Morality, Law and Deliberative Democracy - An Enquiry Concerning Jürgen Habermas' and Karl-Otto Apel's Discursive Programs of Justification.

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- an enquiry concerning Jürgen Habermas´s and Karl-Otto Apel´s discursive programs of justification.

> *"There is an essential connection between freedom and truth,*
>
> *and any misconception of truth is, at the same time,*
>
> *a misconception of freedom."*
>
> Herbert Marcuse (1939)

Introduction

The problem of metaphysics has, since the Enlightenment, constituted an ongoing theme in modern philosophy. On the one hand, a substantial part of modern philosophy has been preoccupied with locating and criticising metaphysical beliefs. On the other hand, philosophy has become engaged with answering the question of how post-metaphysical philosophical categories can be justified. The philosophy of the 20st Century has at length discussed which epistemic and practical standards can be saved from the Enlightenment's critique of metaphysics. This discussion has taken a number of different turns and includes many diverse considerations of e.g. ontology, epistemology, method, semantics and pragmatics. The question of how the relationship between "justification" and "truth" or "rightness" should be conceived on post-metaphysical[1] premises is central to the majority of these discussions.

In particular, in regard to practical moral questions it has been denied that the term ´morality´ constitutes a property which certain norms, in contradistinction to other norms, possess. It has instead been argued that practical philosophy should concentrate on articulating values immanent to communities (communitarism). Other philosophers have even gone one step further and argued that

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[1] This concept of ´post-metaphysics´, which Habermas develops in the work *Nachmetaphysisches Denken*, Maeve Cooke has summarised in the following way: "(a) It has called into question emphatic (substantive) conceptions of rationality and put forward procedural or formal conceptions instead. (b) With regard to the question of valid knowledge and how it may be achieved, it has replaced foundationalism with fallibilism. (c) It has cast doubt on the idea that reason should be conceived abstractly, beyond history and the complexities of social life, and has contextualized or situated reason in actual historical practices. (d) As part of this contextualization of reason, it has replaced a focus on individual structures of language and action. (e) As part of this orientation toward practice and away from abstract or "pure" theory, it has given up philosophy's traditional fixation on theoretical truth and the

nothing "interesting" can be said about ´truth´ either. In fact, the whole unprofitable project of seeking the profound truth or the moral right should be abandoned. Instead, we should embrace the profitable idea of a post-Philosophical culture[2] (Rorty).

It has, however, been argued from many sides that it is possible to accept the post-metaphysical doctrine without accepting the idea of a post-Philosophical era. Kantianism constitutes one such program which argues that it is possible to justify epistemic and practical categories. The discourse ethics has pursued this Kantian idea and attempted to reconstruct it as a relationship between "reasons" and "validity". The fundamental idea of the discourse ethics is hence that ´ethics´ or ´morality´ constitute rational concepts. It is argued that *practical validity* should be conceived in terms of discursive or communicative rationality. According to the discourse ethics the entities which can be normatively valid or invalid are social norms. Norms regulate the lives of the agents who are subordinated to them. If good reasons can be given in support of why a given set of norms should be in force, then existence of these norms is not problematic[3]. However, if more reasons can be given against a set of norms than for these norms, then they are repressive. To distinguish unproblematic "valid" norms from repressive ones we use terms like ´legitimacy´ or ´moral rightness´.

The discourse ethics

It is this discourse ethical answer to how practical categories can be reconstructed on post-metaphysical premises, i.e. within the Enlightenment, that I shall address in this paper. This discourse ethical project of transforming a substantial concept of morality into a formal procedure constitutes in my opinion one of the most important responses to the contemporary challenge of postmodernism[4] and neo-pragmatism. I make the assumption that postmodernism and neo-pragmatism basically argue that it is neither possible nor wise to try to determine what is morally right or wrong by philosophical reasoning. In a certain respect the discourse ethics agrees with this

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representational functions of language to the extent that it also recognises the moral-practical and expressive functions of language" (Cooke: 1994: 38).

[2] Richard Rorty expresses this view by writing: "The question of whether the pragmatist view of truth – that it is not a profitable topic – is itself *true* is thus a question about whether a post-Philosophical culture is a good thing to try for" (Rorty: 1982: xliii).

[3] As Seyla Benhabib writes: "Power is a social resource and a social relation in need of legitimisation. Legitimacy means that there are good and justifiable reasons why one set of power relations and institutional arrangements are better than and to be preferred to others. Conceptions of legitimacy consist of normative arguments, defending the justice and fairness of a particular set of institutions, relations, and arrangements" (Benhabib: 1989: 143).

[4] The breaking up of the grand Narratives discussed by Jean-Francois Lyotard in *The Postmodern Condition* (1984).

assertion. According to the discourse ethical understanding of morality no full-blown moral metaphysics can be uncovered by, for instance, Platonic *anamnesis* or any other ethical foundation program. In another important respect, however, the discourse ethics clearly differs from the anti-foundationalism of postmodernism and neo-pragmatism. The discourse ethics argues that it is possible to uncover certain "rules of reason" which play a constitutive role in determining which ethical norms are right and which are wrong. Hence, it agrees with the postmodern and neo-pragmatic distrust in metaphysics. The question of which norms should regulate societies and communities has to be decided by the people who live in those communities and not by the Philosophy Kings (Plato). In the process of deciding which norms should regulate their community people are, however, subordinated by certain transcendental "rules of reasoning" which cannot be questioned without committing a performative self-contradiction. Thus, at a transcendental meta-level the discourse ethics maintains a sort of foundationalism. I write "a sort of foundationalism", thus keeping the transcendental level unspecific, because, within the discourse ethical position, it is controversial which specific status these "rules of reason" enjoy.

The idea of a ´discourse ethics´ is not unambiguous. No such thing as a single discourse ethical program exists. Different philosophers have presented different suggestions as to how the relationship between ethics and reasons should be thematized. Two philosophers, however, have indicated the idea of a discourse ethics more than any one else viz. the philosophers Karl-Otto Apel and Jürgen Habermas.

Both of these philosophers argue that a procedural concept of practical validity can be extracted from a conjunction of " the idea of a relationship between ethics and reasons" and the "uncovering of certain necessary presuppositions of argumentation". The argument made by the conjunction of these two premises constitutes, in my opinion, the core of the Apelian and Habermasian conception of the discourse ethics. From this it becomes possible to spell out the necessary and sufficient conditions for practical validity. That is, the conditions social norms have to fulfil in order to be valid.

This argument is different from the type of arguments normally met in practical *analytical* philosophy. It is different because it proceeds at a transcendental or universal pragmatic level. It argues that it is possible to recognise in a reflexively way the necessary presuppositions of argumentation (the "rules of reason"). At the same time these presuppositions of argumentation

constitute necessary and sufficient conditions for practical validity. In contradistinction to this way of arguing, practical analytical philosophy has embraced the idea of contingency and hence rejected the idea of transcendental necessity.

However, even between Apel and Habermas disagreement subsist concerning the exact implications of this argument. The controversy primarily concerns: i. which moral relevant rules can be derived from the necessary presuppositions of argumentation; ii. the status these rules have and iii. the institutional implications of these rules. The main focus of this enquiry concerns the way in which it is possible to reconstruct a moral and political theory on the basis of such rules.

Method

Methodically my approach consists of a reconstruction and discussion of the discourse ethical response to what one could call the post-metaphysical condition. A response to the fact that no religious or metaphysical realm supports or upholds our social norms and practices. More specifically, I shall reconstruct Apel´s and Habermas´s different programs of uncovering transcendental conditions for practical rationality. This reconstructive approach has a *systematic* as well as an *exegetic* side.

The *systematic* side consists of a discussion of a specific transcendental discursive justificationary project of morality, law and democracy. I shall discuss the pros and cons of this project, the tension between the Apelian and the Habermasian approaches, as well as the problems contained in these two different approaches. I give particular attention to discussion of Habermas´s discourse theoretical reconstruction of the rule of law (*der Rechtsstaat*). This program constitutes, in my opinion, the most elaborated and promising example of how the insights of the discourse ethics can become theoretically and politically significant. It is my thesis that Habermas´s theory has undergone a change from a normatively strong political-ethical program to a weak meta-ethical program and then back to a very elaborated normatively strong political-ethical program. I shall expound the reasons for this development and discuss the pros and cons of it. Moreover, I shall compare it with Apel´s normative conception of a discourse ethics. Apel too seeks to explain how the discourse ethics is relevant to a justification of law and democracy but opts for a different theory, or - as Apel tends to phrase it - a different *Architektonik*, of how this relevance should be explained. Although, I ultimately favour Habermas´s approach to the relationship between

´democracy´ and ´discourse ethics´ (discourse theory), much vagueness persists in this approach and many philosophical problems are involved. Hence, I shall argue that much of Apel´s critique of Habermas´s theory is to the point.

It is my overall critical thesis that neither Habermas´s programs, nor Apel´s program succeed in *fully* overcoming the major immanent problems of the discourse ethics. The first major immanent problem consists of the fact that the discourse ethics on the one hand reduces *practical validity* to be the outcome of a purely formal procedure, but on the other hand strives to give *substance* (moral relevance) to this *formal procedure*. The second problem concerns how these few transcendental fundamental norms can play a significant role in regard to all the substantial norms that are not transcendentally justified.

I shall argue that as a consequence of these two analytically distinct immanent problems Habermas´s weak program and the program of *Faktizität und Geltung* become mutually incompatible. This is due to Habermas´s Kantian approach to morality in the weak program. This approach has a normative empty moral principle as a consequence. This problem he attempts to counter in *Faktizität und Geltung*. However, this attempt results in a theory that is too substantial. Consequently, Habermas becomes caught in the dilemma that his theory becomes either too formal, and thus empty, or too substantial, and thus does not constitute a discursive program of justification. I compare these Habermasian attempts to capture the concept of ´practical validity´ with Apel´s strong normative program. Even though this program is more substantial than at least Habermas´s weak program, since it operates with fundamental moral norms, I shall argue, that it is still unable to provide a satisfactory theory of morality, law, or democracy. The Apelian theory likewise leads to a dilemma between form and substance viz. between a deontological and a teleological principle.

I shall conclude that Habermas, with his discourse theoretical reconstruction of law and democracy, has provided the most plausible theory, even though this program has not freed itself from immanent tension between substance and form. Thus, I suspect the tension between substance and form constitutes a general problem to Kantian approaches to normative issues. Because of this immanent tension in Habermas´s theory his notion of political and legal validity becomes blurred. However, apparently no cure against this "immanent tension" can be found within a theory that insists on being simultaneously purely formal and morally relevant (substantial). Hence, I suggest

that Apel as well as Habermas have to be more explicit and sensitive to the tension between substance and form. Only this way would they be able to overcome the tension.

The enquiry also has, as mentioned, an *exegetic side*. In an ironic allusion to Karl Marx, Rorty at one point exclaims that "Die Philosophen haben lange versucht, Konzepte zu verstehen, es kommt aber darauf an, sie zu verändern, um sie uns dienstbarer zu machen" (Rorty: 1994: 988). He furthermore includes Habermas and Apel among those philosophers who have helped in changing our concepts. To this description I agree. However, in the case of Habermas, the innovative nature of his programs causes him on occasions to neglect to define his key concepts and to hesitate in regard to specifying the fundamental status of his project. Primarily, he seems to be uncertain concerning how strongly the transcendental aspects of his project should be emphasised. The hermeneutic problems which this uncertainty produces for the reader of Habermas´s philosophy is amplified by the fact that he often, and without really specifying when and why, changes his theory. Thus, I have separated between three different programs, all of which he has held at one point of time or another. This vagueness in Habermas´s work has, as a consequence, meant that his and Apel´s theories are often confused with each other. However, in important respects Habermas differs from Apel´s more transcendentally orientated theory. Even so, these differences are not reflected, most often when Habermas´s, and more rarely when Apel´s theories are discussed, e.g. within the analytical tradition. In effect, this means that Habermas, and Apel, are frequently misunderstood. Hence, I have considered it an important hermeneutic task to distinguish between the philosophies of these two theorists.

The structure of the thesis

The structure of this enquiry evolves around a latent immanent tension between *substance* and *form*. In order to make this tension explicit I have structured my enquiry in the following manner.

In the first chapter I introduce the concept of "communicative rationality". This concept is central to both Habermas´s and Apel´s theories since they both argue that ´practical validity´ can only be conceived as discursive or communicative rationality. I shall show how Habermas argues that not only ´practical validity´ but also ´theoretical validity´ can be accessed solely as *rational acceptability under ideal epistemic conditions*.

In the second chapter I then substantiate the claim that the predicate ´is right´ can be ascribed to norms if they satisfy certain necessary presuppositions of rational argumentation. This is the transcendental element in the discourse ethics. I shall show how the discourse ethics can be read in a strong and in a weak manner. Both versions, however, face problems. The strong programs rest on a *petitio principii* whereas the weak program becomes *empty* of moral significance and *arbitrary* as a moral principle.

In the third chapter I argue that the reconstruction of democracy and law undertaken by Habermas in the work *Faktizität und Geltung* constitutes an answer to the aforementioned *problem of emptiness*. In chapter four I shall list what in my opinion constitute the major problems to the program of *Faktizität und Geltung*.

In chapter five I address Apel´s attempt to justify politics, law and economics on discourse ethical premises. In contradistinction to Habermas´s meta-ethical weak program of justification, Apel argues in favour of a normative moral program. Thus, his theory is, on the face of it, not morally empty in the way Habermas´s weak program is. Apel wants to clarify how it is possible to *act morally* even though the Habermasian ideal conditions are not de facto present. This leads Apel to distinguish between a *deontological* and a *teleological* moral principle. However, I shall argue that it is not possible to coherently hold these two principles simultaneously.

Chapter I. Communicative rationality and the procedures of normative validity

Habermas´s and, as we shall later see, Apel´s moral theories constitute attempts to capture the aspects of ´morality´ which can be said with *certainty* on post-metapysical premises. They both argue that even after the destruction of what they call the substantial conception of ´morality´ (Hegel´s *substantielle Sittlichkeit*) a certain transcendental theory of morality is possible. The idea of a "post-metaphysical condition" constitutes the starting point for both of their philosophies. The idea of "post-metaphysics", furthermore, makes it possible to omit a discussion of religious and metaphysical doctrines. Instead, the focus is on what can be said about morality on non-metaphysical premises.

Neither Habermas nor Apel list any decisive arguments against the possibility of metaphysical arguments. As Rawls writes, Habermas "often criticises religious and metaphysical views without taking much time to argue against them in detail; rather he lays them aside – or occasionally dismisses them – as unusable and without credible independent merit in light of his philosophical analysis of the presuppositions of rational discourse and communicative action" (Rawls: 1996: 376). Instead, the adherents of the discourse ethics presuppose that we have reached a post-metaphysical era and the ambition is to "(..) Konsens und Solidarität auf einer abstrakteren Ebene wiederherzustellen, gleichsam einen "prozeduralen" anstelle eines "substantiellen" Konsenses" (Wellmer: 1993: 176).

It is Habermas´s[5] conviction that in the post-metaphysical era, after the linguistic turn, the idea of *validity* (practical and theoretical) has to be comprehended as ´procedural validity´. This approach, he argues, constitutes a weak form of naturalism. It is naturalistic in the sense it does not acknowledge the existence of any kind of reality that cannot be perceived by our senses. Moreover, it is "weak" in the sense it does not reduce study of our social practices to causal explanation but rather leaves room for a cognitive explanation of these practices (Habermas: 1999: 32). Such a cognitive explanation of social practices, Habermas argues, has to consist in a clarification of the communicative rationality inherent in these practices. *Communicative rational* practices, as we shall see, constitute *procedures* that may produce true statements and just norms as results. Hence, I shall begin this enquiry by giving a clarification of this concept. This leads on to Habermas´s theory of

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[5] The concept of communicative rationality has been developed most clearly by Habermas and thus I focus on his theory in the following.

validity claims. This theory I shall briefly address as well. After having defined the concept of ´communicative rationality´ I commence my account of how and in what way communicative rational processes can be said to produce true and right (valid) outcomes. It will become clear that Habermas holds an epistemic theory of rightness and a realistic theory of truth.

I.1.0 Communicative rationality

What does it mean to be rational? That is the question Habermas wants to answer in a way that ultimately makes it possible to explain moral rightness and political legitimacy. He argues that at least two different concepts of ´rationality´ can be outlined. In one respect, an activity can be rational in an instrumental or teleological sense. This kind of rationality can be described through the example of an agent who carries out intentions on the basis of possessed knowledge. If an agent possesses the intention to perform an act (for instance building a house) and then on the basis of the knowledge K (of architecture and craftsmanship) performs the act (builds it) we say that she has successfully carried out an instrumental action (Habermas: 1999: 109).

Now, according to Habermas a further different sort of rationality exists as well. If the same agent was asked, before building the house, why she thought her claim, that she would be able to construct the house, was valid, and was not able to answer this question, we should say that her enterprise was not rationally founded. The ability to be able to justify raised claims is a rational ability and a justified claim is also a rational claim. This second sort of rationality Habermas terms ´communicative rationality´ (Habermas: 1988: 68). It is this second type of rationality that shall be analysed in this section. The thesis is that communicative rationality is inherent to practices where agents seek to reach a genuine rational agreement on a given subject. Agents who argue exclusively in order to reach an understanding and agreement (Einverständnis) concerning a given topic Habermas calls "communicative acting agents"[6]. This leads us, as we shall see, to Habermas´s theory of validity claims.

As we saw in the above mentioned example, ´communicative rationality´ is understood in terms of the ability to justify raised claims. Raising claims can occur in an explicit manner where somebody,

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[6] This manner of communicating is different from certain other kinds of communication. For instance, if a person tells a joke or recites a poem she is not aiming at reaching an agreement (Einverständnis) with her communication. Other kinds of communication, like insulting somebody, are even explicitly aimed at the opposite of reaching an agreement. However, when I write about communicative action these other senses of the term ´communication´ are not included.

for instance, explicitly claims that they are capable of doing something. It can, however, also be understood in an implicit manner. In the sense that, for instance, if I argue that the earth is round also involves that I raise the claim that the statement ´the earth is round´ is true. In Habermas´s theory of validity claims, it is argued that whenever people discuss matters they raise validity claims. However, agents do not only raise claims of truth.

Habermas argues that three different kinds of validity claims exist. Performing speech acts involves raising validity claims of truth, of rightness and of truthfulness (Habermas: 1989: 79) [7]. This means, that not only statements about the physical world but also statements about a commonly shared social world as well as statements about individuals´ intra-psychic "worlds" raise validity claims. These validity claims can all be redeemed, though in different manners. Expressive speech acts concerning agents intra-psychic "worlds" are redeemed in consistent behaviour. If for instance, an agent claims that she has a headache then this statement can only be redeemed by her behaving in a manner consistent with our intuitive understanding of how one behaves when one has a headache[8]. Constative speech acts concerning the physical world and regulative speech[9] acts concerning the common social world can, however, be *discursively* redeemed. Redeeming a validity claim *discursively* means justifying the raised claim with reasons in relation to (possibly in discussion with) other agents. This process of giving and taking reasons in a dialogue concerning a specific topic constitutes a process of communicative rationality. Hence, Habermas argues that not only empirical statements, which raise claims of truth, but also moral statements raise validity claims that can be settled in a rational manner. The meaning of the concept of ´rationality´ thus includes *rightness* as well.

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[7] Habermas argues that all three validity claims are raised simultaneously (regulative, constative, expressive). However, one of these claims is always raised directly whereas the two others are raised indirectly. It is determined which claim is raised directly by the context in which the speech act is performed. Thus, if an agent says that the earth is round in a scientific discussion then it is clear that a truth claim hereby is raised. However, it can always be questioned which sort of claim is directly raised and thus which illocutionary mode a speech act has. It is always possible to say, for instance, that a specific performance of a speech act is either inappropriate or insincere. The illocutionary mode of a speech act is thus not objectively fixed but rather always a question of interpretation.

[8] Even though, Habermas argues that expressive speech acts cannot be redeemed discursively he maintains that they constitute "communicative rational validity claims": "Die kommunikative Vernunft (..) erstreckt sich auf das *ganze* Spektrum von Geltungsansprüchen (der assertorischen Wahrheit, der subjektiven Wahrhaftigkeit (expressive validity claims) und der normativen Richtigkeit)" Habermas: 1991: 191).

[9] It seems as if Habermas is unclear in regard to which kind of claim regulative speech acts raise. On the one hand, he argues that regulative speech acts raise claims of rightness. However, ´claims of righness´ means claims concerning whether a given speech act is *appropriate* in a given context. On the other hand, he uses regulative speech acts as constative speech acts. He categorises moral statements under regulative speech acts and tends to use moral statements as constative statements.

A statement performed in a speech act in a process of argumentation, which is supported with reasons, counts as being rational. The concept of ´communicative rationality´ can be defined in the following way.

[Def]Communcative rationality: A speech act is communicatively rational if and only if the validity claim it raises is justifiable[10] through reasons by the person who utters it[11].

In the next section it will become clear that Habermas argues that validity claims which are justified under *ideal conditions* are eo ipso valid (true or right)

I.2.0 Cognitive ethics: differences and similarities between theoretical and practical truth

It is Habermas´s and Apel´s thesis that raised validity claims can be redeemed through reasons and that not only empirical statements but also statements about norms raise such validity claims. Hence, it is argued that *normative Geltungsansprüche einen kognitiven Sinn haben und wie Wahrheitsansprüche behandelt werden können* (Habermas: 1983: 78).

The thesis that practical (rightness) and theoretical (truth) validity can only be conceived as *communicative validity* expresses the *rational core* of the discourse ethics. Empirical truth as well as moral rightness has to be determined by argumentation and reasons. In this way the discourse ethics constitutes a program of cognitive ethics. Moral questions can be answered in just as objective a manner as empirical questions. The better justified (through reasons) a practical

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[10] It has to be *justifiable* but not necessarily already *justified* because we treat a lot of speech acts as being rational even though they are not explicitly supported by reasons. This has to do with the person who utters the speech act. When a person utters a speech act she hereby undertakes the rational obligation to justify the claim raised by this speech act if it is contested by the hearer of this speech act. Thus, if we have faith in the person, if she has a history of making true claims, then we treat her speech acts as being rational.

