philosophy are discussed by DÖBERT (DÖBERT, RAINER. 'Against the Neglect of Content in the Moral Theories of KOHLBERG and HABERMAS', In: T. E. WREN (ed.). *The Moral Domain: Essays in the Ongoing Discussion between Philosophy and the Social Sciences*. Cambridge, MA: MIT Press, 1990); DWARS (DWARS, INGRID. 'Application Discourse and the Special Case-Thesis', *Ratio Juris* 5, 1992; pp. 67-78); GÜNTHER (GÜNTHER, KLAUS. 'A Normative Conception of Coherence for a Discursive Theory of Legal justification', *Ratio Juris* 2, 1989; pp. 155-166; GÜNTHER, KLAUS. 'Impartial Application of Moral and Legal Norms: A Contribution to Discourse Ethics', In: D. M. RASMUSSEN (ed.) *Universalism vs. Communitarianism: Contemporary Debates in Ethics*. Cambridge, MA: MIT Press, 1990); HELLER (HELLER, The Discourse..., *Op. Cit.*); PETTIT (PETTIT, PHILIP. 'Habermas on Truth and justice', In: G. H. R. PARKINSON (ed.). *Marx and Marxisms*. Cambridge: Cambridge University Press, 1982). The relevance of this issue for legal studies is well explored in the discussion between ALEXY (ALEXY, ROBERT. 'A Discourse-Theoretical Conception of Practical Reason', *Ratio Juris* 5, 1992; pp. 23 1-5 1; ALEXY, ROBERT. *Begriff und Geltung des Rechts*.

The ethics of discourse, it is argued, is an indecisive methodology that does not provide any substantive moral principles and fails to formulate the road to an ideal society. A meaningful application of the discourse principle can at best be achieved through implementing and investigating procedural requirements inasmuch as they fulfill the realization of substantive principles of human rights, solidarity, care, freedom, or justice.

The proposition that HABERMAS's procedural ethics of discourse should be expanded with substantive norms has also been taken up in some legal research inspired by the theory of communicative action. Notably the German legal theorist ROBERT ALEXY²¹ has applied Habermas's discourse theory to an analysis of law, and suggested that an application of the model of practical discourse to legal discourse is in any case contextualized by the concrete norms that are already present in any given legal structure²². Thus, law always constitutes a substantive ethics to which analyses in terms of the discourse model are subordinate. Legal research on the basis of the ethics of discourse, therefore, should take into account principles that are more fundamental than, and can serve as a standard to confront, normative claims in courts of law. This would permit the laying bare, and criticizing, of the underlying normative principles that guide legal processes of, for instance, constitutional law and legal procedure. Finally, in line with the critique of the indecisive nature of the ethics of discourse, it has been advanced that legal research in terms of HABERMAS's discourse ethics only makes sense if law is subjected to a critique in terms of procedural requirements inasmuch as they meet, or fall to meet, substantive normative principles. Particularly, human rights, far from being taken for granted, should be confronted with legal procedures.

The relevance of the procedural notion of morality has also been of concern in the debate between HABERMAS and the Critical Legal Studies (CLS) movement²³.

FREIBURG UND MÜNCHEN: ALBER, 1992; ALEXY, ROBERT. 'Justification and Application of Norms', *Ratio Juris* 6, 1993; pp. 157-170) and GÜNTHER (GÜNTHER, KLAUS. 'Critical Remarks on ROBERT ALEXY's "Special-Case Thesis"', *Ratio Juris* 6, 1993; pp. 143-156). For a discussion of the human rights perspective in relation to HABERMAS's legal theory, see MULLEN (MULLEN, T. 'Constitutional Protection of Human Rights', In: T. CAMPBELL, D. GOLDBERG, S. MCLEAN and T. MULLEN (eds.). *Human Rights: From Rhetoric to Reality*. Oxford: Basil Blackwell, 1986).