[11] Moreover, it is argued that the *linguistic meaning* of speech acts can be explained by the validity claims they raise and the reasons given in support of these claims. Habermas argues, that all speech acts are performed in a specific illocutionary mode and that, if the claim raised by a speech act is accepted by the other participants in the discussion, then this speech act is illocutionary successful. It is successful in two ways: it has been understood and it has been accepted: "Dieses – wie wir sagen wollen – illokutionäre Ziel ist zweistufig: der Sprechakt soll vom Hörer zunächst verstanden und dann – nach Möglichkeit – akzeptiert werden" (Habermas: 1999: 110). Habermas hence argues that ´meaning´ is defined in terms of reasons. It is not a relation to the world that determines whether a statement is correctly applied or not rather it is the reasons which can be given in support of it. Thus, Habermas argues, with Dummet, that to understand a speech act is to know what makes it acceptable. In performing a speech act the speaker implicitly refers to certain reasons with which she could justify the validity claim raised by the speech act (Habermas: 1989: 127). It is the implicit reference to these reasons that make the speech act intelligible for the hearer. In order for a hearer to understand a speech acts she has to understand the validity claim it raises and to know which reasons would make this claim acceptable (Habermas: 1989: 81). This means the hearer should be able to reconstruct the reasons that could be given in support of it.

statement is, the more likely is it to be right (Habermas: 1983: 53). Intuitively, we are willing to describe empirical statements in terms of universality and objectivity. We are, however, prima facie more reluctant to ascribe moral statements the same sort of universality and objectivity. It is part of our understanding of ´truth´ that a scientific theory that is true in China has to be true in Denmark too or it cannot be true in China in the first place. We are, however, more reluctant to understand ´morality´ in an analogue sense. We are not sure that if a norm is wrong in China then it either has to be wrong in Denmark too or it cannot be right in China either. However, according to Habermas´s Kantian conception of morality norms cannot be right in one community and then false in another. The predicates ´is true´ and ´is right´, even though they are metaphysically[12] different, are epistemologically analogue. I shall briefly address Habermas´s argument in favour of this claim.

I.2.1 Truth and justification

In harmony with the tendencies of the pragmatic tradition of modern philosophy Habermas argues that realistic truth, as a relation between a statement and the world, cannot be epistemically accessed. He consents to Putnam's argument that language and reality is permeated *auf eine für uns unauflösbare Weise* (Habermas: 1999: 246). Putnam argues that "we have no access to unconceptualized reality"[13] and from this assertion Habermas infers that it is epistemologically impossible to identify any basic observation-sentences which could constitute the foundation of a chain of justification. Thus, epistemological foundationalism is not possible. In relation to "truth" this means that we cannot have any access to the property of truth if ´truth´ is conceived as a relation between statement and *naked reality* (Habermas: 1999: 287)[14]. The fact that we do not have any epistemological access to the "naked reality", however, does not make a realistic theory of truth impossible.

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[12] I use the term ´metaphysical theory of truth´ in accordance with Kirkham´s terminology on the issue (Kirkham: 1995: 25). The term ´metaphysics´ is used in order underline that such a theory concerns what truth *is* e.g. which conditions a statement has to fulfil in order to be true. This question can, according to this point of view, be answered separately from the question of whether a solution to the truth-question has any epistemological relevance. That is, separately from the question of whether it is epistemic possible to recognise whether a statement fulfils the conditions for being true. This way of using the term ´metaphysics´ is different from Habermas´s normal use of the term. Normally, he uses it to describe a pre-modern *Sittlichkeit* where norms were right or wrong according to religious dogma.

[13] Putnam: 1994: 297.

[14] More premises had to be listed in order to make this a valid argument. It is, however, in the present paper not possible to go further into the epistemological issues at stake here. Later, though, I shall return to the issue of foundationalism. Because, as we shall see, Habermas is not only anti-foundationalist in regard to our statements about the physical world but also in regard to transcendental issues. Thus, he objects to Apel´s transcendental program of a philosophical *Letztbegründung* of certain moral norms. I shall investigate whether his arguments against the Apelian program are compelling and whether they indeed are consistent with his own position.

In the previous section on communicative rationality we learned that Habermas understands the truth claim as constituting just one special *species* of a more extensive *genus* of validity claims. The assertion that ´truth´ and ´rightness´ both constitute validity claims, which have to be redeemed discursively, could indicate that Habermas understands ´truth´ and ´rightness´ as epistemic concepts. Moreover, in the paper *Wahrheitstheorien* (1973) he surely held this thesis. However, Habermas has changed his view on the concept of truth. He no longer believes that ´truth´ constitutes an epistemic concept (Habermas: 1999: 288). Instead, he now holds a realistic theory of truth and a consensus theory of justification (rational acceptability) [15].

”Wahrheit” ist ein rechtfertigungstranzendenter Begriff, der auch nicht mit dem Begriff ideal gerechtfertigter Behauptbarkeit zur Deckung gebracht werden kann. Er verweist vielmehr auf Wahrheitsbedingungen, *die gewissermassen von der Realität selbst erfüllt werden müssen*” (Habermas: 1999: 285 –my emphasis).

The reason why Habermas now distinguishes between a realistic theory[16] of truth and an epistemic theory of rightness is that he has become more sensitive to the ontological difference between the

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[15] This is in effect what Habermas, in my opinion, claims when he writes: ”Davon läßt sich die Diskurstheorie der Wahrheit inspirieren: Eine Aussage ist wahr, wenn sie unter den anspruchsvollen Bedingungen eines rationalen Diskurses allen Entkräftungsversuchen standhält. Das heißt nicht, daß sie auch schon *deshalb* wahr ist. Ein für ´p´ geltend gemachter Wahrheitsanspruch besagt, daß die Wahrheitsbedingungen für ´p´ erfüllt sind. Ob das der Fall ist, können wir nicht anders als auf dem Wege der Argumentation feststellen, weil uns ein direkter Zugriff auf uninterpretierte Wahrheitsbedingungen verwehrt ist” (Habermas: 1999: 259). In my opinion this quotation should be read as claiming that ´p´ is true because ´p´ corresponds (its truth conditions are satisfied by) with the nature of the world. Now, since we have no direct epistemic access to the nature of the world we have to be content with a consensus theory (rational acceptability) of justification.

[16] This realistic theory of truth Habermas suggest, however, does seem to have problems of its own. Apparently, Habermas thinks that he can solve two problems with this theory. On the one hand, the problem concerning the relation between "justification" and "truth". He quotes Michael Williams for posing the question ”Given only knowledge of what we believe about the world, and how our beliefs fit together, how can we show that those beliefs are likely to be true?” (Habermas: 1999: 248). This metaphysical gap Habermas believes he can bridge. On the other hand, he believes he can explain in what way the idea of ´realism´ is pragmatic fertile. And thus oppose Rorty who argues that ´truth´ from a pragmatic perspective is an irrelevant concept (Rorty: 1982: xxix). It is Habermas´s innovative thesis that the relation between rational acceptability and realistic truth pragmatically can be explained in terms of the need the agents of the life-world have for reliable action-knowledge (Habermas: 1999: 264). He argues that we are entitled to treat "ideal rational agreement" as indicating truth. We are entiteled to do this because after rational agreement is reached there, from the perspective of the life-world, is no longer any reason to continue a discourse. In this way ideal rational agreement can be translated into truth/*Handlungsgewissenheit* in the life-world. And ´ideal rational agreement´ in this context just means an agreement where all the evidence speaks in favour of a given statement and no evidence speaks against it. The translation of ideal rational agreement into *Handlungsgewissheit* thus makes it possible for the life-world to function again – to get back to business as usual. Hence, Habermas claims he has shown why realistic truth is pragmatic relevant. The internal relation between truth and justification is explained in terms of the dialectical play between *life-world* and *discourse*. Ideal rational agreement can be translated into *Handlungsgewissheit* in the life-world. Treating an agreement as constituting the basis for actions means treating this agreement as being true. Hereby, the pragmatic fertility of realism has also been demonstrated. However, this argument ignores the metaphysical problem of ´truth´. If the predicate ´is true´ is conceived as being a non-epistemic why does rational acceptability and justification then count as an indicator of truth? Even though, rational acceptability means that there is no reason to continue a

state of affairs that truth claims relate to and the one that rightness claims relate to. Habermas argues that truth claims relate to the objective world of facts whereas claims of rightness relate to a socially constructed world of norms. This difference not only implies that different sorts of reasons justify respectively truth and rightness claims. It also indicates that the properties ´truth´ and ´rightness´ belong to metaphysically different categories. The concept of ´truth´ has to be realistically conceived as correspondence between a statement and a causal - but not conceptually - independent world (Larmore: 2001:113). The concept of ´rightness´, however, lacks ontological connotations and thus has to be anti-realistically conceived as *ideal acceptability*.

The fact that ´truth´ and ´rightness´ belong to metaphysically different categories, however, does not entail that truth claims can be *redeemed* or justified in a manner different from rightness claims. Because we, as Putnam states, do not have access to unconceptualized reality, *truth* cannot be determined or approximated by anything else than *reasons*. This is implied by Habermas´s epistemic anti-foundationalism. Hence, at an epistemological level truth claims and moral claims remain analogue, even though, they at a metaphysical level belong to different categories. In this way "validity" (empirical or practical) can only be *settled* through reasons as rational acceptability[17].

However, since moral statements do not refer to a physical ontology but rather state what *ought to be the case,* it becomes interesting to learn in what way social norms can be right or wrong in a universal manner. The universality of truth claims is explained by the fact that empirical statements make claims about a world that is identical for all. An agent who agues that atoms exist argues that this statement *agrees with reality* and because of this is valid to all creatures (universal). The question is, however, how can moral statements, which lack reference to an "external ontology", be said to raise universal validity claims.

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discourse this can only mean that there is no *sociological reason* to continue the discourse. There is no sociological reason because rational acceptability can be translated into *Handlungsgewissheit*. However, if ´truth´ is conceived as a relation between a statement and a reality we have no epistemic access to then we have no way of knowing whether *Handlungsgewissheit* or ideal rational agreement indicates truth or not.

[17]Habermas does not differentiate between a consensus theory of justification and "rational acceptability". He generally argues that a norm *is right* or an empirical statement *probably* true if it would be accepted by *communicative acting* agents who raise and defend validity claims under *ideal conditions of justification*

I.2.2 Moral rightness and universal validity

Even though, ´truth´ only can be approximated as rational acceptability empirical statements are still *made true or false* by the external world. In contrast to this moral statements are concerned with what *ought to be the case*.

This ontological difference between the reference of moral and empirical statements imposes some problems on a theory of moral rightness. The question arises of how a fully constructed world of social facts can make moral statements right arises (Habermas: 1999: 281). In order to answer this question Habermas has to either argue in favour of a moral ontology equivalent to the physical ontology of truth claims or to explain the context transcendent sense of moral statements in another way (Habermas: 1999: 281).

Habermas chooses the latter option and argues that the idea of moral rightness can be fully captured in an epistemic theory. He writes that "die "Geltung" einer Norm darin besteht, daβ diese unter idealen Rechtfertigungsbedingungen akzeptiert, d.h. als gültig anerkannt würde" (Habermas: 1999: 298). The discourse ethics hence argues that a social norm *is right* if it would be accepted by *communicative acting* agents who raise and defend validity claims under *ideal conditions of justification*. The question now is how these "ideal conditions of justification" themselves are justified and what they look like.

The answer to these questions is very complex. In a way the whole discourse ethical approach to morality evolves around this question. Habermas and Apel claim that it is possible to provide a transcendental justification of the "ideal conditions of justification" and they hereby differ from other philosophers who have sought to understand either ´truth´ or ´rightness´ as epistemic concepts. However, disagreement also prevails among Habermas and Apel concerning how these questions should be answered. In the next chapter I shall show how two overall approaches can be distinguished from each other.

Chapter II. The two programs of discourse ethics.

Discourse ethics can most adequately be described as a neo-Kantian ethical project where an attempt to resolve the shortcomings and promissory notes of Kantian practical philosophy is made through a transcendental and language philosophical approach to morality. In this respect discourse ethics claims to constitute an *Aufhebung* of Kant´s ethics. This *Aufhebung* is supposed to rest on a certain relationship between language, morality and rationality. It is a project that does not accept the (neo-)Aristotelian dichotomy between *epistemê* (knowledge) and *phronesis* (moral prudence). Instead, it understands morality as a rational concept and hence moral norms as entities that can be objectively right or wrong.

In the preceding chapter it was argued that ´rightness´, unlike ´truth´, is an epistemic concept that can be fully captured in the notion of "acceptability under ideal conditions". However, a comprehensive ethical project lies behind this claim. This project, which Habermas and Apel term "the discourse ethics", I shall now address.

Since the Enlightenment the major part of the secularised philosophical community argues that moral statements do not possess truth-value in relation to an external religious ontology. This is the post-metaphysical condition. Habermas´s weak naturalism is an example of this attitude. This has made the very concept of ´morality´ problematic. To the extent that practical validity is dependent upon truth-value, and truth-value is dependent upon a relation between statement and fact, a moral theory, which maintains that the concept of ´practical validity´ is meaningful, has a problem (Habermas: 1996: 52). If no moral facts exist then moral statements cannot be true or false and if they do not possess truth-value they cannot be meaningful either. Or, as others argue, they may be meaningful but at the same time all false (Mackie).

Discourse ethics, however, attempts to demonstrate how moral rightness can be given *cognitive* content even on post-metaphysical premises. In the previous chapter we saw that this position argues in favour of an epistemic theory of moral rightness (I.2.2). Morally right norms are argued to be the procedural outcome of a communicative rational procedure - i.e. from a discursive process where agents raise and defend validity claims under ideal conditions of justification.

The thesis that a connection between justification (reasons) and moral validity exists constitutes an important aspect of the discourse ethical program. All the adherents of the discourse ethics seem to agree to it. However, agreement concerning the implications of this thesis does not prevail. Albrecht Wellmer, for instance, acknowledges that performance of argumentative speech acts involves raising universal validity claims but rejects that this entails an epistemic theory of truth or rightness[18].

I shall, however, keep focus on the idea that the concept of ´moral rightness´ can be captured in an epistemic theory. However, even within this focus more different discourse ethical versions concerning the normative status and scope of such an epistemic theory exist. The early Habermas claims that not only does the "theory of validity claims" lead to an epistemic theory of truth and rightness but that it also provides a justification of fundamental ethical norms[19]. This program of "fundamental ethical norms" Karl-Otto Apel endorses, though on slightly different premises[20]. The later Habermas, however, rejects the "program of fundamental ethical norms" as well as the "epistemic theory of truth", and instead argues in favour of an "impartial procedure of moral justification"[21].

As it appears from these examples it is controversial as to precisely follows from the thesis that moral statements can be discursively justified. I shall, however, argue that it is possible to arrange the different theories according to an overall *systematic* difference between a strong and a weak program of moral justification. The proponents of the strong program are the early Habermas and Apel. The proponent of the weak program is the late Habermas.

The difference between these programs of justification is often blurred when the "discourse ethics" is discussed. It is, however, essential in order to understand Habermas´s theory of morality, his theory of legal validity, Apel´s theory of morality and legal validity, as well as the differences between Apel´s and Habermas´s overall approaches.

The overall difference between the two programs concerns how much, so to speak, it is possible to extract from transcendental reflection on necessary presuppositions of argumentation. The strong

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[18] See generally *Ethik und Dialog* by Wellmer (1986).
[19] This is most directly argued in the essay *Wahrheitstheorien* (1973).
[20] Apel still holds this program. See for instance "The Response of Discourse Ethics" (2001).
[21] This is Habermas´s current view on the issue. Introduced in the essay "Diskursethik Notitzen zum Begründungsprogram" (1983).

program is essentially normative and argues that it is possible to transcendentally justify certain moral norms. The weak program is essentially meta-ethical and claims that no moral norms but only a moral *perspective* or a moral *procedure* can be transcendentally justified. In the chapter it becomes clear that the disagreement between these programs is caused mainly by different opinions concerning how an adequate theory of morality, which is both *formal* (i.e. post-metaphysical) and *substantial* (morally relevant), can be provided.

Even though Habermas no longer holds a strong program of moral justification this program is, for two reasons, still of interest. It is on the one hand of interest because the diversity of the discourse ethics is hereby explicated. It illustrates how the discourse ethics contains two components: (i) the ideal conditions of justification and (ii) the substantial norms discussed among agents. The argument of the strong program is that it is impossible to know which empirical substantial norms are right, but the "ideal conditions of justification" *per se* constitute moral norms. This argument, however, leads to problems. Hence, Habermas turns to a weak conception of moral justification. This program, however, leads to *emptiness* and *arbitrariness*. On the other hand, the strong program is therefore of interest because Habermas in his theory of law and democracy, in a way, returns to this strong program of justification in order to escape the problem of *emptiness* involved in the weak program.

This chain of argumentation will be developed in this chapter and the next one. I shall commence by stating Habermas´s and Apel´s strong programs of moral justification and the major problems involved in this program.

II.1.0 Habermas´s version of the strong program of moral justification

After the initiation of a post-metaphysical paradigm in modern philosophy, so Habermas asserts that metaphysical theories of morality are no longer possible. Furthermore, after the linguistic-pragmatic turn realistic theories of truth can no longer provide epistemically accessible *criteria* of truth. These two upheavals in modern philosophy were already met in the previous chapter. For Habermas this involves that neither the validity claim of truth nor the one of rightness can be *redeemed* in a realistic or metaphysical way. Instead, the only sense which can be given to the concept of ´validity´

is that a validity claim is redeemed if all rational beings would agree to it[22]. In the former chapter it was also mentioned that Habermas *used to*, though not anymore, conclude from these considerations that ´truth´ and ´rightness´ at a metaphysical level were epistemic concepts. It is this earlier held epistemic theory of ´truth´ and ´rightness´ which we shall now address. This program claimed that: "Eine Konsensustheorie der Wahrheit wird sich deshalb nicht nur auf die Wahrheit von Aussagen, sondern auch auf die Richtigkeit von Geboten oder Bewertungen erstrecken müssen" (Habermas: 1973: 220).

This broad epistemic theory of validity is of interest to us because Habermas understood it as being interwoven with a strong conception of the discourse ethics. In the strong program Habermas argues that moral validity claims can be redeemed in a way analogue to truth claims and that a redeemed moral validity claim has a status analogue to the one that redeemed truth claims possess. If the validity claim of an empirical statement is redeemed then this statement is true. Similarly, a norm is right if the validity claim it raises is redeemed. Both concepts, ´truth´ and ´rightness´, can be seen as parts of a more general concept of *validity*[23]. However, this does not mean that each time a community of agents agrees to a statement or a norm the result constitutes truth or rightness. Rather, according to Habermas, we understand the meaning of the predicate ´is justified´ as being different from the one of the predicate ´is true´[24]. This grammatical difference can be encapsulated in the difference between *factual* and *ideal* justification. A statement is thus not true simply because a specific community agrees on it. Only if all agents would agree to it under *ideal* conditions would it be true. In order to avoid factual consensus becoming a criterion for truth, a difference between factual and ideal conditions is introduced. Factual consensus, under *approximated ideal* conditions, concerning a statement or a norm implies that it is justified. Factual consensus under *ideal* consensus concerning a statement or a norm implies that it is true (or right).

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[22] In the essay "Die Kriterien der Wahrheit" (1973) Nikolas Rescher differentiates between the meaning of the term ´truth´ and the criterion of truth. A criteriological theory of truth is thus a theory which lists the necessary and sufficient conditions a truth-bearer has to fulfil in order to be true. Thus, a criteriological theory of truth is identical with what Kirkham terms a ´metaphysical theory of truth´. The criteriological consensus theoretical theory of truth, which Habermas holds in *Wahrheitstheorien*, has been thoroughly criticised among others by Albrecht Wellmer in the book *Ethik und Dialog* (1986) and Udo Tiez, who refers to Wellmer, in the essay *Faktizität, Geltung und Demokratie* (1993). Neither Habermas, as we saw in chapter 1, nor Apel hold such a criteriological theory of truth any more.

[23] In the essay "Wahrheitstheorien" he expresses this by writing: "Ich will die Auffassung verteidigen, daβ es mindestens vier Klassen von gleichursprünglichen Geltungsansprüchen gibt und daβ diese vier, nämlich Verständlichkeit, Wahrheit, Richtigkeit und Wahrhaftigkeit, einen Zusammenhang darstellen, den wir Vernünftigkeit nennen können" (Habermas: 1973: 220). Incidentally, Habermas later ceases to conceive ´Verständlichkeit´ as a validity claim. However, he continues to advocate such a conception of *reason* which includes rightness and truthfulness as well as truth (Habermas: 1988: 59).

In the essay *Wahrheitstheorien* the ideal conditions are worked out in the way mentioned below. If a statement, concerning either an empirical state of affairs or concerning a norm, is acceptable under these conditions then it is *eo ipso* true or right. The conditions to be fulfilled are:

"first, each participant in the discourse must have an equal chance to initiate and to continue communication; second, each must have an equal chance to make assertions, recommendations, and explanations, and to challenge justifications. Third, all must have equal chances as actors to express their wishes, feelings, and intentions; and fourth, the speakers must act *as if* in contexts of action there is an equal distribution of chances"[25] (Habermas: 1973: 255).

Taken under one label Habermas terms these conditions the "ideal speech situation". Seyla Benhabib phrases the first two types of conditions *symmetry conditions* and the latter two types *reciprocity conditions*. Where the symmetry conditions exclusively deal with speech acts "(..) the reciprocity condition refers to existing *action contexts*, and requires a suspension of situations of untruthfulness on the one hand, and of inequality and subordination on the other" (Benhabib: 1986: 285).

In effect, Habermas has given here an epistemic criteriological discourse theory of truth and rightness. The conditions listed constitute necessary and sufficient conditions for truth and rightness. If and only if these conditions are respected in a discourse then the result of this discourse will eo ipso be true or right[26]. The point of an ideal speech situation is that the discursive outcome of a *truly rational process,* where all relevant arguments have been heard, cannot be false or wrong. To the concept of a *rational process* belongs the existence of a language, which makes a certain degree of *self-transparency* possible. Otherwise, in for instance an ideologically contaminated language, genuine interpretation of *needs* and *interests* would not be possible (Habermas: 1973: 254).

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[24] Putnam has concisely described the difference as consisting in the fact that "justification can be lost truth cannot" (Putnam: 1990: 82). Following the standard terminology on the subject this means that ´x is true´ is extensionally equivalent to ´x would be accepted under ideal conditions (Kirkham: 1995: 14).

[25] I quote this summarised version of the four conditions from Seyla Benhabib (Benhabib: 1986: 285).

[26] In this theory of truth the condition "that all arguments must have been heard" is not stated. Thus, a de facto discourse, which respects these conditions, would produce true outcomes. This is, of course, highly implausible and has been modified by Habermas. The modified version we shall meet in the next section in the universalizability principle U.

It is, however, not clear exactly which normative consequences can be drawn from such a theory. On the face of it the idea of an ideal speech situation, however, may contribute to a meta-ethical elucidation of how we understand moral statements. It was stated at the beginning of this chapter that it is a problem for any moral theory if it cannot explain how we can ascribe truth-conditions or assertibility-conditions to moral statements. By conceiving ´rightness´ as an epistemic property Habermas´s theory of an ideal speech situation has shown how this problem can be solved. Habermas has hence provided us with a meta-ethical argument in favour of moral cognitivism.

However, the strong program pretends to do more than provide a meta-ethical principle. It namely argues that, even though it is not possible to know which norms *would be* accepted under ideal conditions, the ideal speech situation *per se* involves moral norms. Habermas describes the status of the rules designating the ideal speech situation as:

(..) *"*weder ein empirisches Phänomen noch bloβes Konstrukt, sondern eine in Diskursen unvermeidliche reziprok vorgenommene Unterstellung. Diese Unterstellung kann, sie muβ nicht kontrafaktisch sein; aber auch wenn sie kontrafaktisch gemacht wird, ist sie eine im Kommunikationsvorgang operativ wirksame Fiktion. Ich spreche deshalb lieber von einer Antizipation, von einem Vorgriff auf eine ideale Sprechsituation" (Habermas: 1973: 258).

I shall firstly explain in what way we have to counter-factually presuppose the ideal speech situation when we argue, and then secondly how this apparently implies strong moral norms.

Firstly, whenever we argue we raise validity claims of, among other things, truth and rightness. Hence, when I say that "x is a bad thing to do", I also raise the claim that this statement is valid. Claiming that it is valid is equivalent to claiming that no reasons speak against it but all reasons speak for it. This means that I assert that the statement would be accepted under ideal conditions such as those expressed in the ideal speech situation. Thus, if I sincerely (wahrhaftig) mean what I say, then I have to presuppose that my statement would be endorsed in an ideal speech situation. This presupposition will, furthermore, most often be counter-factual in the sense that the ideal conditions are not realised. A more elaborated version of this argument will be given in the next section. It is, furthermore, the fact that we always presuppose these "conditions of the ideal speech situation" when we argue which explains why not only empirical but also moral statements raise universal validity claims. The idea is that performing a moral (regulative) speech act means saying

that a certain norm is right. Saying that a norm is right equals saying that it would be accepted in the ideal speech situation i.e. accepted by all (universal). I shall return to this argument in the section on the weak program (II.4.2).

Secondly, the "ideal speech situation" is also described as an "in Zukunft zu realisierenden Lebensform" (Habermas: 1973: 258). This description implies that substantial norms can be transcendentally justified. The ideal speech situation does not merely constitute rules of argumentation but also social rules of a future form of life. This would be a form of life which was regulated by rules ensuring that social matters would be dealt with in a rational manner viz. according to the rules designating the ideal speech situation. Dealing with social matters in accordance with these rules means dealing with them in an impartial way where all pros and cons concerning the matter in question have been heard. Habermas does not draw any distinction between rationality and justice and thus the necessary presuppositions of argumentation are transformed into norms of justice.

Such an interpretation of the strong program is endorsed by Benhabib[27]. She interprets the early Habermas as arguing that the concept of truth involves freedom and justice. Justice in the sense that the "ideal speech situation" makes it visible that truth and rightness can only be approximated if all rational agents are allowed to take part in the procedure of discursively finding the true statements or the right norms. It is thus implied by the "ideal speech situation" that agents have the right to participate in discourses concerning truth and rightness (Benhabib:1986: 286). Habermas, in this way, seems to take over the counter factual *idealisations* of argumentation and use them as substantial norms or rights. They are substantial in the sense that they put restrictions on political and social processes. The argument of the strong program seems to be that to the extent agents are subordinated the rule of social norms inconsistent with the rules of the ideal speech situation these social norms are immoral. This means that all social norms that would not be accepted by all agents subordinated these norms eo ipso are immoral. The ideal speech situation hence provides both a criterion norms have to fulfil in order to be moral as well as a set of basic moral norms all agents have to respect in order to be moral. For instance, agents are not allowed to prevent other agents access to the procedure of justifying norms because this would be in contradiction with all four of the ideal conditions and moral norms designating the ideal speech situation.

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[27] That is, she agrees that Habermas once held this program but rejects the theses of the program.

Before I address Apel´s version of the strong program I shall remark that, even though it may make sense to understand ´validity´ as a property that statements possess if they are redeemed in a rational discourse, the specific way this is done in *Wahrheitstheorien* proves inadequate. The reason for this is that no condition is incorporated in the "ideal speech situation" which prevents a factual consensus that could generate truth. The ideal conditions, designating the "ideal speech situation", are not idealised enough. This leads to the very implausible result that factual agreement in a concrete community can constitute truth – as long as this agreement has respected the ideal conditions. However, it seems perfectly possible that a result which has come about in a discussion that satisfied the listed conditions is still false. In relation to the concept of ´truth´ this problem does not to apply to the (new) theory of truth stated in the first chapter (I.2.1). In relation to ´rightness´ the problem will be addressed in the next section and in the section concerned with legal legitimacy (III.1.0).

II.2.0 Karl-Otto Apel´s version of the strong program of moral justification

In the previous section it was argued that the leading idea of the strong program is that (a) transcendental rules of argumentation can be located and (b) these rules have a moral content. In the case of Habermas the "moral content" of these rules was argued to constitute political norms. The rules designating the "ideal speech situation" were hence argued to regulate an "in Zukunft zu realisierende Lebensform".

Karl-Otto Apel´s writings on ethics, in contradistinction to Habermas´s strong program, rather concerns moral norms relevant for individual agents[28]. Furthermore, Apel is preoccupied with grounding these ethical norms in an absolute way (Letztbegründung). In this respect he clearly differs from the later Habermas, as we shall see. Apel emphasises the absoluteness of these norms because he operates with a Kantian distinction between hypothetical and categorical imperatives. Hypothetical imperatives constitute procedures that are necessary to follow in order to achieve certain objects. A categorical imperative, however, constitutes a procedure that determines what is right in itself. Apel´s point is that it is only possible to distinguish between moral and immoral actions and norms if a categorical imperative exists.

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[28] As already mentioned Habermas´s strong program is not very elaborated and it is hence difficult to pinpoint how it precisely differs from Apel´s strong program. It is, however, not my ambition to establish how these two strong programs distinguish themselves from each other. The interesting fact I seek to make explicit is that Habermas once held a strong program, that he gave it up and now in Faktizität und Geltung apparently holds a strong program again. This development within Habermas´s practical philosophy is in no way made explicit by Habermas himself.

I shall in this section state the transcendental pragmatic[29] argument in favour of Apel´s fundamental norms and specify which status these norms possess. In chapter 5 I shall then return to the transcendental pragmatic conception of the strong program and elaborate on the normative implications of this program.

The transcendental pragmatic version of the strong program controversially argues that it is possible ultimately to justify certain moral[30] norms. Hence, it seems natural to begin an exposition of this program by stating why it is controversial. The reason for this is that the rational process behind the transition from pre-modernity to modernity[31] has caused a disbelief in metaphysical reasons. "Ultimate justification of ethical norms" is most often thought to rest on metaphysical reasons and hence seems impossible. Furthermore, Habermas emphasises that the post-metaphysical approach is opposed not only to metaphysics but also to the sort of *prima philosophia* Apel upholds (Habermas: 1988: 44). This intuitive mistrust in "ultimate justification" has been given a systematic account in the critical rationalist Hans Albert's formulation of the Münchhausen-Trilemma.

Hans Albert argues that any justification of any assertion ultimately rests upon either an: 1) infinite regress (q follows from x which follows from p etc.), 2) a logical circle (q follows from x which follows from q) or 3) a petitio principii (q follows from x and we simply assert x) (Apel[a]: 1998: 36).

This trilemma denies the possibility of ultimate justification within all sorts of discourse – also within physics or mathematics. It seems, however, as if the trilemma rests upon a certain "deductive understanding" of justification. Hans Albert, hence, seems to presuppose that an assertion is only justified if it follows deductively from another assertion. One could argue that, of course, if this is our concept of ´justification´ then it follows that we will never be capable of justifying any assertion. Although, we normally operate with other kinds of inductive and abductive justifications as well, and these do not seem to be affected by this trilemma. Presumably, Hans Albert would not be impressed by such an objection but rather argue that both of these types of justification are included by the trilemma. The facts from which inductive conclusions are drawn have to be justified

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[29] Apel calls his discourse ethical program a *transcendental pragmatic* program.
[30] Apel, unlike Habermas, does not distinguish between ´ethics´ and ´morality´ hence I do not distinguish between these two terms when I write about Apel.
[31] Habermas uses the terms ´pre-modernity´, ´conventional´ (in the sense of Lawrence Kohlberg), ´traditional´ and ´metaphysical´ to refere to a type of society where it was not tried to give norms a rational justification. Rather, they were justified with appeal to religion or tradition. A shift from ´pre-modernity´ etc. towards ´modernity´, ´post-conventionality´, ´post-tradition´ and ´post-metapysics´ has, however, been initiated. Thus, now it is tried to rationally justify moral norms.

themselves. If these "facts" are also justified inductively then we soon land in an infinite regress. The same argument goes for abduction.

It is however Apel´s thesis that still another kind of reflexive "justification" exists. In order to approach this form of justification one should inquire into the very idea of "questioning assertions". It is Apel´s thesis that all participants in discourse have to recognise the existence of certain presuppositions of argumentation. It is not possible to question these presuppositions because they are necessary and constitutive of argumentation. This means it is not possible to question these presuppositions without at the same time presupposing them. These presuppositions constitute norms and an agent who denies a norm while at the same time presupposing this norm commits a performative self-contradiction.

Hence, the transcendental pragmatic argument claims that it is possible to recognise reflexively certain *moral* norms that cannot be denied without committing a performative self-contradiction. Neither can they be deductively justified without performing a petitio principii and thus they enjoy a transcendental status. Apel describes their status in the following way:

"Wenn ich etwas nicht ohne aktuellen Selbstwiderspruch bestreiten und zugleich nicht ohne formallogische petitio principii deduktiv begründen kann, dann gehört es eben zu jenen transzendentalpragmatischen Voraussetzungen der Argumentation, die man immer schon anerkannt haben muß, wenn das Sprachspiel der Argumentation seinen *Sinn* behalten soll. Man kann daher diese transzendentalpragmatische Argumentationsweise auch die *sinnkritische Form der Letztbegründung* nennen" (Apel[a]: 1998: 69).

Now, which moral norms can, according to the transcendental pragmatic, be justified in such a way? This question will be answered through a reconstruction of the transcendental pragmatic argument. The argument asserts that if we are genuinely interested in solving a problem, we "have to argue rationally" in order to obtain a true solution[32] to the problem. The first transcendental pragmatic norm thus simply states that one has to argue rationally. This is a universal norm and it is not possible to deny it without committing a performative self-contradiction. Not much ethical content seems to be contained in this norm. However, spelling out what in fact is contained in this norm leads to a second norm. If we genuinely want to solve a problem then we have to seek a

solution against which no relevant reasons object viz. a solution where all evidence supports it. This means we have to aim at a solution all agents could consent to. In short, we are rationally obligated to aim at a rational consensus (Kuhlman: 1984: 594).

The fact that we are obligated to aim at a rational consensus implies that no other factors than the force of the better argument are allowed to regulate the discourse and that no arguments can be expelled from discourse without reason. Moreover, the fact that we raise validity claims towards each other indicates that we recognise each other as being rational agents. As rational agents who are capable of producing rational arguments we cannot from the beginning (prior to), without reason, be expelled from discourse. Apel describes this as the fundamental norm that "All possible discourse partners must acknowledge each other as having *equal rights* in representing their interests by arguments" (Apel[a]: 2001: 48). Genuine argumentation involves a commitment to redeem the validity claims, which are raised in the argumentation. If I claim something in a discussion, then, if I am genuinely interested in the truth concerning this issue, I will willingly listen to comments and critique of this claim. This is the only way to approximate the truth of the issue. This means that from the recognition that all possible discourse partners possess equal discursive rights a regulative principle is implied. In the life-world, moral conflicts have to be resolved in such a way that: "those material norms have to be established that in case of their being generally obeyed probably will have consequences that could be acceptable to all affected persons" (Apel[a]: 2001: 49).

The argument is that if an agent attempts to question the validity of any of the fundamental norms or principles just mentioned she gets mixed up in a *performative self-contradiction*. The first norm, that we have to argue rationally, cannot be meaningfully questioned. It is not meaningful to argue that it is possible to find a solution to a problem through irrational argumentation. Furthermore, if we seriously argue something then we have to presuppose that our argument deserves to be endorsed by all rational agents. If an agent claims that a certain proposition is true then this agent also presupposes that this claim should be shared by all rational agents. To raise the validity claim that a argument is valid is an integral aspect of arguing for something. This furthermore implies that "all possible discourse partners must acknowledge each other as having *equal rights* in representing their interests by arguments".

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[32] This reconstruction of the transcendental pragmatic argument is written on the background of a summary of a discussion between Apel and Hans Albert worked out by Wolfgang Kuhlman (Kuhlman, Weinheim: 1984).

Because when an agent raises a validity claim she raises it towards all possible rational agents. If the claim raised is valid then all rational agents will have to consent to it[33].

Moreover, he argues that we, as rational agents, are morally obligated to engage in discourse in order to discover which norms are moral. This moral obligation thus constitutes an "a priori obligation". That is, the validity of this "obligation" is determined *prior to* and not in the practical discourse. The line of argumentation seems to consist in two arguments. The first argument claims that:

(i) We make validity claims when we argue morally. (ii) A moral validity claim can be redeemed if all rational agents rationally agree to it. (iii) To "rationally agree to a validity claim" means agreeing to it under certain necessary presupposed rules of argumentation. (vi) Redeemed moral validity claims constitute morally right norms expressed in moral statements. Hence, rational agreement to a validity claim raised by a norm under necessary presupposed rules of argumentation constitutes a morally right norm.

This criteriological argument can be "made" normative by a second argument:

(i) Agents are obligated to act morally. (ii) Being obligated to *find out* what is morally right is a part of being obligated to act morally. (iii) It is only possible to find out what is moral if one engage in discourse. Hence, agents are *obligated* to engage in practical discourses when confronted with moral conflicts.

In short a fundamental norm and a regulative principle is, according to Apel, uncovered by transcendental reflection of necessary rules of argumentation: (1) "all possible discourse partners must acknowledge each other as having *equal rights* in representing their interests by arguments" and (2) "those material norms have to be established that in cases of their being generally obeyed probably will have consequences that could be acceptable to all affected" (Apel[a]: 2001: 39-40) [34].

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[33] The point of the "ultimate justification" is thus to spell out what we already necessarily presuppose. Wolfgang Kuhlman describes this as a program which is preoccupied with: "Das Aufdecken, die Einsicht, daβ wir das Gesuchte in gewisser Weise immer schon in Händen haben, ist der springende Punkt bei der strikt reflexiven Letztbegründung, nicht seine Ableitung" (Kuhlman: 1981: 589)

[34] Besides the norm of "mutual recognition" Apel also claims that a norm of co-responsibility is transcendentally involved by argumentation. As I reconstruct Apel´s arguments in this essay this norm does not play any role. I have chosen to omit this dimension of Apel´s argumentation because it is not relevant to the theses of this essay and because the status of this norm even to Apel is not really clear. See especially the paper "Diskursethik als Ethik der Mit-

These norms Apel argues enjoy a transcendental status. Hence he calls them: "(..) *Grundnormen des Moralischseins,* die als – *reflexiv einsichtige – normative Bedingungen der "praktischen Diskurse"* nicht deren fallible Ergebnisse sein können, sondern *a priori konsensfähig sein müssen*" (Apel: 1998: 770).

The question is, however, whether *moral* norms can in fact be uncovered by this "transcendental reflexive" method. This question I shall address in the next section.

II.3.0 Moral transcendentalism, inconsistency, or petitio principii

The *intention* of both versions of the strong program can be summarised as an attempt to, by transcendental reflection[35], uncover fundamental moral norms. However, in the case of Habermas the "ideal speech situation" provided "political" norms which where supposed to regulate a form of life. Whereas Apel argued that it was possible to transcendentally derive norms that made it possible for the individual to act moral in concrete situations. This difference in levels and the implications of it will be spelled out in the following chapters. We shall see that it is no coincidence that the strong program is carried out with much more detail and clarity by Apel than it is by Habermas. In the next section it will become clear that Habermas, contrary to Apel, finds the strong program inadequate as an explication of a moral theory. Moreover, as we shall see in chapter 3 he even seems to loose faith in moral theory as such (III.3.0).

The main reason why Habermas omits the strong program and instead turns towards a weak program of justification is found in the alleged latent inconsistency in the basic structure of the strong program. Both Habermas and Apel operate with two categorically different types of norms. At a first order level we find substantial norms of the sort "you should help elderly ladies" and "stealing is wrong" and at a second order level we find transcendental norms which determine which of the first order norms are in fact morally right. Both categories of norms have a moral content. The first order norms are clearly morally substantial as they command agents to act in certain ways.

Verantwortung vor den Sachzwängen der Politik, des Rechts und der Marktwirtschaft" (2001) as well as the interview with Apel "Primordiale Mitverantwortung – Zur transzendentalpragmatischen Begründung der Diskursethik als Verantwortungsethik" (2001).

[35] This concept of "transcendental reflection" was not really made clear by Habermas in his strong program. However, as we shall see in the next section Habermas makes use of the reflexive method to recognise transcendental rules as well.

The second order norms are, however, also morally substantial as they are supposed to regulate a form of life (Habermas) and command agents to respect discursive rights of other agents (Apel).

I shall, however, argue that this "normative structure" involves either *inconsistency* or the introduction of *unjustified substantial values* i.e. a petitio principii[36]. I shall frame the problem in relation to Habermas´s strong program but the problem also applies to Apel´s strong version of a program of moral justification. It seems to me that Habermas and Apel are capable of opposing the problem of inconsistency but not the one of "unjustified substantial values" (petitio principii).

The *first* problem states that the strong program is *inconsistent* because it makes two apparently inconsistent claims. On the one hand, it generally claims that we as rational agents cannot know whether norms would be accepted under ideal conditions. On the other hand, it claims that specially the "ideal conditions" constitute moral norms which we in fact know are moral (i.e. would be accepted under ideal conditions). Apparently, it is argued that "morality" is procedurally and non-procedurally defined at the same time[37].

This problem can, however, be solved by loosening the first claim. Instead of arguing that the validity of *all* norms has to be determined procedurally it can be argued that *certain* moral norms can be transcendentally justified. Though, ´truth´ and ´rightness´ constitute properties that *generally* have to be determined in dialogue *certain* norms can be reflexively transcendentally justified. The reason why these norms are transcendentally justified is that they constitute necessary enabling conditions of the practical discourse in which it is determined which other substantial norms count as being moral.

The argument can be reconstructed in the following way: (i) Agents are obligated to act morally. (ii) Being obligated to *find out* what is moral is a part of being obligated to act morally. (iii) Agents are only, even in principle, capable of determining which norms are moral if they satisfy the conditions designating the "ideal speech situation". Conclusion: since agents are obligated to act morally they

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[36] This petitio principii is different from the one which Apel argues that his theory rests upon. The petitio principii he has in mind consists of the fact that rational agents have to presuppose certain norms which cannot consistently be questioned but which cannot be deductively justified either. The petitio principii I have in mind here is different. I argue that Apel and Habermas assert, without justifying this assertion, that ´morality´ is identical with ´discursive justification´.

[37] Therefore Benhabib states: "The ideal speech situation is a circular construction; it presupposes those very norms whose validity it was supposed to establish" (Benhabib: 1986: 290).

are also obligated to find out what is moral and hence *obligated* to respect the necessary enabling conditions of moral discourse[38] (the ideal speech situation).

This, however, leads us to the *second* problem of "unjustified substantial values". The question is whether the *third* premise of the above mentioned argument is indeed true. Does "rational discourse" constitute the only way to determine what is moral? Many approaches to morality would not agree with this premise. Religious people, for instance, would argue that morality consists in the words of God and that it is possible, if one listens carefully to one's heart, to hear these words. Utilitarists argue that those actions which lead to the greatest amount of happiness are morally right. Finally, sceptics would argue that *rational discourse* may constitute a reasonable procedure to settle conflicts but this does not imply that this procedure also - or therefore - is moral.

Thus, in my opinion, it is possible, on the one hand to accept the argument that "rational discourse" involves certain norms that necessarily have to be respected if rational discourse is to be possible. On the other hand, however, this does not imply that these "necessary norms" automatically constitute moral norms.

In this way the strong program asserts, without justifying it, a substantial premise[39]. It *presupposes* that "rational discourse" is capable of producing moral norms. In this way the program makes a *petitio principii*. Furthermore, only if one accepts this premise does one also have to accept that it is immorally not to respect the rules designating the rational discourse.

Apel, in my opinion, does not consider this problem of an "unjustified substantial value". Instead he, somewhat unreflectively, maintains that the rules necessary for rational discourse constitute ultimately justified moral norms. Habermas likewise only sees the first problem of inconsistency and argues he is capable of solving this problem in the weak program. I shall now address this weak program of moral justification and show why it does not solve the second problem of an "unjustified substantial value".

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[38] This line of argument is found in Apel´s strong program and thus he is not vulnerable to the problem of inconsistency.