21 ALEXY, ROBERT. *A Theory of Legal Argumentation*. Oxford: Clarendon Press, 1989. ALEXY, ROBERT. 'On Necessary Relations Between Law and Morality', *Ratio Juris* 2, 1989; pp. 167-183. ALEXY, ROBERT. 'Problems of Discursive Rationality in Law', In: W. MAIHOFFER and G. SPRENGER (eds.). *Law and the States in Modern Times*. Stuttgart: FRANZ STEINER, 1990.

22 See, also: ALEXY, ROBERT. "Epilogo a la teoría de los derechos fundamentales". Trad. CARLOS BERNAL. *Revista española de derecho constitucional*, year 22, 66 (septiembre-diciembre de 2002): p. 13-64. BOTERO, ANDRÉS. 'Recepción crítica (y parcial) de la concepción sobre sistema jurídico y razón práctica de ROBERT ALEXY.' Conference in Buenos Aires University, March 31 2008; 24p. Unpublished text.

23 For introductions to the perspective of Critical Legal Studies, see, for instance, FITZPATRICK and HUNT (FITZPATRICK, PETER and HUNT, ALAN. *Critical Legal Studies*. Oxford: BASIL BLACKWELL, 1987); UNGER

While analyses from the CLS perspective share with Habermas the view that law and morality are closely related, CLS scholars have generally argued against the possibility of rationally reconstructing law's moral grounding in terms of a universal procedure of discourse. The moral justification of law is denied in favor of a demystification of legal morality and decision-making as an arbitrary 'patchwork quilt'. HABERMAS has responded to this position by arguing that, while CLS scholars perform a valuable task in criticizing the functions of law in terms of its own aspirations, they fail to offer any justification or rational basis for their criticism. They thereby confront the paradox of implicitly presupposing a rational standard to substantiate their own moral position, at the same time questioning the possibility of its existence in law²⁴.

The question of the moral foundations of law (or the extent of differentiation of law from morality) is also the central issue that sets HABERMAS's work most clearly against the legal theory of NIKLAS LUHMANN²⁵. LUHMANN suggests that societal

(UNGER, ROBERT M. *The Critical Legal Studies Movement*. Cambridge, MA: Harvard University Press, 1986). HABERMAS has occasionally commented upon the Critical Legal Studies approach to law (e.g. HABERMAS, JÜRGEN. 'Law and Morality', In: S. M. McMURRIN (ed.), *The Tanner Lectures on Human Values*, Volume 8. Salt Lake City: University of Utah Press, 1988; HABERMAS, JÜRGEN. *Faktizität und Geltung*. Frankfurt: Suhrkamp, 1992; s. 261 ff.), and several commentaries have centered on the relationship between HABERMAS's work and Critical Legal Studies (see BELLIOTTI, RAYMOND A. 'Radical Politics and Nonfoundational Morality', *International Philosophical Quarterly* 29, 1989; p. 33; Hoy, Interpreting the..., Op. Cit., pp. 135-176; HUSSON, CHRISTINE A. DESAN. 'Expanding the Legal Vocabulary: The Challenge Posed by the Deconstruction and Defense of Law', *Yale Law Journal* 95, 1986; pp. 969-991; INGRAM, DAVID. 'DWORKIN, HABERMAS, and the CLS Movement on Moral Criticism in Law', *Philosophy and Social Criticism* 16, 1990; p. 237-268; RASMUSSEN, DAVID M. 'Communication Theory and the Critique of the Law: HABERMAS and UNGER on the Law', *Praxis International* 8, 1988; pp. 155-170; and RASMUSSEN, *Reading HABERMAS*, Op. Cit.).