[39] This critique of the strong program resemblances the standard critique of Rawl´s "original position". Here, it is equally argued that it may be that the resulting norms of the original position are just but the rules which constitute this position are themselves not satisfactory justified.

II.4.0 Habermas´s weak program of moral justification

In this section I would like to address Habermas´s alternative to the strong program. Instead of the strong program Habermas now argues for a weak conception of moral justification of norms. The weak program has abandoned the epistemic theory of truth as well as the thesis that the norms constitutive of the rational discourse also constitute fundamental a priori justified moral norms.

The universalizability principle U stands at the core of this program. This principle claims that a norm is right if all those affected by a norm rationally agree to it. I shall start out by inquiring into the status of this principle. Does it constitute a meta-ethical principle or does it belong to normative ethics? Though Habermas himself does not use these terms I shall claim that U foremost belongs to the domain of meta-ethics. It is a criteriological principle which defines what morality is but which does not provide any moral norms. I will go on to show how the principle U constitutes a principle in the Kantian tradition. This will lead to a demonstration of how the principle itself is grounded. It will become clear that Habermas, in order to ground U, makes use of Apel´s argument of a performative self-contradiction. This argument, in Habermas´s version of it, basically claims that agents by entering a discourse have to presuppose certain transcendental rules. The principle U can, according to Habermas, be derived from these rules. It is furthermore these transcendental rules or "necessary presuppositions of argumentation" that explain the *universal character* of the validity claim that moral statements raise.

An inquiry into Habermas´s latest view on discourse ethics thus shows that moral norms, according to Habermas, cannot be justified through transcendental argumentation. Instead, Habermas argues that moral norms *exclusively* have to be justified among the agents who are subordinated by these norms.

At the end of this chapter I shall, however, argue that the weak program is faced with two serious problems. On the one hand, Habermas, without noticing it, places the weak program in a dilemma between resting on a petitio principii, or being morally arbitrary. On the other hand, the weak program is faced with the problem that, even if one grants that it constitutes a formal moral program, it still remains morally empty.

II.4.1 The status of the moral principle U

It is the overall claim of the weak program that the moral principle U is derivable from certain necessary presuppositions of argumentation. This principle is supposed to constitute the moral point of view. Thus, if a norm is adopted in accordance with this principle it is eo ipso a morally right norm. I would like firstly to state this principle and discuss the status of it. Afterwards, I address the question of how it is justified.

The universalizability principle U is defined in the following way:

"So muβ jede gültige Norm der Bedingung genügen, -daβ die Folgen und Nebenwirkungen, die sich jeweils aus ihrer *allgemeinen* Befolgung für die Befriedigung der Interessen eines *jeden* Einzelnen (voraussichtlich) ergeben, von *allen* Betroffenen akzeptiert (und den Auswirkungen der bekannten alternativen Regelungsmöglichkeiten vorgezogen) werden können" (Habermas: 1983: 75).

This definition makes it interesting to learn the status of this principle. Is it a meta-ethical or is it a normative principle?

It is not prima facie clear whether U constitutes a meta-ethical or a normative principle. Indeed, as Albrecht Wellmer puts forward, U is intended to constitute an *Aufhebung* of Kant´s categorical imperative[40]. And since the categorical imperative constitutes a normative principle one might expect that U equally is intended to constitute a normative principle. Hence, Wellmer suggests that U should be read in the sense of U^1. This principle is defined as follows:

(U^1) "In Situationen S h zu tun, ist (moralisch) richtig (geboten), wenn alle (zwanglos) wollen können, daβ die entsprechende Handlungsweise – unter Berücksichtigung ihrer voraussichtlichen Folgen für jeden einzelnen – allgemein wird" (Wellmer: 1986: 58).

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[40] In the essay *Treffen Hegels Einwände gegen Kant auch auf die Diskursethik zu?"* Habermas, for instance, writes: "In der Diskursethik tritt an die Stelle des Kategorischen Imperativs das Verfahren der moralischen Argumentation" (Habermas: 1991: 12).

In effect U^1 says you have to perform the act h in situations which can be described as S-situations because all rational agents would accept this kind of action in S-situations[41]. However, in response to Wellmer and other commentators of his work Habermas has made it clear that U should be conceived as a meta-ethical principle. He does not use the term ´meta-ethics´, however, but instead distinguishes between "Begründungs-" and "Anwendungsdiskurse" (Habermas: 1991: 138). The principle U solely determines what it means for a norm to be valid (Begründungsdiskurs). From this principle it then may become possible to derive a normative principle that makes it possible for agents to act morally in context-dependent situations (Anwendungsdiskurs) (Habermas: 1991: 136). Habermas, however, does not address this additional application problem of the discourse ethics. The normative conceptual structure of Habermas´s practical philosophy can thus be described as in diagram 1.

Diagram 1.   Universal pragmatic / transcendental rules
|
Moral principle U
|
Substantial obligating norms
adopted in accordance with U
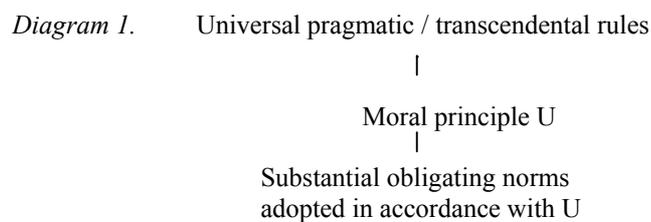
The fact that U constitutes a meta-ethical principle does, however, not make it impossible to understand this principle as constituting an *Aufhebung* of Kant´s categorical imperative. Kant claimed that actions are moral to the extent they are consistent with maxims acceptable to all rational beings. He, however, wrongly thought that it is possible for individuals to test monologically (in solitude) whether a given maxim is or is not acceptable to all. The discourse ethical approach adopts the Kantian idea that "morality consists in universality" but add that whether a norm is universal or not has to be settled in a *real* dialogue. That is, in a dialogue which actually takes place among those agents affected by the norm in question. The discourse ethical approach thus endorses the idea that moral validity consists in *universality* but correctly adds that whether or not a norm in fact is universally acceptable has to be determined in a universal dialogue. The "moral perspective" is no longer to be conceived in terms of individuals´ capacity to test whether all rational beings would agree to a certain norm. Rather, the "moral perspective" is equivalent to a rational consensus attained under ideal conditions of justification.

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[41] This way of deriving a normative principle from U is actually quite close to the suggestion made by Klaus Günther which Habermas endorses (Habermas: 1991: 138).

Furthermore, Kant justified the thesis that moral valid norms have to be universally acceptable by claiming that it followed from a *"Faktum der Vernunft"*. The weak program has a different program of justification. This, I shall address now. In doing so it will also be explained in what sense moral statements raise *universal* validity claims equivalent to empirical statements.

II.4.2 The grounding of the discourse ethics

Even though the Kantian idea of identifying morality with universality does possess a certain prima facie plausibility the question remains whether the idea does more than "reflect the moral intuitions of the average, male, middle-class member of a modern Western society" [42]. The question is whether U should be read in a communitarian or in a liberal universal manner. This question, the Habermasian cognitivist answers *mit einer transzendentalen Begründung seines Moralprinzips* (Habermas: 1983: 87). The ambition is to show that U can be derived from necessary transcendental rules of argumentation[43]. It is argued, that such a grounding of U, beyond any doubt, will demonstrate that U does not solely constitute the idiosyncrasies of a specific cultural perspective. Furthermore, it is argued that such a *transcendental justification* will not be identical with the argument in the strong program. In the strong program it was argued that certain substantial moral norms can be transcendentally derived. In the weak program this thesis has been abandoned. Instead, only the transcendental rules constitutive of a moral procedure, the "moral point of view", is to be given a transcendental justification.

The fact that moral norms raise claims of such an " universal perspective" (the moral principle U) is, as we shall see, due to the fact that this "perspective" is entailed by "necessary presuppositions of argumentation". These "presuppositions" are *necessary* in the sense that we cannot deny the existence of them without committing a *performative self-contradiction*.

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[42] Most bluntly Habermas puts this point in an interview with Peter Dews. Here he says: "According to my conception, the philosopher ought to explain the moral point of view, and –as far as possible –justify the claim to universality of this explanation, showing why it does not merely reflect the moral intuitions of the average, male, middle-class member of a modern Western society. Anything further than that is a matter for moral discourse between participants" (Peter Dews´ interview with Habermas: 1986: 160).

[43] In this context Habermas writes: "Die geforderte Begründung des vorgeschlagenen Moralprinzips könnte demnach die Form annehmen, dass jede Argumentation, in welchen Kontexten sie auch immer durchgeführt würde, auf pragmatischen Vorraussetzungen beruht, aus deren propositionalem Gehalt der Universalisierungsgrundsatz "U" abgeleitet werden kann" (Habermas: 1983: 93).

Apel argued, as we saw in the previous section, that because these "presuppositions" cannot be denied without committing a performative self-contradiction they constitute a *Letztbegründung*. The concept of a ´performative self-contradiction´ should, according to him be explained as a contradiction between fundamental (transcendental) moral norms and the propositional content of speech acts. Hence, he argued that certain fundamental *moral* norms are *Letztbegründet*.

Even though Habermas and Apel agree in relation to the basic structure of a justificationary program they disagree in regard to the status of this structure. Habermas agrees that "basic" necessary presuppositions of argumentation can be reflexively located but argues that they are neither moral nor *Letztbegründet*[44].

Instead, it is argued by Habermas that performative self-contradictions occur when an agent performs a speech act where the propositional content of this speech act is inconsistent with the constitutive rules of argumentation (Habermas: 1983: 90). Hence, Habermas and Apel disagree in regard to the status of the "necessary presuppositions". Apel insists on reading them as constituting or implying fundamental moral norms. Habermas instead distinguishes between *communicative rationality* and *moral rationality*. Moral claims just constitute one special branch of claims that can be discursively redeemed. Hence, he argues that not only moral but also theoretical problems have to be solved discursively[45]. This means, that standing under an illocutionary obligation to justify raised claims cannot constitute a *special moral obligation*, since it is also operative in the case of truth claims. Instead, it only constitutes the "(..) Muβ einer schwachen transzendentalen Nötigung, ohne dabei dem präskriptiven ´Muβ´ einer Handlungsregel zu begegnen (..)" (Habermas: 1991: 191). Thus, even though reason (Vernunft) is inherently communicative this does not entail that it is

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[44] In effect Habermas not only rejects ultimate justification of moral norms but also of constitutive rules as well. Thus, the constitutive rules which have been made explicit through transcendental reflection are, according to Habermas, also fallible. Hence, he writes: "(..) wir müssen uns auf die pragmatischen Vorraussetzungen dieser anspruchvollen Kommunikationsform *unausweichlich*, eben ohne Alternative einlassen. Dieser Nachweis der faktischen Nichtverwerfbarkeit von normativ gehaltvollen Präsuupositionen einer mit unserer soziokulturellen Lebensform *intern* verschränkten Praxis steht gewiβ utner dem Vorbehalt der Konstanz dieser Lebensform. Wir können nicht a priori ausschlieβen, daβ diese sich ändert" (Habermas: 1991: 194). This argument Apel, in my opinion correctly, criticises for being metaphysical. In effect Habermas namely adopts a "quasigöttlichen – Standpunktes, der das *Nichthintergehbare* der primordialen Argumentation nicht anerkennen will, sondern die Welt als "begrenztes Ganzes" (Wittgenstein) von auβen als kontingent begreifen will" (Apel: 1998: 796).
[45] This thesis we met in section 2 in the first chapter which investigated the relation between practical and theoretical truth.

inherently moral[46]. Apel, however, brackets communicative and moral rationality together. Thus, he awkwardly seems to argue that agents are also *morally* obligated to justify *truth* claims[47].

In chapter 5 I shall return to Apel´s understanding of these "necessary presuppositions of argumentation". For now, I shall like to specify Habermas´s understanding of their status and subsequently show in what way the moral principle U can be said to be derived from them.

By classifying the necessary rules of argumentation as constitutive rules[48] Habermas implicitly seems to refer to John Searle´s distinction between *constitutive* and *regulative* rules. Searle argues that constitutive rules of games have to be separated from regulative rules of etiquette or morals. If you break a constitutive rule of a game (e.g. start moving the pawns backwards in chess) then you alter the game. Because in a sense the constitutive rules are the game. If you on the other hand break a regulative rule you overstep a social convention and can be expected to be socially sanctioned (Searle: 1971: 42). The constitutive rules (the presuppositions of argumentation) Habermas mentions are extremely deep-seated in language and cannot be changed[49]. Hence, breaking them does not "alter the game" but rather discloses a pragmatic self-contradiction in the agent who breaks them. The fact that they are constitutive, however, also means that they do not constitute practical imperatives in the sense regulative rules do. Subordination to these rules, hence, is not identical with being subordinate to a practical imperative (a norm of action).

This way of conceiving the "necessary presuppositions", however, does not make the argument of performative self-contradiction impossible, even though, it implies that the concept of performative self-contradiction no longer has a moral status. If an agent violates one of these "necessary presuppositions", e.g. claims that a norm is right without letting certain people have access to the norm-justifying discourse, then this agent makes a *rational* but not a *moral* self-contradiction. In order to be able to specify this distinction between a moral and a rational self-contradiction I shall first have to state the relevant transcendental presuppositions of argumentation.

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[46] However, by drawing this distinction between "communicative rationality" and "morality" it becomes unclear why the fact that all agree to a norm eo ipso means that this norm is right. This problem I return to at the end of this section.
[47] This interpretation is, however, consistent with the fact that Apel sees the communicative imperative "argue rational" as a fundamental discourse ethical norm, as we saw in Apel´s version of the strong program.
[48] –*sie ermöglichen die Praxis, die die Teilnehmer als Argumentation verstehen* (Habermas: 1991: 133)
[49] As Habermas writes: "Denn Konzepte wie Wahrheit, Rationalität, Begründung oder Konsens spielen in allen Sprachen und in jeder Sprachgemeinschaft, obwohl sie verschieden interpretiert und nach verschiedenen Kriterien angewendet werden mögen, dieselbe grammatische Rolle" (Habermas: 1992: 379). The reason why they play this universal role is due to the "necessary presuppositions of argumentation".

Habermas adopts the "constitutive presuppositions of argumentation" relevant for the derivation of the moral principle U from Robert Alexy. The idea is that seriously engaging in argumentative discourse involves certain commitments. These commitments can be stated as three pragmatic presuppositions of argumentation:

(a) Every subject with the competence to speak and act is allowed to take part in a discourse.

(b) i. Everyone is allowed to question any assertion whatever.

   ii. Everyone is allowed to introduce any assertion whatever into the discourse.

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

(c) No speaker may, by internal or external coercion, be prevented from exercising his rights as laid down in (a) and (b)[50] (Habermas: 1983: 99).

These rules *have to* be presupposed fulfilled in order for argumentation to be possible. In this way, they have a transcendental status. The reason why they have to be presupposed was given in the section concerned with the strong program, where it was stated that performing a communicative speech act involves raising validity claims. Claiming that a statement is valid[51], furthermore means claiming that it deserves rational agreement – since ´validity´ is defined as *rationally agreement*[52]. Thus, everybody, if sufficiently informed, would have to agree to it. However, if an agent raises such a validity claim but does not allow other agents to question it or to express their opinion concerning it, this agent performs a performative self-contradiction. Such an agent in effect claims that a certain statement is valid but that not everybody has to *rationally* agree to this.

On the one hand, the agent implicitly *raises* the claim that her validity claim deserves to be accepted by all rational beings – this is the performative element. On the other hand, she refuses to listen to arguments that question this – this is the propositional element. This self-contradiction, however, does not possess a moral status. It does not exemplify a contradiction between a moral norm and a propositional statement.

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[50] I have adopted William Rehg´s English translation of these rules (Rehg: 1994: 62).

[51] However, only in the case of regulative and constative speech acts.

[52] As Habermas writes in *Faktizität und Geltung*: "Mit dem assertorischen Sinn seiner Behauptung erhebt ein Sprecher den kritisierbaren Anspruch auf die Gültigkeit der behaupteten Aussage; und weil niemand über die Möglichkeit eines direkten Zugriffs auf uninterpretierte Geltungsbedingungen verfügt, muβ ´Gültigkeit´ epistemisch verstanden werden als ´Geltung´, die sich für uns erweist" (Habermas: 1992: 29).

It rather constitutes a contradiction between a constitutive norm and the propositional content of a speech act[53] (Habermas: 1991: 186). In the next section I shall, however, suggest that if Habermas is correct in his evaluation of these rules or "necessary presuppositions" then this seems to imply that he cannot even provide a meta-ethical criterion of moral rightness.

II.4.3 The problem of arbitrariness

On the face of it, the derivation of the universalizability principle from "necessary presuppositions of argumentation" seems unproblematic. It follows from the "necessary presuppositions" that no arguments a priori can be expelled from discourse if this discourse is to be rational. And since the universalizability principle U states that all *those affected by a norm* have to consent to it, in order for the norm to be rational, the universalizability principle seems to be implied by these "presuppositions". However, the formulation of U, in my opinion, has to be revised. The "presuppositions of argumentation" state that all rational agents should have access to discourse. Hence, it should be made clear that not only *those affected by a norm* but *all rational agents* have to agree to the norm in order for it to be valid. Thus, the condition in U, which claims that "all those affected" should agree to a norm in order for it to be valid, should be changed to "*all rational agents*"[54].

The moral principle U seems simply to express an *abbreviation* of the necessary presuppositions of argumentation. Hence, there seems to be no difference between U and U^2, which is defined in the following manner[55]:

(U^2) A norm is morally right if and only if it is rationally acceptable under ideal conditions viz. the "necessary presuppositions".

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[53] Habermas emphasises this difference by writing: "Der normative Gehalt der allgemeinen Argumentationsvorraussetzungen wird auf diese Weise nur in Anspruch genommen, um die *epistemische* Frage, wie moralische Urteile möglich sind, aber nicht um die *existentielle* Frage zu beantworten, was es heiβt, moralisch zu *sein* (Habermas: 1991: 186). Habermas, seems to argue that the "necessary presuppositions" explain how and when a moral statement is justified but they do not entail moral obligations – they do not say that rational agents *are* (sein) morally obligated.

[54] Furthermore, since Habermas emphasises that moral rightness is analogue to truth it seems obvious that moral validity has to be determined by all rational agents and not only those affected by the norm in question.

[55] This is not an uncontroversial statement. Habermas at one point argued that "U muβ sorgfältig unterschieden werden von irgendwelchen inhaltlichen Prinzipien oder Grundnormen, die nur den *Gegenstand* moralischer Argumentation bilden dürfen; vom normativen Gehalt der Argumentationsvorraussetzungen, die (wie in 3.1-3.3) in Regelform expliziert werden können" (Habermas: 1983: 103). Habermas thus wants to separate a *morally relevant* principle U from "moral norms" on the one hand and from the "necessary presuppositions" on the other hand. This is, in my opinion, not logically possible. Furthermore, I see no argument for such a status of U in Habermas´s writings.

If U claimed anything more than that which is contained in the transcendental necessary presuppositions then this would constitute a *substantial claim which was not transcendentally justified*. Hence, this claim would have to be justified somehow. However, if one accepts that U and U^2 are identical it becomes unclear in what way the principle U^2 can be said to constitute a specific *moral* principle.

Hence, on a deeper level the weak program is, in my opinion, confronted with a dilemma between making use of *unjustified substantial values* or becoming *arbitrary*. On the one hand, the principle U^2 can be read in a strong manner. Read this way no substantial difference exists between the strong and the weak program. Hence, the weak program then becomes open to the criticism of making use of *unjustified substantial values* stated against the strong program. On the other hand, the weak program can be read in weak manner. Read this way the principle U^2, however, *does not* constitute any transcendentally justified moral principle after all.

I shall start out by stating in what way U^2 can be seen as making use of *unjustified substantial values*. This problem emerges if one argues that the "presuppositions of argumentation" restrict which *kind* of norms can be said to be valid. The problem is that it seems to be a part of the meaning of the "universalizability principle" that a norm, which explicitly is not in the interest of all those affected by it, eo ipso is immoral and vice versa. If this reading is correct then the principle argues that it can be determined a priori which norms are immoral, viz. those inconsistent with U^2, and which are not. It is an empirical question whether a given concrete norm actually is in the interest of all those affected by it. However, it can be a priori determined that if a norm in principle is not in the interest of all those affected by it *then* it is eo ipso immoral. This is, however, clearly a moral judgement. Hence, the "necessary presuppositions", also in Habermas´s weak program, have a *moral content*. However, it is unclear how the meta-norm (the principle U^2), which a priori dictates that certain norms are moral and certain others immoral, itself is justified. Even if one accepts the transcendental deduction of the universalizability principle this does not make U^2 a *moral* principle. In fact, U^2 only *becomes* a moral principle if we *treat* it as a moral principle. It seems fairly easy to treat U^2 as a moral principle since it encapsulates many of our intuitions of morality. However, if U^2 *only* constitutes a moral principle to those who see it as a moral principle then U^2 ultimately seems to rest upon values of a given culture. The *validity* of the "value", that we conceive U^2 as a *moral* principle, however, cannot be dependent upon whether it is justified by the procedure of U^2. Hence, this particular value seems to be *antecedent* or *a priori* valid. Thus, we are

once more confronted with the problem of making use of *unjustified substantial values* – committing a petitio principii. The weak program also presupposes certain substantial values – viz. the value that *justice* or *moral rightness* has to be universal.

In order to escape this problem Habermas might argue that even at an a priori level norms inconsistent with U^2 do not automatically constitute immoral norms. This option leads to the second problem of the dilemma viz. the problem of *arbitrariness*. If, even at an a priori level, it is not possible to say that norms that are inconsistent with U^2 constitute immoral norms then U^2 does not even constitute a meta-ethical explanation of morality. In effect, U^2 simply constitutes one arbitrary procedure of settling moral issues next to principles such as tossing coins or just letting the strongest get the most.

II.4.4 The problem of emptiness

Leaving the above mentioned problems aside for the moment I shall address the question of what can be gained from the universalizability principle U^2 if one grants that it constitutes a moral procedure i.e. expresses the moral point of view.

From the beginning of this chapter I have argued that the weak program, unlike the strong program, belongs to the domain of meta-ethics. The distinction between ´meta-ethics´ and ´ethics´, I have argued, to a wide extent matches Habermas´s distinction between ´Begründungs-´ and ´Anwendungsdiskurse´. The main ambition of the weak program consists in giving a theory of ´moral rightness´ that explains both how moral norms can be right or wrong in a universal manner and how this, at least in principle, can be cognitively recognised. This meta-ethical approach to morality Habermas distinguishes from an *ethical normative approach* which aims at representing the principle U^2 as a principle that can morally guide agents who wishes to make the morally right choice in concrete situations.

However, even though the universalizability principle is refered to the level of meta-ethics, Habermas maintains that it plays a role in regard to how agents should arrange their common life[56]. The argument is that if the agents in a community wish to be regulated by social norms that are discursively justified then the agents of this community have to respect the necessary rules of

argumentation and hence U^2. This argument has been spelled out by William Rehg[57]. Rehg argues that:

"If one assumes (1) a pluralistic group decides to resolve their conflicts of interest co-operatively by reaching argued agreement (as rational conviction) on a norm; and if (2) a commitment to argument means treating all the competent speakers on the issue as equal dialogue partners in this argument (..); and finally, if (3) a social norm is a shared general expectation serving to resolve potential conflicts of interest by regulating the pursuit of those interests (..); then (4) every such moral expectation must rest on reasons all those subject (and affected by) the expectation can accept in open debate, for otherwise the norm is not justified for those subject to it, and thus its observance may not be expected of them (nor may the non-interference of other affected parties be expected)" (Rehg: 1994: 66).

This argument illustrates how agents *have to* make use of U^2 as a rule of argumentation if they want to live rationally and hence morally. The first and second premises claim that *if* agents want to regulate their lives with rational norms *then* all rational beings have to be heard before adopting any norms. No arguments can be excluded a priori from a discourse if the discourse is to be rational. This in effect means that the agents have to make use of the principle U^2 as a "rule of argumentation" when they wish to settle moral conflicts. The third premise specifies what a norm is and the fourth premise explains why norms accepted in open debate also count as being valid.

First of all, it is interesting to note that this argument certainly does not solve the *problem of arbitrariness* mentioned in the former section. Rehg asserts that if agents want to be rational then they have to do X because rationality consists in X. However, the transference from (communicative) rationality to morality (the crossing from the third to the fourth premise in his argument) he does not explain or justify. This problem is, however, for the moment, not the issue. Second of all, only very little follows even if one accepts that it somehow could be made plausible that U^2 constitutes a purely *formal* and moral procedure. This means that even if one accepts Rehg´s argument those agents who seek to regulate their common lives with moral (rational) norms will never be able to reach certainty concerning the status of the norms they discuss. Habermas argues that the discourse ethics explains the epistemic dimension of morality (Habermas: 1991: 187). This

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[56] The status of the principle U thus more accurately lies between meta-ethics and normative ethics or it constitutes a meta-ethical principle with moral-political relevance.

means, that a social norm is justified if the validity claim it raises is supported by reasons and morally right if it satisfies the ideal conditions stated in U^2. However, even if we accept that the universalizability principle constitutes a moral procedure this surely does not make it possible to determine whether de facto existing norms are right or wrong. The weak program involves at least two distinct problems. These two problems taken together I term the *problem of emptiness*.

The first problem concerns the fact that the epistemic criterion of morally rightness becomes too abstract to have any relevance for de facto existing norms. Wellmer´s diagnosis of consensus theories of truth also applies to Habermas´s consensus theory of rightness viz. that it "(..) ist ein Maβ jenseits des menschlichen Erkenntnis- und Beurteilungsvermögen, und darin vergleichbar dem Maβ einer Welt-an-sich, von der wir principiell nicht wissen können, ob unsere Überzeugungen und Urteile ihr angemessen sind" (Wellmer: 1999: 379). This means the criterion for determining whether a norm is valid or not is too ideal to determine the status of any de facto existing norms. Hence, in effect, it seems as if chronic uncertainty concerning the normative status of actions and norms have to prevail if one accepts the premises of the weak program.

The weak program thus may refute metaphysical scepticism, i.e. the thesis that moral norms by principle cannot be right[58]. However at the same time it promotes epistemological scepticism because it makes the procedure for determining whether a norm is moral so ideal that it cannot take place. Hence, we can never *know* whether our contemporary norms in fact would be accepted under ideal conditions.

This fact may not constitute a problem to a *pure* meta-ethical theory. However, as we have seen, in spite of everything, Habermas wishes to formulate a theory that maintains some practical moral relevance.

The second problem concerns the fact that even under ideal epistemic conditions consensus concerning the status of a given norm can not be expected to occur. Hence it does not seem possible to establish, within Habermas´s theory, that for instance "racism" constitutes a morally wrong norm

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[57] In the essay *Erläuterungen zur Diskursethik* (1991: 134 footnote 18) as well as in *Faktizität und Geltung* (1992: 140 footnote 32), Habermas endorses this argument.

[58] In fact it cannot solve the problem of metaphysical scepticism either because it cannot solve the *problem of arbitrariness*.

or ideology[59]. In fact, no moral standpoint, no matter how outrageous it may be, can be said to be morally wrong according to Habermas´s theory. If an agent, for instance, advocates racism, then this agent has to *consent* that racism is wrong before it can be *established* that racism is wrong. A norm is morally right if and only if all rational agents consent to it. This can, however, not mean that a norm is *morally wrong* if all rational agents *do not* consent to it. If this were to be the case then probably all our contemporary norms would be morally wrong since no rational consensus probably could be reached in regard to their status. It hence seems more plausible to claim that a norm is morally wrong if all rational agents rationally agree (consent) that it is wrong. This, however, implies that "racism", for instance, only is *morally wrong* if all rational agents, including the racists, agree that this norms is morally wrong. However, if racists truly believe that "racism" constitutes a morally right norm then it seems unlikely that they would agree that "racism" is a morally wrong ideolgoy. Hence, it can not be established that "racism" constitutes a morally wrong norm.

It is an exegetic thesis of this paper that this problem of emptiness plays a central role to Habermas´s political philosophy developed in *Faktizität und Geltung*. In the next chapter I shall show how Habermas in the program of *Faktizität und Geltung* is capable of *overcoming* the problem of *emptiness* (III.5.0). However, as we shall see, this is only possible at the cost of abandoning the aspiration of purity and non-substantiality characteristic of the weak program. I shall instead argue that Habermas returns to a normative program akin to the strong program of moral justification.

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[59] Uwe Steinhoff pushes this point to its limit when he writes that the following follows from Habermas moral theory: "Wenn es der Fall *wäre* (und man kann ja nie wissen), daβ auch nur *ein* Betroffener (z.B. ein Kinderschänder, Vergewaltiger, Diktator) als Teilnehmer an rationalen Diskursen den Normen "Du sollst keine Kinder schänden", "Du sollst nicht vergewaltigen", "Du sollst die Menschenrechte achten" nicht zustimmen könnte, *dann könnte diese Normen, das ist wahr, keine Gültigkeit beanspruchen*". Steinhoff adds "Wenn Habermas dieser Aussage nicht zustimmt, bestreitet er die Richtigkeit seiner Theorie. Stimmt er der Aussage aber zu, so setzt er diese ebenso wie ihren Schöpfer in ein ungünstiges Licht" (Steinhoff: 1996: 454).

II.5.0 A provisional assessment of the discourse ethics

In the first chapter we saw that Habermas as well as Apel argue that ´validity´, on post-metaphysical premises, has to be understood as "communicative or discursive redemption of validity claims". We furthermore learned that a validity claim is redeemed if it is satisfied under ideal conditions of justification. This idea constitutes the basis of the Habermasian and Apelian versions of the discourse ethics. In the present chapter we have been informed that the "ideal conditions of justification" constitute necessary transcendental presuppositions of argumentation. We have also learned that they can be read in two different manners. They can either be read in a "procedural *and* substantial manner" (the strong program) or in a "purely procedural manner" (the weak program).

The structure of the discourse ethical program contains two components: A *formal* transcendental component viz. the "necessary presuppositions of argumentation" and a *substantial* component viz. the "discourse among moral agents". If one, so to speak, focuses on the first of these components then one arrives at the strong "procedural *and* substantial program". The idea of this program is that certain *moral* norms can be transcendentally justified. These norms then constitute the necessary and sufficient conditions norms have to fulfil in order to be moral. If one on the other hand emphasises the second component then one arrives at the weak program. The idea of the weak program is that no a priori justified norms exist. It is only possible to make transcendental rules of argumentation explicit. It is norms exclusively, which are decided by moral agents themselves, that can justly claim moral validity.

These two programs I have addressed from the perspective of three distinct positions: (i) Habermas´s strong program which was mainly a program concerned with justification of political norms. (ii) Apel´s strong program. This program was concerned with justification of moral norms relevant for agents who wish to act morally. (iii) Habermas´s weak program. This program was primarily concerned with providing a criteriological theory of morality. It, however, also claimed to be of relevance in regard to the procedure agents should make use of if they want to establish moral norms.

However, it became clear that both of these programs face problems. The main problem of the strong program is that on the one hand it makes use of unjustified values (petitio principii). On the other hand, even though it contains certain fundamental norms, it is still unable in practice to say

anything about the *normative status* of the vast majority of substantial moral norms. It can say that those norms that explicitly violate certain peoples´ discursive rights are immoral. In this way it can say that a norm or ideology like racism is immoral. However, the normative status of the rest of our norms cannot be determined. In this way the strong program also suffers from the *problem of emptiness*. The main problem of the weak program is that it is apparently both *empty* in the sense that it is without any sort of normative relevance and only constitutes an *arbitrary* moral procedure. According to this program "moral" discourse at best only provides provisionally fallible norms.

Both of these programs thus stand in need of elaboration. Respectively, both Habermas and Apel seek to substantiate their versions of the discourse ethics by showing its relevance for democracy and the rule of law. In chapter 5, I return to Apel´s conception of a discourse ethical justification of politics and legality. Before turning to this project I shall, however, deal with Habermas´s comprehensive program of reconstructing the modern *Rechtsstaat* with discourse theoretical means. I argue that Habermas´s motivation for performing this reconstruction is based on the hope that the problem of the *emptiness* of the discourse ethics hereby can be solved. The problem of arbitrariness (*petitio principii*) I do not address until my conclusion.

Chapter III. The discourse theoretical reconstruction of law and democracy

I ended the previous chapter by arguing that Habermas´s philosophy of law and democracy, in my opinion, is supposed to constitute an answer to the moral epistemological *problem of emptiness* involved by the weak program. In effect, it seems reasonable to argue that it is supposed to constitute a response to the "post-metaphysical condition". It seems to me that this condition can be said to rest on at least three assumptions: i. no a priori valid substantial (metaphysical) moral norms exist; ii. only those norms which satisfy a *Maß jenseits des menschlichen Erkenntnis- und Beurteilungsvermögen* (Wellmer) are right; iii. it can be recognised whether norms are more or less justified, though, it is by principle impossible to determine whether they are right or wrong.

In this chapter I shall demonstrate how a discourse theoretical reconstruction of democracy and law, to a certain extent, can give "substance" to the idea of ´discursive validity´, even on such premises as the ones just mentioned.

I will show how the philosophical epistemic problem concerning the impossibility of determining the validity of social norms (the problem of emptiness), according to Habermas, also has a

sociological side. This sociological problem, Habermas argues, has to be solved by the rule of law. Thus, it is argued that the epistemic problem I introduced in the previous chapter (the problem of emptiness) can be overcome[60] by the rule of law. After having introduced this sociological problem I shall state how Habermas believes that the solution to this sociological is dependent upon a repositioning of the discourse ethics (the moral principle U^2). It is argued that legal norms, like moral norms, have to be justified in a post-metaphysical manner. However, legal norms differ from moral norms, not only because legal norms are institutionalised as laws and moral norms are not. They also differ from each other because different types of reasons are accepted in legal and moral discourses respectively. In order to capture this difference the relationship between *legitimacy* (legal norms) and *morality* (moral norms) is reconstructed by Habermas in a new normative framework. This new normative framework makes it possible for Habermas to conceive legal validity (legitimacy) as the product of a unification of "democracy" and "human rights". In effect, Habermas argues that legal validity rests at the same normative level as morality but, in contradistinction to morality, is the product of a deliberative democratic process.

In this chapter I mainly outline this very complicated argument and only briefly mention some problems concerning the new way of conceiving the relationship between morality, law and democracy. In chapter 4 I then suggest what, in my opinion, constitute the most significant problems produced by this new normative structure.

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[60] I use the term ´overcome´ because the program of *Faktizität und Geltung* cannot *solve* the *epistemic problem* mentioned in the chapter on discourse ethics. It can, however, solve the *sociological problem* implied by this epistemic problem.

III.1.0 The sociological problem

At the beginning of Habermas´s *Magnum Opus* in the philosophy of law and democracy, the work *Faktizität und Geltung*, Habermas states *"daβ im Zeichen einer vollständig säkularisierten Politik der Rechtstaat ohne radikale Demokratie nicht zu haben und nicht zu erhalten ist"* (Habermas: 1992: 13). This statement he elsewhere elaborates by claiming that it is not possible that *es normativ betrachtet, einen Rechtstaat ohne Demokratie geben könne* (Habermas: 1999: 293).

The arguments in support of this thesis, that radical democracy and the rule of law are internally related, will be investigated in this chapter. Habermas argues that the thesis that ´democracy´ and ´law´ are internally connected, is a necessary product of a sociological problem. Before turning to the relationship between democracy and the rule of law I shall reconstruct his arguments in support of this thesis.

In chapter 1, I gave a reading of Habermas´s program of communicative rationality (I.1.0). Here, it was argued that "communicative rationality" should be seen as a process where agents justify argumentative (speech) actions with reasons. This theory of communicative rationality plays an important role in explaining how societies work. More precisely, it is important in order to explain how social order and social integration is possible. Habermas argues that the process of social integration always is, and has to be, permeated with communicative rationality. This permeation he expresses in the concept of ´communicative action´. Communicative acting agents are agents who seek to come to an agreement concerning facts. In this case concerning social facts i.e. norms. It is Habermas´s sociological claim that the process of social integration is characterised by inter-acting agents who discursively agree to norms. It is a premise of Habermas that a society cannot be integrated through strategic acting agents alone. Therefore, a stable social order is dependent upon social integration through communicative action (Habermas: 1992: 43). In this way a social world of norms and institutions is created. Habermas seems to be led by the idea that agents in society in a metaphorical sense meet at the *Agora* and discuss various suggestions concerning the most suitable arrangement of society[61]. In discussing such arrangements the agents, as we saw in chapter 1, raise validity claims. To the extent the validity claim of a certain norm is widely accepted this norm can, for the time being, be institutionalised as a legitimate norm.

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[61] A very elaborated theory of how such discussion is possible in a modern complex society is given in *Faktizität und Geltung*.

A serious methodological sociological problem, however, arises from this characteristic. It becomes difficult to explain how social integration and the reproduction of society de facto is possible on *so fragilen Boden wie dem transzendendierender Geltungsansprüche* (Habermas: 1992: 23). Any consensus obtained on communicative premises appears to be inherently unstable. The problem being that the social norms created on these premises at the same time are, so to speak, loaded with an ideal tension[62] (Habermas: 1992: 36). A society regulated with, from the perspective of the citizens, acknowledged norms and institutions can apparently only be stable for a defined time. This is due to the fact that the validity claims implicit in all norms and institutions transcend any particular society's context of justification. The validity we claim for a given social practice cannot be fully established within this practice. It always points further toward an ideal justification. As a consequence our social practices seem to be permanently unstable. This problem Habermas understands as a problem concerning the relationship between *factual justification* of norms and the *validity* of these norms. Hence the title of the book Habermas has devoted to solving this problem "Faktizität und Geltung". Since norms cannot be justified at any factual level they seem to be in permanent danger of being refuted by better reasons[63]. It is always possible that better *reasons* will emerge and undermine the current social practices by showing they are wrong (Habermas: 1992: 54).

This problem can, according to Habermas, be solved by the medium of law. This owes to the law constitutes *the* medium which can produce social integration in modern complex societies without recourse to archaic religious meta-institutions. Hence, Habermas rejects the Marxist thesis that the relations of production rather than the law constitutes the structure which holds society together. This theory reduces law to a super-structure phenomenon, and in this way, in reality reduces law to an epiphenomenon (Habermas: 1992: 65). Equally, he dismisses Niklas Luhman´s understanding of the law as being a closed self-referential autopoetic system. Luhman maintained that law has no direct relation to society as such but can only can influence society indirectly (Habermas: 1992: 69).

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[62] In fact this sociological problem is a part of the moral epistemological problem I mentioned at the end of the previous chapter (II.4.4).

[63] To a certain extent a stable integration seems possible if either a massive consensus prevail or if archaic institutions exist The embedding of the communicative action in the life world contexts or regulation of expectations through archaic institutions explains how social integration on the basis of *Verständigungsprozessen* is possible in small and undifferentiated groups. However, in a modern pluralistic complex society these conditions are not sufficient to guarantee social integration (Habermas: 1992: 38).

Habermas, however, dismisses these more pessimistic approaches in relation to the functions of the law. Instead he argues that the law can *overcome* the epistemological gap between factual justification of social practices and the ideal validity claim of the norms governing these social practices. The law can, however, only perform this task if it is effective and legitimate at the same time. A law is effective to the extent it is actually obeyed. Normally, this means to the extent that it is supported by actual power. Thus, empirically effectiveness consists in the fact that if an agent breaks the law then she will, most likely, be sanctioned. She will get a fine or maybe even have to go to prison. Furthermore, a police force will guarantee this. In this way the effectiveness of the law secures a high rate of social integration and social order. It is, because of the threat of sanctions, highly likely that agents will follow the laws constituting any specific legal community. The fact that agents are likely to obey the law is, however, to the extent it is produced by the threat of sanctions, not related to moral motives.

It is a sociological consequence of the effectiveness of law that agents, to a high degree, can predict the behaviour of each other. It is possible for a mother or a farther to send their child to buy milk in the local store without having to fear that the storeowner will deceive the child. Since, the storeowner will be sanctioned by the legal system if he is caught in deceiving the child he will most likely not do this[64]. The legal system thus stabilises agents´ expectations of each other in a very effective manner and it hereby generates social integration and social order. According to Habermas the main purpose of norms is that they stabilise expectations i.e. make it possible for agents to have a stable expectation of how other agents (and institutions) behave and hereby make social inter-action possible. However, the *threat of sanctions* only constitutes one aspect of the social integrative power of laws. Another, equally important, aspect consists in legal norms legitimacy. Habermas shares Max Weber´s sociological belief that social integration and social order in a society only is possible, in the long run, if the norms that rule this society are legitimate[65]. If the citizens in a society do not believe that the legal norms of their society are legitimate, social disorder will most likely be the result. A society regulated by illegitimate legal norms will most likely be a repressive society.

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[64] Another instrumental reason to why the storeowner probably would not defraud the child is that this would be bad business in the long run. People would not want to buy groceries from a swindler. Still, another reason would be that he simply finds it immoral to cheat other people.

[65] Of course the sociological point is that the citizens of the given society *believe* that they are legitimate. This may be a false belief caused by ideology. The idea of the argument, however, is that such ideological support of a given regime will be exposed in the long run.

And, at least unnecessary[66], repression constitutes a strong incitement to form political resistance. In some cases this may even lead to revolution. Thus, a successful social integration (social order) is dependent upon a legal system which generates legal norms that are both *effective* and *legitimate*. As Habermas formulates it: *Obgleich Rechtsansprüche mit Zwangsbefugnissen verknüpft sind, müssen sie jederzeit auch ihres normativen Geltungsanspruches wegen – also aus "Achtung vor dem Gesetz" –befolgt werden können* (Habermas: 1992: 47). The *legitimacy* of a legal norm is independent of its *effectiveness* whereas the effectiveness of a legal norm is dependent upon its legitimacy.

Habermas thus seeks a sociological methodology that makes it possible to explain how law can be legitimate and effective at the same time. The question of why agents let themselves be bound by norms cannot be explained only by *the fear of sanctions* but also has to be answered from the perspective of legitimacy (Habermas: 1992: 91). Hence, in the following sections Habermas´s theory of political legitimacy will be discussed.

III.2.0 A two-fold reconstruction of the law

In the previous section it was stated that law constitutes the prime social integrative force in modern societies. Equally, it was argued that in the long run only legitimate or valid law can play this social integrative role. This leads to the question, when is law legitimate?

In order to answer this question of how legitimate law is possible Habermas takes the self-image of the legal discourse as his methodological starting point. The concept of a ´legal discourse´ refers, in this context, to the history of attempts to justify law. Habermas thus poses the question, when is a legal norm legitimate according to the legal discourse? In his own words he intends to make a *reconstruction* of the normative self-image modern law (Habermas: 1992: 109). He thus investigates the matter of *legitimacy* in a historical manner.

However, Habermas does not only, or even primarily, proceed at a historical level. Rather, the term ´reconstruction´ includes, in the way it is used here, more than one meaning. On the one hand, it

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[66] In *Erkenntnis und Interesse* Habermas differentiates between necessary and unnecessary repression. He understands repression as limitation of the fulfilment of peoples needs. At certain stages of history all the needs people may have cannot be fulfilled because of the industrial, technological and economical stage of the society. Thus, the economical stage of society constitutes a *necessary* degree of repression. This degree of repression is a "necessary condition" in the sense that if it is abolished society may fall apart.

means "reconstructing the history of different conceptions of legitimacy". Here the focus primarily lies on the attempts to justify law either through "human rights" or through "popular sovereignty". On the other hand, the reconstructive project also refers to Habermas´s own project of making a discourse theoretical *Aufhebung* of the difference between "human rights" and "popular sovereignty". At this level it is argued that an adequate reconstruction of the law brings forth that ´valid law´ has to be understood in a discourse theoretical manner.