24 The underlying theme of HABERMAS's critique is the so-called 'performative contradiction' he argues Critical Legal Studies are subject to. Performative contradiction refers to the fact that the content of an argument contradicts inevitable assumptions of the act of argumentation itself (see HABERMAS, *Moral Consciousness...*, Op. Cit., pp. 80-85). HABERMAS has regularly employed an analogous mode of critique against deconstructionist and postmodern theories (see HABERMAS, JÜRGEN. *The Philosophical Discourse of Modernity: Twelve Lectures*. Cambridge: Polity Press, 1987), and raised similar arguments against the work of MICHEL FOUCAULT (Ibid., pp. 238-293; HABERMAS, JÜRGEN. *The New Conservatism: Cultural Criticism and the Historians' Debate*. Cambridge, MA: MIT Press, 1989. pp. 173-179; see the discussion in JAY, MARTIN. 'The Debate over Performative Contradiction', In: A. HORNETH, T. MCCARTHY, C. OFFE and A. WELLER (eds.). *Philosophical Interventions in the Unfinished Project of Enlightenment*. Cambridge, MA: MIT Press, 1992).

25 The theories of NIKLAS LUHMANN deserve a discussion beyond the scope of this introduction. For an elaboration of Luhmann's legal theory, see LUHMANN (LUHMANN, NIKLAS. *A Sociological Theory of Law*. London: ROUTLEDGE & KEGAN PAUL, 1985. LUHMANN, NIKLAS. 'Operational Closure and Structural Coupling: The Differentiation of the Legal System', *Cardozo Law Review* 13, 1992; pp. 1419-41). HABERMAS has criticized Luhmann's project from the standpoint of its systems-theoretical foundations (HABERMAS, *The Philosophical...*, Op. Cit., pp. 368-85) and its repercussions for the study of law (HABERMAS, Law and..., Op. Cit., pp. 251-60). The general contrasts between the theories of HABERMAS and LUHMANN are clarified in HOLUB (HOLUB, JÜRGEN HABERMAS..., Op. Cit., pp. 106-32); and their diverging approaches to law are discussed by EDER (EDER, Critique of..., Op. Cit., pp. 931-944); TEUBNER (TEUBNER, GÜNTHER. 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review* 17, 1983; pp. 239-

evolution has reached such a high level of differentiation in modern societies that law is an autopoietic system which no longer needs any justification in terms of normative points of view. The autopoietic perspective of law implies that the legal system is operationally closed so that it functions only in terms of its own binary code (lawful/unlawful) set in its own programs (laws). Other social systems, including morality, are in like manner closed, and while exchange of information between different systems is possible, the intransparency between systems prevents interference of any one system in the autonomous operation of another. HENCE LUHMANN argues that law cannot and does not need to be morally grounded to secure its internal functionality.

Obviously, Luhmann's perspective is in marked contrast to HABERMAS's conception of law, specifically on the question of the moral justification of law. On the basis of the two-level perspective of system and lifeworld, HABERMAS interprets processes of juridification as the ambiguous result of lifeworld resistances transformed in terms of the imperatives of the political and the economic system. Whereas monetary and bureaucratic interventions in law can be conceived in terms of purposive functionality, the lifeworld dimensions of law, HABERMAS maintains, should be analyzed from the perspective of communicative action aimed at mutual understanding. HABERMAS's identification of law as an institution, which is still in need of moral justification, and law as a medium, as a system detached from moral-practical concerns, precisely points out the central 'ambiguity in the rationalization of law'²⁶.

This debate raises a final issue pertinent to explore in relation to HABERMAS's legal theory, and to which his most recent works on law have paid much attention. It concerns the relationship between the functionality of law (as a medium) and its continued need for moral justification (as an institution). This problem stems from the fact that in *The Theory of Communicative Action*, HABERMAS attributed a crucial, yet somewhat ambivalent, role to law in the evolution of modern societies²⁷. As an institution, law is linked to morality and as such part of the lifeworld, while as a medium, law is a functional entity just like the political and economic systems. The ambiguity in this formulation is that it seems to rigidly separate two types of law: some laws make a claim to normative rightness and are open to critique, while others are purely a matter of systems imperatives (in terms of efficiency and productivity). In addition, HABERMAS originally argued that law as a medium remains bound to law as an institution, and yet, they follow quite different paths of

285. TEUBNER, GÜNTHER. 'How the Law Thinks: Toward a Constructivist Epistemology of Law', *Law and Society Review*, 23, 1989; pp. 727-757).

26 HABERMAS, *The Theory...*, *Op. Cit.*, p. 270.

27 These criticisms of HABERMAS's approach to law in its original formulation in *The Theory of Communicative Action* are discussed by RAES, *Legalisation...*, *Op. Cit.*; VAN DER BURG, *Op. Cit.*

rationalization (cognitive-instrumental versus communicative). The thesis of Juridification and internal colonization of the lifeworld, then, seems to neglect the possibility that law as an institutional complex of the lifeworld can be restructured by systems to bring about a colonization of law, rather than that law is itself a colonizing medium. This formulation would allow for a position that retains law's intimate connection to morality, while not denying the possibility of systems imperatives intervening in law. Indeed, HABERMAS argues in some of his most recent publications that modern law is situated between lifeworld and system because, and to the extent that, law is rational in terms of the just procedures of law established and secured in democratic constitutional states²⁸. In other words, modern law, while not free from possible interferences by the formally organized systems of politics and economy, can be morally grounded. Law can be legitimate in terms of moral-practical discourse, not because it incorporates concrete, ethically right values, but because it relies on a procedurally conceived notion of rationality realized by democratic principles in legislation, jurisprudence and legal administration.

The question of the legitimacy of law, with which I ended my review of the debate on HABERMAS's legal theory, has occupied center stage in HABERMAS's latest writings on law. As I noted, the rigidly drawn distinction between the functionality and the morality of law made it problematic to retain the notion of the internal colonization of the lifeworld while at the same time holding on to the argument that law as a whole remains in need of moral justification. These considerations on the necessity and possibility of the legitimacy of legality led HABERMAS to the negative conclusion that he 'cannot maintain the distinction [he] made in the second volume of *The Theory of Communicative Action* between law as a medium and law as an institution'²⁹. With the recent publication of *Faktizität und Geltung*³⁰, HABERMAS has thoroughly addressed this theme and elaborately dealt with the legitimacy of law, specifically in the context of democratic constitutional states. The chapters in the book *HABERMAS, Modernity and Law*³¹ address these concerns.

28 HABERMAS explicated this change in his thoughts on law in several papers published after —(the 1981 German original of) *The Theory of Communicative Action* (see, e.g., HABERMAS, Law and..., Op. Cit.; HABERMAS, JÜRGEN. 'Towards a Communication-Concept of Rational Collective Will-Formation: A Thought-Experiment', *Ratio Juris* 2, 1989; pp. 144-54; HABERMAS, JÜRGEN. 'Remarks on the Discussion', *Theory, Culture and Society* 7, 1990; pp. 127-32; HABERMAS, JÜRGEN. 'Morality, Society and Ethics: An Interview with TORBEN HVILD NIELSEN', *Acta Sociologica* 33, 1990; pp. 93-114). See also HABERMAS's discussions on civil disobedience which anticipate the reorientation in his legal theory (see HABERMAS, JÜRGEN. 'Civil Disobedience: Litmus Test for the Democratic Constitutional State', *Berkeley Journal of Sociology* 30, 1985; pp. 96-116; HABERMAS, JÜRGEN. 'On Morality, Law, Civil Disobedience and Modernity', In: P. DEWS (ed.). *Autonomy and Solidarity: Interviews with JÜRGEN HABERMAS*, revised edn. London: Verso, 1992).

29 HABERMAS, Remarks on..., Op. Cit., p. 130.

30 HABERMAS, *Faktizität und...*, Op. Cit.; HABERMAS, *Between Facts...*, Op. Cit.

31 DEFLEM, MATHIEU (ed.). *Habermas, Modernity and Law*. London: Sage, 1996.

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