It is thus Habermas´s overall thesis that ´human rights´ and ´popular sovereignty´ encapsulate aspects of a proper understanding of ´legitimacy´ but that neither of these ideas contain the whole story in regard to legitimacy (reconstruction[1]). Rather, ´human rights´ and ´popular sovereignty´ have to be seen as constituting connected concepts. The argument is that the idea of ´human rights´ constitutes a set of enabling conditions *die die Ausübung der Volkssouveränität ermöglichen* (Habermas: 1999: 300). Hence, Habermas wishes to show that, on the one hand, ´legitimacy´ cannot be reduced to either of these ideas (rights or democracy) but on the other hand both ideas taken together constitute necessary and sufficient conditions for an adequate understanding of ´legitimacy´. The concepts of ´human rights´ and ´popular sovereignty´ can, however, only be reconciled if they are reconstructed in discourse theoretical terms (reconstruction[2]). Finally, as we shall see, this discourse theoretical *Aufhebung* of ´rights´ and ´democracy´ makes it possible to understand citizens´ *autonomous democratic* rule as constituting *legitimate* rule.

III.2.1 The first reconstruction: Human rights and popular sovereignty

Habermas conceives the current understanding of ´legitimacy´ as being the product of a long process of rationalisation. From an overall point of view two things have taken place in this process of rationalisation: It has become philosophically impossible to justify norms with metaphysical or religious reasons and people have become aware of this fact – they have stopped blindly believing in the authority of norms and institutions.

A change in the life-world, on a personal as well as on an inter-subjective cultural level, has taken place. The change is commonly described as a shift from pre-modernity to modernity and has manifested itself in two dimensions viz. in an ethical and in a moral dimension. The concept of ´ethics´ refers in this context to ´popular sovereignty´. The process of rationalisation, has made it possible for people to choose their own values. It is, furthermore, because they choose them

(popular sovereignty) that they express legitimate normative force. The concept of ´morality´ refers to ´human rights´[67]. Thus, a different tradition within the "legal discourse" argues that people possess inviolable rights and that laws are solely concerned with making agents´ inviolable rights compatible with each other (Habermas: 1992: 129). Hence, the rationalisation of the life-world has resulted in the manifestation of two different *principles of justification*. Norms can be justified by either of these two principles i.e.: *either* because people choose them (they reflect the values of people – ethics) *or* because the norms are necessary in order to make people's inherent human rights compatible with each other (morality).

However, the ideas of *morality* and *ethics* are, if interpreted rigidly, not compatible. Both principles claim to be able to justify legal norms but from apparently incompatible perspectives. The ethical popular sovereignty perspective claims that what citizens agree upon among each other eo ipso constitutes valid law. The moral perspective, on the other hand, argues that citizens (as human beings) possess moral rights which no community legitimately can overrule. A discussion concerning the normative primacy of these two categories, *human rights* and *popular sovereignty,* has hence evolved. Liberals proclaim the priority of human rights and fear the tyranny of the majority. Republicans focus on the popular sovereignty and believe that human rights only play a role to the extent that they are part of a community's collective identity.

As an alternative to this discussion Habermas seeks to follow Kant and Rousseau in their effort to work out an alleged internal relation between popular sovereignty (ethics) and human rights (moral)[68]. He seeks to create a conceptual framework that would make it possible to unite private and public autonomy. The idea is to see communicative reason as a result from such a unification of

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[67] It is crucial to notice that Habermas in this context uses the terms ´ethics´ and ´morality´ differently from the way he normally uses them. Normally ´ethics´ simply refers to values whereas ´morality´ refers to norms that can be universalised. See especially the essay "Vom pramatischen, ethischen und moralischen Gebrauch der praktischen Vernunft" in *Erläuterungen zur Diskursethik* (1991).

[68] However, according to Habermas neither Kant nor Rousseau manages to harmonise and justify rights and sovereignty in a satisfactory manner. In Kant´s program the human rights constitute an absolute limit which the popular sovereignty is not allowed to transcend (Habermas: 1992: 131). Hence, this theory is ultimately liberal. The problem for Rousseau is that he understands *autonomy* in an ethical sense. He emphasises a community's articulation of values and claims that individuals should be coerciced to the extent they do not submit to these general interests. However, Rousseau could not demonstrate that the general interest and the individuals interest are necessary coincident. Hereby, he ultimately argues in favour an ethical republican program i.e. he argues that the majority rule of a community legitimately can overrule the interests of the individual. Thus, neither of them succeeded in establishing a necessary relationship between individual and general interests.

private and public autonomy[69]. The thesis is that only through this way is an adequate theory of legitimacy is possible. The idea of autonomous rule by citizens is also expressed in this theory of legitimacy because human rights and popular sovereignty are united in this concept of ´legitimacy´. The idea is that ´human rights´ constitute necessary enabling conditions that make popular sovereignty (the idea of citizens´ autonomous rule) possible. If these conditions are satisfied citizens can (communicative rationality) adopt rational legal norms (laws) in open debate. The argument in favour of this claim will be presented in section III.4.0.

III.3.0 The second reconstruction: The new normative framework

As a consequence of the rationalisation of the life-world a positive law separated from morality has emerged. The fact that law can no longer can be seen as being justified by morality, however, has not made legitimate law impossible. Rather, ´legal legitimacy´ and ´morality´ have both become ideas that have to be justified in a post-conventional manner (Habermas: 1992: 96). In this context ´post-conventional´ simply means that since legal norms cannot be justified or legitimised by, themselves taken for granted, natural-rights, they have to be justified by reasons[70]. Of course, one can still argue that a specific norm is legitimate because it expresses natural-rights. Habermas, however, simply states that the "natural-rights" have to be justified themselves.

Thus, authority can no longer be conceived as constituting a "natural" phenomenon. Rather, as we saw in the previous chapter, all valid manifestations of authority have to be justified with reasons. It was because of this "post-metaphysical condition" that Habermas took the sociological problem of social order as the starting point for his deliberations concerning political legitimacy. This sociological problem was a product of a moral epistemological problem concerning our inability to access epistemologically the normative status of social norms. The sociological problem thus arose on the background of a "theory of validity claims" and a "theory of moral rightness". The "theory of validity claims" argued that when people seek to reach a rational agreement (Einverständnis) concerning practical matters then raising validity claims is part of the process of discussing matters.

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[69] Habermas expresses this by writing: "(…) im Begriff der Autonomie die Vereinigung von praktischer Vernunft und souveränem Willen so zu denken, dass sich die Idee der Menschenrechte und das Prinzip der Volkssouveränität wechselseitig interpretieren" (Habermas: 1992: 130).

[70] As Habermas writes: "Die Entzauberung religiöser Weltbilder hat nicht nur destruktive Folgen, indem sie das "Doppelreich" heiligen und profanen Rechts und damit die Legeshierachie untergräbt; sie führt auch zu einer Reorganisation der Rechtsgeltung, indem sie die Grundbegriffe von Moral Recht *gleichzeitig* auf ein postkonventionelles Begründungsniveau umstellt" (Habermas: 1992: 96).

Whether a raised validity claim *is* in fact right can only be rationally determined through reasons and ultimately depends upon whether it would be accepted under ideal conditions. The sociological problem, however, consisted in the fact that it is difficult to imagine stable institutions in a society where all contemporary institutions are permanently in danger of being refuted by better reasons.

In order to solve this problem a theory of political legitimacy is needed. A theory that makes it possible to explain how a political regime can be *recognised* as being legitimate and thus protected against the permanent danger of being undermined by better reasons. As we shall see Habermas argues that such a concept of ´legitimacy´ can be established if the dichotomy between human rights (morality) and popular sovereignty (ethics) is reconciled. Habermas argues that: ”Unter normativen Gesichtspunkten entspricht dem die Annahme, daβ die moralische und staatsbürgerliche Autonomie gleichursprünglich sind und mit Hilfe eines sparsamen Diskursprinzips erklärt werden können, das lediglich den Sinn postkonventioneller Begründungsforderungen zum Ausdruck bringt” (Habermas: 1992: 138).

Habermas hence claims that, on the one hand, norms adopted according to a procedure which respects both human rights and popular sovereignty are right. On the other hand, this procedure can only be made explicit under the perspective of the discourse principle.

Hence, in order to demonstrate the argument in favour of this claim I shall first have to show how the discourse principle is defined. Afterwards, I show how this principle makes it possible to reconcile human rights and popular sovereignty in a procedure that produces legitimate norms.

III.3.1 The discourse principle

Habermas defines the ´discourse principle´ in the following way:

“D: Gültig sind genau die Handlungsnormen, denen alle möglicherweise Betroffenen als Teilnehmer an rationalen Diskursen zustimmen könnten” (Habermas: 1992: 138).

It is clear from this quotation that the discourse principle D provides a criterion of *validity*. This can more formally be expressed in the following way.

The letter ´n´ stands here for any norm and the symbol ´↔´ expresses a bi-implication.

D^{generel}: (n is valid ↔ n is rationally acceptable by all those affected by n.)

This principle resembles the moral[71] principle U^2 which encapsulated the moral point of view in Habermas´s moral theory[72]. It is, however, not identical with U^2. The difference between the discourse principle D and the moral principle U^2 is a difference between species and genus. The moral principle U^2 and the norms justifiable by this principle constitute a sub-category of a more broad and fundamental principle of autonomy and rationality[73]. In the same vein, as we shall see, a democracy principle (the principle of law) constitutes a sub-category of this fundamental discourse principle. Hence, the discourse principle overarches both law and morality and can be translated into the principle of law (democracy) as well as into the principle of morality.

Habermas´s new normative framework of practical philosophy thus has the following form:

Diagram 2.
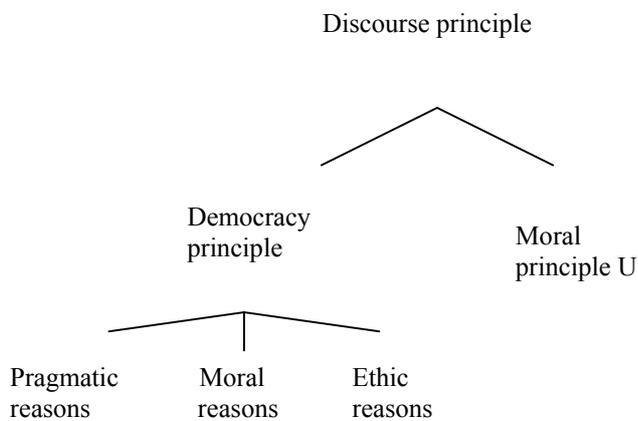
Concerning the status and the justification of the discourse principle it is claimed that the discourse principle solely expresses the *impartial point of view* and it is itself grounded in the *"symmetrischen Anerkennungsverhältnissen kommunikativ strukturierter Lebensformen*" (Habermas: 1992: 140). Astonishingly, this is all Habermas writes about the justification of the discourse principle. This is

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[71] Habermas does not indentify U – moral principle - and U^2 - necessary presuppositions of argumentation in the way I do.

[72] Especially in Habermas´ most significant essay on discourse ethics "Diskursethik – Notizen zu einem Begründungsprogram" in "Moralbewuβsein und kommunikatives Handeln" (1983), the moral principle U is claimed to capture the fundamental principle of practical reason.

extraordinary since the introduction of this principle involves a revision of the basic normative structure that earlier constituted the architecture of Habermas´s practical philosophy. The former normative structure of practical philosophy was captured in diagram 1 in section II.4.1. The interpreter of *Faktizität und Geltung* thus has to figure out for herself in what way the *"symmetrischen Anerkennungsverhältnissen kommunikativ strukturierter Lebensformen"* ground the discourse principle. Habermas, however, gives his audience a hint. He defines the concept of ´rational discourse´, which plays *the* central role in the definition of D, as: " ´rationaler Diskurs´ soll *jeder* Versuch der Verständigung über problematische Geltungsansprüche heißen, sofern er unter Kommunikationsbedingungen stattfindet, die innerhalb eines durch illokutionäre Verpflichtungen konstituierten öffentlichen Raums das freie Prozessieren von Themen und Beiträgen, Informationen und Gründen ermöglichen" (Habermas: 1992: 138).

A norm is thus rational if participants in a discourse, where all themes, reasons, information etc. are heard and where all those affected by the norm agree to it. This description of ´rationality´ we have met earlier in this paper viz. in the chapter on ´communicative rationality´. In this chapter it was argued that ´communicative rationality´ indicates when a norm is justified. The ´discourse principle´, however, constitutes a *criterion* of the validity of social norms. This is, though, perfectly consistent with our investigations into the concepts of ´truth´ and ´rightness´. Here, we learned that a norm is morally right if it is the result of a communicative process that has taken place under ideal communicative conditions. It was claimed that "(..) der Sinn von ´Richtigkeit´ (geht) in ideal gerechtfertigter Akzeptabilität auf" (Habermas: 1999: 285). And, as we saw in the chapter on discourse ethics "ideal conditions", under which norms have to be justified in order to be right, indeed are conditions of inclusion of all arguments and exclusion of any sort of coercive force.

If this interpretation is correct, however, there seems to exist no difference between the moral principle U^2 and the discourse principle D. Morality is, as we saw in chapters 1 and 2, defined in terms of ideal justified acceptability, and since the principle D is apparently defined in the same way, the only possible difference between the two principles is a rhetorical one. This problem of distinguishing between the moral principle and the discourse principle, in my opinion, points towards a serious problem in Habermas´s practical philosophy.

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[73] Thus, Habermas concedes that in his earlier writings on dicourse ethics he had not sufficiently differentiated between a discourse and a moral principle.

Habermas argues that if the discourse principle and the moral principle melt together then the result will be a moral justification of law which, as we shall see, is claimed to be sociologically implausible and which has normatively undesirable consequences[74]. The problem of differentiating between the three principles I address in chapter 4. For the moment I shall, however, accept the assumption that a difference between the moral principle U^2, the democracy principle and the discourse principle can be made plausible.

It is this difference between the democracy and the moral principle which makes it possible to define ´legitimacy´ in non-moral terms. Habermas argues that the discourse principle, $D^{general}$, can translate into either a moral principle or a democracy principle. The discourse principle is supposed to justify the different procedural theories of *morality* and *justice*. Habermas argues that legal norms have to be justified by the democracy principle. Hence, a path between natural-law theory and legal positivism[75] reveals itself. Due to the new conceptual framework, which provides two distinct principles of validity, it becomes possible to justify legal norms in a non-moral way.

According to this conception, norms justified through the democracy principle constitute valid *legal* norms whereas norms justified through the moral principle constitute valid *moral* norms. These two principles are furthermore co-original (gleichursprünglich) and normatively co-ordinated (Habermas: 1992: 138). The term ´co-original´ refers to the argument that the discourses of *morality* and *law* have been simultaneously differentiated from a common *Sittlichkeit*. The claim that they are *normatively co-ordinated* means that they on the one hand both constitute criteriological principles of validity but on the other hand cannot be reduced to each other.

Having clarified these concepts it now becomes possible to give a more precise description of the moral and the democracy principle. If a norm is justified solely under the perspective of impartiality (gleichmässiger Interessenberücksichtigung) then it is eo ipso a *morally* right norm (Habermas: 1992: 139). This can be expressed in the following conditional:

D^{moral}: (n ist valid $\leftrightarrow$ n is rationally acceptable by all those influenced by n *using* moral reasons alone).

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[74] This argument I shall return to in chapter 4.

[75] Even though, the term ´natural law´ includes more distinct programs I in the present context simply uses this term to refer to projects that seek to justify positive law with some sort of metaphysical reasons (Zippelius: 1994: 89-96). That may be the nature of human beings, a religious cosmology or something else. I understand the term ´legal positivism´, in this context, as the thesis that no normative justification of law can be given (Zippelius: 1994: 7).

If, on the other hand, the norm in question is justified with the help of ethic-political, pragmatic *as well* as moral reasons[76] it is a *legal* norm justified through the democracy principle (Habermas: 1992: 139). This means that Habermas in his efforts to reject a natural law justification of legal norms claims a very intimate relationship between democracy and legal validity.

A legal norm is hence valid if it satisfies the conditions listed on the right side of the following conditional:

$D^{democratic}$: (n is valid $\leftrightarrow$ n is rationally acceptable by all those influenced by n *using* ethic-political, pragmatic and moral reasons) [77].

By introducing this new normative conceptual framework Habermas is able to combine the concepts of ´rationality´, ´autonomy´ and ´legitimacy´ in a highly interesting new manner. The line of argument can be presented as follows. Political rule only constitutes *legitimate* political rule if all the members of the political community rationally agree to this political rule. Hence, the democracy principle constitutes the principle agents in a legal community *have to* make use of if they want to be regulated by legitimate political norms (rule). Since citizens in such a *radical democratic* community furthermore are only subject to norms they themselves have adopted, then these citizens are autonomous.

In this way, Habermas provides a strong argument for conceiving democratic decisions as being legitimate, not because they reflect aggregation of interests or natural rights but rather because they are results of a rational deliberative democratic process.

However, in order to attain the full force of this argument one problem remains to be solved. The concept of ´autonomy´ that has been developed in this section seems to refer to the self-determination (autonomy) of a collective subject (the citizens). This construction, however, seems to be potentially problematic. There seems to be no guarantee that the will of the collective subject (the autonomy of the people) is necessarily co-extensive with the will of all the *individuals*

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[76] The status of and the relationship between ethical reasons (values) and moral reasons (universal norms) is very complex. Indeed in chapter 4 I argue that Habermas does not manage to give a satisfying description of these two "categories of reasons" or "contexts of justification". I furthermore argue that this lack of clarity constitutes a serious problem in Habermas´s program concerning a justification of law.

[77] Habermas argues that legal-political questions also involve competing particular interests that cannot be reconciled by discourse as such but only by bargaining and compromise. Such bargaining is "allowed" within the democracy principle. However, this does not mean that compromises as such express valid norms because compromises depend in turn on criteria in need of discursive justification (Habermas: 1992: 187-207).

subordinated by the will of the people. How does one ensure that the will of the people does not oppress the will of some of the individuals? We have already faced this problem in the section concerned with the status of ´human rights´ and ´popular sovereignty´. It was argued that it is possible to conceive ´human rights´ and ´popular sovereignty´ as presupposing each other rather than ruling each other out. This argument will be further elaborated in the next section.

III.3.2 The internal connection between human rights and democracy

The intention of the discourse theoretical program of justification is to recast the discussion of ´human rights´ in terms of communicative rationality. If this indeed succeeds, a very important philosophical problem concerning the status of rights would be solved. Before unfolding this complex argument it is interesting to notice how extraordinary this strategy in reality is.

The idea of "human rights" seems to play a significant moral role in our understanding of *wrong* and *right*, and a constitutive role in our legal system. Constitutive in the sense that any democratic legal political system is based on a constitution and the laws of any democracy have to reflect its democratic constitution. However, agreement concerning the status (justification) of the rights expressed in this constitution, and concerning rights generally, does not prevail. Some philosophers tend to conceive them in a metaphysical realistic way and thus claim that they constitute an external limit to the legal community. Hence, according to these philosophers the democratic legal community can, ceteris paribus, never be justified in passing laws that violate such rights[78]. Other philosophers deny that rights possess such a status. Instead they suggest, anti-realistically, that rights only exist to the extent members of a community ascribe them to each other. Understanding rights as something agents ascribe to each other does not mean that rights become an arbitrary unsubstantial phenomenon. Rights may indeed express very deep-seated values of a community but they, however, do not constitute an, by principle, external limit to the legal communities[79]. Thus, the discussion concerning how to understand ´legal legitimacy´ has been structured around views on the status of rights. One has had to choose between democracy (popular sovereignty) and justice (rights) in one's comprehension of the legitimacy of society (Rosenfeld[b]: 1998: 83, 96). This dichotomy has already been discussed in previous parts. I will now turn to the issue of how a discourse theory of law can reconcile these two apparently incompatible positions. Habermas wants to show how this whole discussion is wrongly conceived. In showing this several other dichotomies

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[78] Kant exemplifies according to Habermas this position.

are to be reconciled. In broad terms one could say that the alleged contrast between "the individual" and "the collective", viz. the dichotomies in diagram 3, are to be removed:

Diagram 3.

Morality	Ethics
Human Rights	Popular Sovereignty
Private autonomy	Public Autonomy

III.4.0 The discourse-theoretical argument of an internal connection between rights and democracy

Intuitively, the argument in support of Habermas´s thesis that "human rights" and "popular sovereignty" are internally connected seems both obvious and adequate. Basically, the argument claims that the idea of ´popular sovereingty´ only makes sense if people ascribe, among other things, a degree of *autonomy* to each other. Conceiving each other as being autonomous individuals means seeing each other as individuals equipped with rights to decide over their own destiny; as "having the right only to follow norms, which they themselves have agreed to". This means possessing the right to be allowed to participate in the political discourse concerned with settling which constraining norms (laws) should be institutionalised. If these rights are not ascribed to the citizens of a society then popular sovereignty (democracy) becomes impossible. This follows from the very idea of popular sovereignty viz. that citizens themselves decide which norms should be adopted. If this idea is to be coherently implemented then agents have to be free to participate in the law making assembly.

In this way, the idea of ´popular sovereingty´ presupposes the idea of ´human rights´ (autonomy and participatory rights)[80]. These rights, however, only exist to the extent that agents ascribe them to each other. They do not have any ontological status of their own. This means that only if agents agree upon (popular sovereignty) having such rights do they exist. Hereby, ´rights´ presuppose ´popular sovereignty´.

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[79] Rousseau constitutes an important exponent of this position.
[80] As we shall see it is not fully clear which rights can be said to be involved by this sort of argument. However, traditional rights such as right to property or right to privacy do not seem to be involved.

These two realms hence presuppose each other in a circular manner and only after this circular process has been initiated do agents become citizens in a society. As such citizens they ideally pass laws and at the same time they are legal persons subject to these laws. This is, in effect, exactly what Habermas means when he writes:

"Daher kann das Demokratieprinzip nur als Kern eines *Systems* von Rechten in Erscheinung treten. Die logische Genese dieser Rechte bildet einen Kreisprozeβ, in dem sich der Kode des Rechts und der Mechanismus für die Erzeugung legitimen Rechts, also das Demokratieprinzip, *gleichursprünglich* konstituieren" (Habermas: 1992: 155).

In fact, this way of viewing matters seems to rest upon an argument identical with the argument in support of the strong program in chapter 2. The essential argument in favour of the reconciliation of human rights and popular sovereignty in a democracy principle can in my opinion be reconstructed in the following way. (i) The validity (legitimacy) of most norms (and in this respect ´rights´ are norms too) is dependent upon the reasons given in support of these norms; (ii) Certain norms (rights), however, are necessary presuppositions for discourse. Hence, agents have to accept these norms (ascribe these rights to each other) in order for discourse to be possible.

However, the argument in *Faktizität und Geltung* differs from the argument in the strong program in two respects. On the one hand, several more rights are said to be a priori justified by the discourse theoretical argument than in the strong program. On the other hand, the discourse theoretical argument only claims to make explicit the necessary conditions (rights) for a special branch of democratic validity. In the strong program the rights implied were argued to constitute necessary conditions for the whole domain of practical validity. Whether this second difference in fact "holds" I shall return to in the next chapter.

Now I will address the five categories of rights which according to Habermas constitute necessary enabling conditions for rational democratic discourse. First of all, it is argued that the basic right to the greatest possible amount of personal freedom is implied. This category of rights of freedom, Habermas argues, has to be correlated with certain rights specific to the agents who are a part of the, in the process of being established, legal community. That is, rights that members of the community enjoy contrary to those who are not members of the community. Furthermore, the right to file complaints if the other two sorts of rights are offended is implied.

(1) Grundrechte, die sich aus der politisch autonomen Ausgestaltung des Rechts auf das grösstmögliche Mass gleicher subjektiver Handlungsfreiheiten ergeben.

(2) Grundrechte, die sich aus der politisch autonomen Ausgestaltung des Status eines Mitgliedes in einer freiwilligen Assoziation von Rechtsgenossen ergeben;

(3) Grundrechte, die sich unmittelbar aus der Einklagbarkeit von Rechten und der politisch autonomen Ausgestaltung des individuellen Rechtsschutzes ergeben.

Moreover, in order for the agents to be authors of the laws they are subordinated by they have to be equipped with a further category of participatory rights.

(4) Grundrechte auf die chancengleiche Teilnahme an Prozessen der Meinungs- und ,Willensbildung, worin Bürger ihre politische Autonomie ausüben und wodurch sie legitimes Recht setzen.

This fourth category makes it possible for the agents to play the role of citizens who decide on the laws that govern their lives. From these four basic rights a fifth category is entailed

(5) Grundrechte auf die Gewährung von Lebensbedingungen, die in dem Masse sozial, technisch und ökologisch gesichert sind, wie dies für eine chancengleiche Nutzung der (1) bis (4) genannten bürgerlichen Rechte unter gegebenen Verhältnissen jeweils notwendig ist (Habermas: 1992: 155,156).

Even though this *system of rights*, in my opinion, constitutes the major new contribution to the discourse ethical or discourse theoretical approach to practical validity I shall not enter an elaborated examination of these categories of basic rights. Instead I will mainly restrict myself to some few remarks concerning the overall argument. However, before I begin an evaluation of the overall argument I argue that it is not clear how the first right to "größtmögliche Maβ *gleicher* subjektiver Handlungsfreitheiten" follows from the discourse theoretical argument. The argument of the discourse principle *does* imply that the "pre-society agents" have to recognise each other as being autonomous individuals in order to be able to adopt rational norms. The question is, however, whether this can be translated into "größtmögliche Maβ *gleicher* subjektiver Handlungsfreitheiten".

The problem is that the discourse theoretical argument only implies two things clearly: (1) Agents have to ascribe *autonomy* to each other. This means they have to recognise each other as being separate individuals; (2) They also have to ascribe participatory rights to each other. If the norms governing a specific community are to be rational all members of this community, as Rehg emphasised[81], have to have access to the process of adopting these norms. However, these two sorts of pre-conditions for the institutionalising of a rational procedure do not seem to imply the right to

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[81] This was made explicit in Rehg´s argument in section II.4.4 on the weak program.

"größtmögliche Maβ *gleicher* subjektiver Handlungsfreitheiten". However, I shall not pursue this problem any further but instead return to the overall argument[82].

In regard to the status of the derived rights Habermas seems to be reluctant to conceive them as being the product of a transcendental deduction. He emphasises that the categories just listed indeed only constitute *categories* and not substantial rights. This means that they *as categories* must always be given a substantial content by an empirical constitutional interpretation. Hence: "Das System der Rechte gibt es nicht in transzendentaler Reinheit" (Habermas: 1992: 163).

The question is, what does he mean with these remarks? There are, in my opinion, two distinct possibilities: (i) He means that the mentioned categories of rights in reality constitute necessary presuppositions of argumentation. As such presuppositions they have to be *interpreted* in a certain moral fashion in order become normative substance. (ii) He means that the categories of rights constitute necessary presuppositions of argumentation but that they also, somehow a priori, possess normative content. However, how this normative content should be *interpreted* has to be settled by discourse in each new epoch. Because even if we actually possess an a priori right of freedom the interpretation of this right is not settled a priori. Thus, the basic "right to freedom" is not up for discussion – only the manner in which this right should be understood.

It seems to me that Habermas ignores the first possibility[83]. Hence, the justification of the system of rights in fact rests upon "unjustified values" - upon a petitio principii just as the strong program mentioned in the sections II.1.0 and II.2.0 does.

Having clarified how Habermas, in my interpretation, understands the status of the system rights and the discourse theoretical argument in favour of this system it now becomes possible to formulate the overall argument concerning political legitimacy.

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[82] Indeed, Habermas sometimes seems to argue that the validity of not only this right but all of the rights *solely* has to stem from whether they would be accepted in a rational dialogue (Habermas: 1998: 416-417). However, such a line of argument seems to destroy the whole point of combining ´rights´ and ´democracy´.

[83] In my opinion this becomes clear in following quotation: "Dieses System soll genau die Grundrechte enthalten, die sich Bürger gegenseitig einräumen müssen, wenn sie ihr Zusammenleben mit Mitteln des positiven Rechts legitim reglen wollen" (Habermas: 1992: 151). Habermas argues that citizens *have to* ascribe these *fundamental rights* if they want to regulate their common life with legitimate laws. Hence, he presupposes that these *fundamental rights* are a priori valid.

III.5.0 The legitimacy of the institutions of democracy and the solution to the sociological problem

At the beginning of this chapter it was argued that what I described as the "post-metaphysical condition" had a sociological side as well. Post-metaphysical moral theory can only provide a highly ideal and abstract criterion of validity. It seems, however, as if continuous political instability is a consequence of such a theory. Any provisionally justified political rule seems to be in permanent danger of being judged illegitimate because of the constant possibility of emergence of "new reasons". Reasons that will undermine the justification of the actual political rule. The core of the "sociological problem" thus consisted in the gap between factual (local) justification of a social practice and the ideal (universal) validity claim this social practice (or the proponents of it) raises. Furthermore, it was claimed that this problem could be solved by valid law.

However, at first glance it looks as if this problem cannot be solved by the law after all. On the one hand, as Rehg rightly emphasises, is it according to Habermas´s theory not possible for citizens to distinguish between legitimate and valid laws (Rehg: 1996: 466). Intuitively, we do operate with such a distinction. We believe that it is possible to say that a norm is wrong (i.e. not valid) without challenging its legitimacy. However, since Habermas does not differentiate between ´valid´ and ´legitimate´ he has to argue that a wrong norm eo ipso is an illegitimate norm. Thus, from this perspective it is not easier to determine whether a law is legitimate (valid) than it is to determine whether a norm is morally right (valid)[84]. Thus, it seems as if the problem of social order cannot be solved by law and as if the problem of the emptiness of the weak program cannot be overcome by turning to democracy and law after all.

On the other hand, however, the problem of social order on post-metaphysical conditions can be solved by institutionalising the "places" necessary for rational valid law. These, "institutionalised places" (institutions) are legitimate to the extent they make it possible for legal subjects to exercise their rights. Thus, their legitimacy does not depend upon being accepted in a rational dialogue. Rather, they constitute necessary conditions that enable such rational dialogue. In effect, this means that Habermas wants to reconstruct the institutions of democratic and legitimate rule on the basis of these rights.

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[84] The epistemological problem of both the strong and the weak program consisted in the fact that we are unable to determine whether any contemporary norms are morally right. It was argued that the medium of law could overcome this problem.

The criterion of validity given by the democracy principle does not in itself explain what a regime (Herrschaftsordnung) and its institutions over time should look like in order to be legitimate. However, the rights necessary for the democracy principle do offer this. They constitute conditions that have to be respected in order for legitimate rule to be possible. The idea is that a state and certain essential institutions constitute *objektiv-rechtliche Implikationen* – the state is implied by the rights (*System von Rechten*) constitutive of the democracy principle (Habermas: 1992: 168).

Hence, the right to equal freedom implies or presupposes an institution that sanctions agents who violate the freedom of other agents. The right to equal membership-rights presupposes an institution that can act on behalf of all the members. The right to the protection of the law presupposes an impartial administration of justice. The right to be a part of the process that passes laws presupposes a legal regulation of this process which secures that it is open for members´ participation. Finally, an institution that is capable of implementing adopted "political programs" is implied. In short a state which can sanction, organise and execute force is implied (Habermas: 1992: 168).

Hereby, the question of how social integration and social order is possible on *so fragilen Boden wie dem transzendendierender Geltungsansprüche* is answered. This is possible because the process of raising and defending validity claims becomes institutionalised. The "institutionalised process and its implications" i.e. the state is, furthermore, not directly exposed to critique because its validity does not depend upon being accepted in a rational dialogue but rather upon whether it adequately expresses the conditions which make the rational dialogue possible[85]. One is tempted to say that its validity does not depend upon a rational discourse but rather upon transcendental insight into necessary presuppositions. In effect this constitutes an ingenious solution to the problem of legitimacy in a post-metaphysical society. It also seems to constitute a return to the ideas of the strong program and a break with the ideas of the weak program. In the strong program it was argued that the rules constituting the "ideal speech situation" at the same time constituted rules which should rule an "in Zunkunft zu realisierende Lebensform". Now, even more than this is claimed. It is actually argued that the five listed categories of basic rights as well as their institutional implications are presupposed, as enabling conditions for democracy, by the discourse principle.

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[85] Of course these rights will only be "in force" if agents ascribe them to each other. However, agents are not *free* in regard to these rigths. They *have to* ascribe them to each other if they want to live in a legitimate society. This *transcendental status* of the system of rights should, in my opinion, be emphasized more than Habermas apparently is prepared to.

This solution[86] apparently solves more problems. It demonstrates how the idea of communicative rationality, after all, can play a significant role in relation to how people should regulate their lives. The problem of the weak program was that it became empty. It was not capable of providing any sort of norms. However, in the program of *Faktizität und Geltung* certain fundamental rights and a discourse principle are combined in a way which: i. makes democratic laws probably valid (rational); ii. uncovers certain necessary rights for the institutionalising of democracy; iii. provides an *accessible* criterion (the system of rights) for the valuation of the legitimacy of the democratic institutions.

In the next chapter I shall, however, show that Habermas´s division between legal (democratic) and moral validity in *Faktizität und Geltung* involves serious problems.

Chapter IV. The democracy principle. Between values and norms.

As it was stated throughout the previous chapter it is Habermas´s ambition to show how legal norms can be justified in claiming legitimacy without making use of metaphysical reasons. This is done by a theory of legitimacy where ´legitimacy´ is explained through a discourse theoretically purified democratic procedure. In order to justify this theory of legitimacy Habermas has introduced a new normative conceptual framework of his practical philosophy (illustrated in diagram 2 in section III.3.1). In this it is argued that the discourse principle (communicative rationality) can be divided into two mutually consistent procedures of validity viz. the democracy principle and the moral principle.

This new normative framework is, however, not consistent. In this chapter I argue that within this new normative framework an overall *tension* exists between the democracy principle (legitimacy) and the moral principle U^2 (moral rightness). This *tension* is found on two different levels within this new framework. It is found: (i) between the moral principle and the democracy principle and (ii) between moral reasons (universalism) and ethical reasons (localism) *within* the *democracy principle*. Moreover, the second tension between morality and ethics *produces* the first tension between morality and democracy.

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[86] At least in my interpretation of Habermas´s program. It is not fully clear how Habermas would relate to this interpretation.

Moral norms raise claims of *universal* validity whereas legal norms raise claims of *local* validity. The reason why moral norms raise universal validity claims is due to the fact that ´morality´ is defined as the discursive outcome of a rational discourse. Moreover a discourse is only rational if *all* arguments and hence *all* agents have access to this discourse. Legitimate legal norms are, however, also claimed to be the outcome of a rational discourse hence they also have to raise universal validity claims. However, Habermas denies this because according to him local ethical values also play an important privileged role in determining ´legitimacy´. Habermas insists on that ethical values play a significant role in determining ´legitimacy´ because only that way it becomes possible to explain how legitimate laws also constitute *motivating* norms.

Hence, the tension between ethics and morality and hence between democracy and morality is due to the theory of moral motivation Habermas holds. I argue that insistence on this theory of moral motivation leads Habermas´s theory of legitimacy to a dilemma between either becoming too substantial (only locally valid) or too ideal (without motivating force). In section IV.2.0 I suggest another theory of moral motivation according to which this dilemma does not occur.

IV.1.0 The problem concerning the relationship between the moral principle U^2 and the democracy principle

The weak program of the discourse ethics argues that raising a moral validity claim involves a commitment to justify this claim before all possible discourse partners and against all objections. This commitment was captured in the moral principle U. In the section on the weak program it was, furthermore, argued that the universalizability principle U merely constitutes an *abbreviation* for necessary presuppositions of argumentation. Hence, I argued that U should be read as claiming that a norm is only valid if it satisfies the necessary presuppositions of argumentation viz. is rationally acceptable to all rational agents. This I called U^2.

However, according to the democracy principle a norm no longer has to be acceptable to *all* rational agents in order to be valid. Rather, certain norms, viz. legal norms, only have to be justified within a particular community in order to be valid. Hence, Habermas operates with two distinct procedural conceptions of validity. On the one hand the predicate ´is right´ only applies to norms which all rational agents could rationally assent to. On the other hand the predicate ´is legitimate´ applies to

norms which only some rational agents, viz. those within a particularly legal community, have to consent to.

Habermas believes that having two distinct criteria of validity is unproblematic because the moral principle U^2 and the democracy principle, in principle, cannot be inconsistent with each other. Of course, if an inconsistency even in principle could occur then this would be very problematic. The reason for this is simple. The concept of ´legitimacy´ is conceived as being determined by a rational procedure. In effect this means that Habermas holds a theory of a *Vernunftrecht*. Agents are cognitively capable of determining whether a law is *probably* legitimate or not. Equally, as we have seen, he also believes that it is possible to cognitively recognise whether moral norms *presumably* are right or wrong. Hence, he also holds a theory of *Vernunftmoral*. Admittedly, it would be odd if it was possible, through rational insight, to recognise that norms could be *rationally* legitimate but at the same time *rationally* immoral. This would in fact lead to the paradox that we at the same time, as acting agents, in principle, could be obligated to follow a certain norm and to not-follow the same norm. To avoid such a paradox Habermas argues that for *cognitive* reasons[87] morality has to constitute a necessary condition for legitimacy (Habermas: 1992: 128). The idea is that if morality constitutes a necessary condition for the procedure of legitimacy then the two procedures cannot produce inconsistent outcomes.

The question is, however, whether this manoeuvre of making the moral perspective a necessary condition for political legitimacy in fact also makes the democracy and the moral principle necessarily compatible with each other. I will argue that the democracy and the moral principle have to be identified in order to establish a consistent *discursive* theory of legitimacy. If these two principles are not identified the result will be two different theories of validity viz. a discourse ethical theory of morality and a hermeneutic communitarian theory of legitimacy. This problem is, as we shall see, repeated in the democracy principle. This principle is faced with the dilemma of becoming either too ideal or too substantial.

I shall commence my justification of this claim by addressing Habermas´s understanding of the democracy principle. As we remember from chapter 3 the predicate ´ is legitimate´, according to the

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[87] Habermas writes: "Gründe für die Legitimität des Rechts müssen, bei Strafe kognitiver Dissonanzen, in Einklang stehen mit den moralischen Grundsätzen universeller Gerechtigkeit und Solidarität sowie mit den ethischen Grundsätzen einer bewußt entworfenen, selbstverantworteten Lebensführung von Einzelenen wie Kollektiven" (Habermas: 1992: 128).

discourse theory, applies to norms which fulfil the conditions listed on the right side in the following conditional:

$D^{democratic}$: (n is valid ↔ n is rationally acceptable by all those influenced by n *using* ethic-political, pragmatic and moral reasons)

The question[88] is whether the *moral* perspective constitutes a necessary condition for legitimacy in the sense that moral reasons overrule pragmatic and ethical reasons. Or whether it rather constitutes a necessary condition in the sense that moral reasons constitute one necessary condition next to other necessary conditions viz. pragmatic and ethical reasons. In such a way that legitimacy is equally dependent on all three sorts of reasons.

Most certainly Habermas would not accept the first reading of the relationship between morality and legitimacy. According to this reading ´morality´ would not only, if it overrules pragmatic and ethical reasons, constitute a necessary but also a sufficient condition for legitimacy. Thus, according to this reading ´legal legitimacy´ would be determined by the moral principle. Habermas, however, argues that such a moral justification of law is implausible because:

”Es hält an einer Verdoppelung des Rechtsbegriffs fest, die soziologisch betrachtet, unplausibel ist und, normativ betrachtet miβliche Konsequenzen hat”[89] (Habermas: 1992: 135).

Firstly, I will like to state the arguments behind this claim I will then return to how the relationship between "morality" and "democracy", according to Habermas should be conceived. I shall, however, argue that this Habermasian conception of the relation between "morality" and "democracy" is false.

IV.1.1 Three arguments against a moral justification of law

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[88] I shall not address the question of the role of pragmatic reasons. Pragmatic reasons consist of technical considerations of what is pragmatically possible in a society. For instance, it is not pragmatically/economically possible to give all the citizens of Denmark a new Mercedes each year. Such consideration are, however, not of interest in regard to the abstract question of how an adequate theory of legitimacy can be provided.

[89] Habermas first mentions this criticism in relation to Kant and natural law theory. However, he later elaborates and writes: "Auch unabhängig von Kants metaphysischen Hintergrundannahmen lebt in der Verdoppelung von Recht überhaupt in natürliches und posititives Erbe fort, nämlich die Intuition, daβ die ideale Gemeinschaft der moralisch zurechnungsfähigen Subjekte – die unbegrenzte Kommunikationsgemeinschaft von Josiah Royce bis Apel – über das Medium des Rechts in die Grenzen der historischen Zeit und des sozialen Raums eintritt und als Rechtsgemeinschaft eine konkrete, raumzeitlich lokalisierte Gestalt gewinnt (Habermas: 1992: 137).

The speculative argument

This argument is a result of Habermas´s speculative reconstruction of the rationalisation of the life-world. Habermas argues that alongside the historical separation between morality and ethics, the law also broke away from an original traditional normative background (*Sittlichkeit*).

"Mit der Erschütterung der sakralen Grundlagen dieses Gewebes aus Recht, Moral und Sittlichkeit setzen Differenzierungsprozesse ein. Auf der Ebene des kulturellen Wissens trennen sich (..) juristische Fragen von moralischen und ethischen Fragen"(Habermas: 1992: 137).

Habermas sees this historical differentiation between ethics, morality and law as indicating that ´legitimacy´ has to be conceived in a non-moral way.

The "normative" argument

Habermas claims that a moral justification of law *normativ betrachtet mißliche Konsequenzen hat*. The primary explanation of this claim seems to be that Habermas seeks to formulate a theory of legitimacy which explains how citizens can rule society in a genuinely autonomous way. That is, in a way where the citizens are both addressees of the law (legal subjects) and makers of the law (legislators). If one claims that law is valid because of a connection with morality, in the sense of rights, then these rights constitute an external limit, which the citizens, in their legislation, cannot legitimately transcend. In effect, this means that they put restrictions on the autonomy of the citizens. The liberal conception of natural rights constitutes an example of such a problematic theory. Even more evidently, this would be the case in a theory where ´legitimacy´ was explained with metaphysical or religious reasons. In such a theory citizens would not be autonomous because they would not dispose over authority to revise or decide the laws of the society in which they lived. Rather, the philosophers, the priests or whomever have access to the *metaphysical* laws would be entitled to decide which *positive* laws were legitimate and which were not. Normatively, moral justification of law thus seems to lead to a restriction of the individuals´s autonomy and potentially to a class-society where an elite rules the majority[90].

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[90] Interestingly, this Habermasian point of view is very akin to Rorty´s reasons for criticising any attempt to say something profound about truth or morality. Habermas, however, argues that it within the Enlightenment is possible to justify procedures whereas Rorty argues for the blessings of a post-Philosophical and post-Enlightenment culture. He argues that "This would be a culture in which neither the priests nor the physics nor the poets nor the party were thought of as more "rational" or more "scientific" or "deeper" than one another" (Rorty: 1982: xxxviii).

This strong objection against the project of justifying law with moral reasons, however, operates with a particular concept of morality. It operates with a conception according to which "morality" is equivalent to some sort of "realistic moral truth". However, other sorts of procedural theories of morality are on the market nowadays[91]. Among these procedural theories we find Habermas´s own theory of, as well as Karl-Otto Apel´s variant of, a discourse ethics. According to these theories morality should not be interpreted realistically. To use the terminology of a previous section ´morality´ does not include any ontological connotations. Rather, what is morally right can only be determined in a rational discourse. If ´morality´ is understood in this way, and not in terms of essentially taken for granted human rights or in terms of metaphysics, then a "moral justification of law" seems to be perfectly consistent with "fully autonomous citizens". It is then the citizens themselves, in their capacity of being rational moral agents, and not some religious or intellectual elite, who decide which norms should be institutionalised as laws and which should not.

The sociological argument

Habermas, however, argues that such a procedural moral justification of law is *sociologically* implausible. The argument is that even if ´morality´ is conceived as an "universal impartial perspective" it still, as William Rehg argues, is too "pure" to deal with the complexity of legal norms (Rehg: 1998: 259). In order to explain what is meant by "morality becomes to pure" I shall have to address the Habermasian distinction between ´morality´ and ´ethics´.

Normally Habermas uses the term ´ethics´ to refer to values[92]. Hence, the ethical right thing to do, is whatever is in accordance with ones values (Habermas: 1991: 104). Contrary to this, ´morality´ is defined in terms of impartiality and universality. A morally right action is thus an action, which is an example of a norm, which all rational beings could agree to. This distinction between ´morality´ and ´ethics´ is of course very delicate and difficult to draw. What, however, is of interest in the present context is that Habermas argues that ethical reasons (values) constitute much stronger reasons to act than moral reasons do. This is a complicated claim. The idea, though, is that values constitute a part of the identity of people and communities, whereas ´morality´ is dependent upon reasons external to the identity of people and communities. The ethical fact that *I* see myself as a

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[91] Furthermore, even though utilitarism is not procedural it also constitutes an example of a non-metaphysical moral theory.
[92] See especially "Vom pragmatischen, ethischen und moralischen Gebrauch der praktischen Vernunft" in *Erläuterungen zur Diskursethik* (1991) pp. 100-119. In this essay the terms ´ethics´ and ´morality´ are thus used in a different way than they were used in the previous chapter.

person who helps my family constitutes a much stronger motive for action than the (alleged) universal moral norm that *one* should help other people.

The idea that a moral justification of law is sociologically problematic should be seen in relation to this distinction between ´morality´ and ´ethics´ and Habermas´s view on *moral motivation*. The sociological argument claims that if laws are to be *effective* then they have to incorporate ethical and pragmatic reasons as well as moral reasons. Because citizens of a given community would not be *motivated* to follow laws which in no way reflect the values of this community but rather were only the result of a global discourse on justice[93].

In order for laws to be effective, in order for people to want to follow them, they have to reflect the values of the community they regulate[94]. As Parsons claims agents are only disposed to follow norms if the *institutionalised* values reflect the *internalised* values[95] (Habermas: 1992: 91).

From these considerations Habermas concludes that a pure discourse ethical (moral) justification of law is *sociologically* implausible because agents would not be *motivated* to follow laws which only incorporate moral reasons. This argument, according to Habermas, constitutes the most important argument against a discourse ethically justification of legal norms. The two other arguments do in fact not constitute relevant arguments against a moral justification of law. I shall hence in the following limit my discussion to this third sociological argument.

Habermas´s alternative thesis that ethical, pragmatic as well as moral reasons have to enter the discursive justification of laws will be analysed in the next section. Before turning to this section it, however, should be remarked that none of the three arguments listed against a moral justification of law allow the conclusion that a moral justification of law is conceptually, or because of meta-ethical arguments, impossible. Rather, the above mentioned arguments only constitute pragmatic reasons for a different way of conceiving ´legitimacy´. Reasons claiming that the democracy theory of

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[93] Hence, Habermas writes "Natürlich bezieht sich auch die kulturell freischwebende Moral auf *mögliche* Handlungen; aber mit den Motiven, die den moralischen Urteilen Schubkraft für die Praxis verleihen, und mit den Institutionen, die dafür sorgen, daß berechtigte moralischen Erwartungen tatsächlich erfüllt werden, unterhält sie sozusagen von sich aus keinen Kontakt mehr". (Habermas: 1992: 21).

[94] Thus Habermas writes "Auch wenn sich Kants Begriff der Legalität insoweit als nützlicher Leitfaden für die Analyse der Formbestimmungen des Rechts erweist, dürfen wir die Aspekte der Legalität nicht als Einschränkungen der Moral verstehen; ich möchte vielmehr aus dem soziologisch nahegelegten Ergänzungsverhältnis von Moral und Recht verständlich machen: die Konstituierung der Rechtsform wird nötig, um die Defizite auszugleichen, die mit dem Zerfall der traditionalen Sittlichkeit entstehen" (Habermas: 1992: 145).

[95] This is also a part of the explanation of how social order is possible.

justification of law is preferable to a moral theory of justification of law because the discourse theory is more coherent with: (i.) the rationalisation of the life-world; (ii) a post-metaphysical justification of law and (iii.) a law that is regarded as sociologically effective.

IV.1.2 The problem concerning the relationship between ethical values and universal moral norms

Habermas thus rejects the idea of conceiving the moral perspective as a necessary and sufficient condition for legal legitimacy. Instead, he argues that morality simply constitutes one necessary category of reasons next to ethics and pragmatic reasons. Since they all constitute necessary and only taken together sufficient conditions it follows that laws are only legitimate to the extent that they reflect all three categories of reasons. The main argument against a moral justification of laws was that such laws would not contain ethical reasons and hence would not motivate agents to obedience.

I shall, however, argue that the ambition to conceive the democracy and the moral principle as *distinct* though *compatible* principles cannot be fulfilled. The reason for this is simple.

Moral rightness is defined as "universal rational consensus in regard to a norm". The reason why the consensus has to be universal is due to the fact that agents raise validity claims when they argue. Habermas argues in the weak program that a norm is morally right (valid) if the validity claim raised by the norm is redeemed. He furthermore argues that this validity claim only is redeemed if all rational agents consent to the norm. If an agent claims that a norm is morally right but at the same time refuses to listen to arguments against this norm, then she commits a performative self-contradiction.

The democracy principle, however, claims that the validity of norms can be determined by a rational discourse in a *demarcated* community. Hence, it claims that only *certain* agents have to agree to a legal norm in order for it to be legitimate (valid). It is however, unclear why agents who claim that such legal norms are valid do not make a performative self-contradiction. Though, apparently the reason for this is to be found in the *ethical values* which legal norms contain.

The overall incompatibility between the morality principle U^2 and the democracy principle is hence due to the fact that ethical values are given a priviliged status within the democracy principle. Hence, the tension between the moral principle U^2 and the democracy principle is transformed into an incompatibility between *ethical values* and *moral universality* within the democracy principle.

Ethics and morality constitute two analytically distinct procedures for determining " practical validity" *within* the democracy principle. The legitimacy (validity) of social norms in a democracy

is hence dependent upon two procedures. On the one hand, legitimacy is dependent upon an ethic-hermeneutic procedure concerned with articulating the values of the society in question. On the other hand, the validity is also dependent upon a communicative rational moral procedure of redeeming the validity claims raised by the norms in that society.

However, Habermas´s ambition to classify *ethics* and *morality* as distinct though compatible necessary conditions can, in my opinion, not be fulfilled. Legal norms are *either* legitimate if and only if they are universally accepted, *or* they are valid if and only if they reflect the values of a particular community. No third option, contrary to what Habermas thinks, exists.

The reason for this is that moral validity implies ethical validity whereas ethical validity does not imply moral validity. I will illustrate this fact in the following. In order to make this *asymmetrical* relationship between ´morality´ and ´ethics´ clear I shall identify ´morality´ with ´universalism´ and ´ethics´ with ´localism´.

One can meaningfully say that a norm is (*probably*) illegitimate if it (*probably*) cannot obtain universal (moral) consent. However, one *cannot* say that a universal norm is illegitimate because it cannot obtain local (ethical) consent. The reason for this is that universalism implies localism but localism does not imply universalism. The relationship between localism and universalism is asymmetric. Universal norms have to be *compatible* with local norms in order to be *universally valid* whereas local norms do not have to be compatible with universal norms in order to be *locally valid*.

This means that there is no difference between claiming that (i) "a norm has to be locally *and* universally valid in order to be legitimate" and claiming that (ii) "a norm has to be universal valid in order to be legitimate".

In other words: since universalism implies localism there is nothing informational gained by stressing that a norm has to be *locally* as well as *universally* valid in order to be legitimate. In saying that a legitimate norm has to be *universally* valid it is already implied it has to be *locally* valid.

This seems to indicate that the moral principle U^2 (universalism) after all, does constitute the criteriological principle according to which legal norms have to be justified. Ethical reasons (localism) are already contained in this criterion. If agents, because of local ethical reasons, do not agree to a norm then this norm is not universally valid and hence not legitimate.

However it is only meaningful for Habermas to stress that ethics (localism) constitutes a *necessary condition* for legitimacy if *ethics* constitutes a *privileged* set of reasons which is weighed over reasons external to ethical communities. This would, however, mean that a norm constitutes a valid legal norm simply if it is ethically locally valid. However, this means that ethics (localism) constitutes a necessary and sufficient condition for legitimacy. Morality (universalism) would then play no role in determining ´legitimacy´. Hence, law would no longer be discursively justified but rather justified by a hermeneutic communitarian procedure.

Thus, Habermas has to choose whether his theory of legitimacy is based on either a universally moral or a locally ethical program of justification. On the one hand, one would think he would favour the universal program. This program is consistent with the idea of discourse ethics outlined in chapter 2 i.e. with the whole idea of communicative rationality and an epistemic theory of rightness. On the other hand, he stresses the importance of ethical values in regard to legitimacy. He also explicitly rejects the idea of a universal justification of legal norms in the three arguments mentioned in section IV.1.1[96]. Hence, it seems to me that he in fact tends to adopt this ethical conception of legitimacy. If this is the case then he in fact does not hold a *discursive theory* of legitimacy. Instead, legitimacy is the product of a hermeneutic communitarian procedure of articulating values of a given community.

The reason why Habermas stresses the importance of ethical values, in my opinion, is to be found in his wish to give substance to the formal theory of morality developed in the weak program of moral

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[96] The fact that Habermas understands statements concerning ethical values as being valid without raising universal validity claims seems to underpin this second reading. As Putnam describes it, Habermas has a *naturalistic* understanding of values. Putnam uses the term ´naturalistic´ in the sense of the logical positivism. Hence, he argues that Habermas treats "values" as entities without any cognitive content (Putnam: 2001: 281). According, to this way of understanding statements concerning values such statements, unlike moral statements, express valid *preferences* agents or communities simply either have or do not have. The claim seems to be that to the extent norms regulating a community reflect the values of this community they are ethically right. This implies the problem that a norm can be ethical right but morally indefinable. Michael Rosenfeld emphasises this problem too when he, in relation to Habermas, writes: "(..) at least with respect to certain issues, moral norms that are impartial as among all conceptions of the good seem impossible; that moral norms appear more likely to be in conflict with ethical norms than in harmony with them (..)" (Rosenfeld[a]: 1998: 147).

justification. The main problem[97] of the weak program was that it became empty of moral significance. This problem was largely opposed by the system of rights stated in the last chapter (III.5.0). However, in *Faktizität und Geltung* Habermas introduces a new problem concerning the discourse ethics. This is illustrated by the third of the arguments against a discourse theoretical justification of legal norms stated in section IV.1.1. Here it is argued that morally justified norms do not *motivate* agents to act. Ethically justified norms, however, *do* motivate agents. Habermas thus insists on stressing that legal norms have to be ethically justified because he wants to ascribe *motivational* force to legal norms. This theory of moral *motivation* thus pushes him into a dilemma.

IV.1.3 The dilemma of the program of Faktizität und Geltung

One way to solve the problem concerning the disharmony between localism (values) and universalism (moral norms) would be to abandon the idea that values enjoy a special status in norm-justifying discourses. Richard Bernstein, for instance, finds this analytical distinction implausible. Using himself as an example, he argues that the fact that he has a history as an American Jew does not make it impossible for him to distance himself from this perspective and critically reflect on the values of this history. Hence, he finds it "completely artificial and arbitrary to suggest that when I ask more universal questions I am shifting to a different type of discourse with a different logic of argumentation" (Bernstein: 1998: 302).

However, an elimination of the analytical distinction between ´values´ and ´morality´ in favour of universalism would imply that the democracy principle became identical with the moral principle U^2. Habermas´s reluctance to identify these two principles seems, however, *sociologically* understandable. If the Habermasian concept of ´democracy´ is *idealised* to such a degree that it becomes *fully consistent* (identical) with the moral principle then *sociological* methodological problems follow. Idealising the democracy principle in this way means conceiving radical deliberative democracy as a pure rational procedure equivalent to a moral procedure. Furthermore, since the concept of ´moral rightness´, as we remember from section I.2.0, is analogous to ´theoretical truth´ *radical democracy* would then constitute a procedure that produces truth-analogue results (legal norms) as well[98].

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[97] Another main problem was that it, in a certain sense did not contain a moral principle. However, this problem I bracket for the moment and return to in my conclusion.

[98] In fact, Habermas seems sometimes to be very close to such an idealised conception of ´democracy´. For instance, he argues that "Die Mehrheitsregel behält eine interne Beziehung zur Wahrheitssuche (..)" (Habermas: 1992: 217). The

Habermas argues that *moral action* only takes place if: i. people are *motivated* to examine whether a norm is or can be morally justified; ii. people are *motivated* to act according to norms which they have recognised as being valid. Thus, to a large extent people only act morally if they have been socialised and hence formed a moral identity (super-ego). Only because of the incorporation of *ethical* reasons in the legal discourse do laws possess a more direct access to motivating reasons.

This assertion Habermas expresses by arguing that the legal discourse simultaneously constitutes a "system of action" and a "system of knowledge" (Habermas: 1992: 146). The moral discourse on the other hand only constitutes a "system of knowledge".

Therefore a highly idealised conception of ´democracy´, without connection to rich *values* of a particular community indeed seems very vulnerable to sociological criticism. The problem is that, to the extent ´democratic legitimacy´ is conceived solely in universal terms, it looses contact with motivating reasons. It cannot explain social order and social integration.

Hence, Habermas is caught in a dilemma: *On the one hand*, in order to constitute a system of action the democracy principle has to favour values (localism). This involves, however, that the democracy principle becomes too empirical and hence incompatible with the moral principle (universalism). This problem can only be solved by *idealising* the democracy principle i.e. by favouring the moral principle (universalism). *On the other hand*, when so idealised the norms produced by the democracy principle loose their *motivating* power.

In short, the democracy principle becomes *either* too empirical *or* too abstract.

IV.2.0 A possible solution to the dilemma

The above mentioned dilemma mainly seems to be the product of a special theory of moral motivation. Habermas, however, is not very explicit in regard to how this theory of moral motivation should be understood. I, however, understand it as claiming that agents in post-metaphysical cultures are not motivated to act morally because moral norms no longer are

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minority in a democracy has the chance in the future to produce better arguments and thereby revise any decision with which they disagree.

interwoven with religious beliefs and agents hence no longer fear the consequences of their actions in the hereafter.

The above mentioned dilemma can then be solved by changing this theory of motivation. Instead, of explaining motivation for moral actions in terms of values Habermas could explain it in terms of cognitive insight. Agents would then be motivated to respect probably legitimate laws because of insight into the fact that probably legitimate laws are rationally justified[99].

With such a cognitive theory of moral motivation it would no longer be decisive to ascribe ethical values a privileged status in regard to the legitimacy of legal norms. Hence, the major obstacle to identifying the discourse, the democracy and the moral principle with each other would be out of the way.

The whole issue of legitimacy and social order could then be settled by combining a universalizability principle / democracy principle with a universal system of rights.

One could argue that the legitimacy of the central part of the institutions as well as the legitimacy of the central laws in any deliberative democracy are dependent upon whether they express and promote an a priori justified system of rights. The system of rights would itself be transcendentally justified by the fact that it only contains rights necessary for rational dialogue. The question of exactly which rights are implied by this transcendental argument would have to be settled in discourse. However, this somewhat vague idea of transcendental rights would constitute the *bedrock* of the discourse. The transcendental rights should be inscribed in a constitution and no law could legitimately restrict this constitution if it genuinely expresses the rights. Such a reading emphasises two aspects of Habermas´s theory he normally tones down himself: A *liberal* focus on *"natural" rights* and a *foundational* focus on *transcendentally* justified rights. I return to this interpretation in my conclusion.

Identifying the democracy principle with the moral principle U^2 seems to be the only possible approach to practical validity consistent with the theory of communicative rationality developed in section I.1.0. Here, it was argued that practical statements like empirical statements raise universal validity claims. Furthermore, it would help explaining how the mysterious discourse principle D,

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[99] Of course more would have to be said about such a cognitive theory of moral motivation.

introduced in section III.3.1 as standing at the centre of Habermas´s new normative framework, can be justified. The discourse principle can simply be identified with the moral principle U^2 and, like U^2, it can be transcendentally justified – derived from necessary presuppositions of argumentation.

Finally the universal reading of the democracy principle seems to imply that "democracy" is in fact only possible as "world democracy". The norms operative within any demarcated democracy raise *universal* validity claims. These claims can only be redeemed if *all* rational agents, citizens of the world, consent to these claims. Thus, in order to rationally redeem such norms a world public to which all rational agents have access seems to be implied. Even though this for pragmatic reasons is not possible now or in the near future, Habermas´s idea of a discourse theoretical reconstruction of law and democracy can only be fully implemented as a "world democracy".

Chapter V. A moral justification of law and the distinction between a Part A and a Part B in the discourse ethics.

In the former chapter I argued that because of a special theory of moral motivation the Habermasian discourse theory of radical deliberative democracy led to a dilemma. The concept of democracy became either too pure (and thus sociologically implausible) or too substantial (and thus inconsistent with the very idea of a discourse theory of validity).

In this chapter I shall discuss Apel´s discourse ethical theory of law and democracy. In this theory the above mentioned dilemma does not arise. Apel does not share Habermas´s theory of motivation. Instead he seems to favour a cognitive theory moral motivation. Hence, the fact that the idea of ´democracy´ becomes "pure" does not constitute a problem. The issue for Apel is not whether agents (sociologically) are willing to follow valid norms but rather whether they *can* follow them in a *responsible* way. By addressing this issue I also return to a question I posed at the end of the second chapter viz. how the strong (Apelian) discourse ethical program relates to law and democracy.

I shall show how Apel brings attention to a type of moral problem not addressed by Habermas. The problem of how one should act if it is not *responsible* to act in accordance with U. Using this problem as a starting point Apel argues that he is capable of formulating an alternative theory of legitimacy. I shall, however, agree with Habermas that this problem cannot be solved within a

discourse ethical program of justification. This furthermore means that Apel´s theory of legitimacy should not be favoured over Habermas´s "system of rights".

V.1.0 The problem of applying discourse ethics to the real world

In the section concerned with the weak program (II.4.0) it was argued that Habermas does not really hold a normative theory of morality. Rather, he argues that the discourse ethics only provides: (a) an explanation of why moral statements, similar to empirical statements, raise universal validity claims; (b) the "presuppositions of argumentation" of which use has to be made of in order to redeem universal moral validity claims. The explanation of this consisted in a transcendental or formal pragmatic argumentation for the universalizability principle U. Through, this explanation we learned that genuine argumentation is only possible if certain norms or rules are respected. From these norms the moral principle U was derived. I argued that U should be read as an *abbreviation* of the necessary presuppositions of argumentation viz. as U^2. Habermas, however, did not pursue the possibility of developing a normative moral theory from this principle. Rather, it seems as if he regards the whole idea of a normative discourse ethics to be thoroughly problematic because moral insight does not constitute a substantial motive for moral action (IV.1.1). Therefore, he instead saw a more weighty task in formulating the methodology of a political theory. A political theory that could explain how legal norms can be both legitimate and effective and thus explain social order.

This resignation in relation to the scope of the discourse ethics is not shared by Apel. Rather, he maintains that the concept of ´validity´ can only be adequately understood within the perspective of a normative discourse ethics. However, the discourse ethical program outlined in section II.2.0 has to be elaborated and supplemented.

Apel agrees with Habermas that moral reasons no longer motivate agents in the manner they did when they were a part of a substantial *Sittlichkeit* (Hegel). This Apel classifies as a general problem of post-conventional moral theories. Thus, it also applies to, for instance, utilitarianism. The fact that agents know what is morally right does not necessarily imply that they are going to act morally. However, Apel emphasises the fact that moral insight constitutes a weak form of motive more strongly than Habermas does (Apel[b]: 2001:113). Apel claims that insight into the fundamental norms constitutes a moral reason to act. Thus, he seems to favour a *cognitive* theory of moral motivation. This would have to be a theory where recognition of the right thing to do provides a reason to act. However, he does not state more specifically how such a theory should look like.

He, however, emphasises that agents´ willingness to follow legal norms does not so much depend upon whether these norms express values as upon whether these norms are backed up by institutionalised sanctions or not (Apel: 1998: 788). Thus, he, unlike Habermas, finds the conception of a universally justified law, institutionalised as positive law unproblematic from the perspective of moral motivation.

In contradistinction to Habermas he is interested in the question of *how* agents can act morally. In his theory of politics and legality Apel adopts Habermas´s principle U[100]. As we remember from section II.2.0 Apel argues that it is a fundamental norm that "those material norms have to be established that in cases of their being generally obeyed probably will have consequences that could be acceptable to all affected" (Apel[a]: 2001: 40). When he writes about law and politics he identifies this fundamental norm with the universalizability principle U. He furthermore conceives U as a normative principle. Thus, he argues that we are morally obligated to act in accordance with U. His version of the principle U I term $U^{norm.}$.

His argument for such a normative reading of U I reconstructed in the following manner (II.2.0). (i) Agents are obligated to act morally. (ii) Being obligated to *find out* what is moral is a part of being obligated to act morally. Hence, agents are *obligated* to engage in practical discourses when confronted with moral conflicts[101].

It is, however, a problem to such a normative interpretation of U that U^{norm} apparently prescribes actions which sometimes cannot be performed in a "responsible" way. The core of the problem is that even if an agent is willing to solve problems in a moral manner (in accordance with U^{norm}) this is only possible if *other* agents also are willing to solve problems this way. This result follows from the fact that ´morality´ is defined as a *discursive* property. If a majority of agents are not willing to discuss a moral problem then no rational discursive solution can be found. Apel, furthermore, argues that if *some* agents are not willing to solve matters in a moral way then it may not be responsible for *other* moral agents to try to solve matters morally i.e. in accordance with U^{norm}.

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[100] Apel does not reflect on the relationship between the universalizability principle and the necessary presuppositions of argumentation. Thus, he does comment on the scope of U in the way I have done by distinguishing between U and U^2.

[101] This argument is primarily directed against Habermas. Habermas argues that agents can approximate moral norms in rational discourse but denies that agents are morally obligated to enter such rational discourse. He denies this because he argues that no norms can be justified prior to discourse - not even the norm that one should enter discourse.

To solve a practical matter in accordance with U^{norm} means to enter a genuine rational discourse concerning this matter. It is a part of the definition of a ´genuine rational discourse´ that such a discourse only is possible if all the agents involved in the discourse argue communicatively. This means the agents have to respect the "necessary presuppositions of argumentation". This also means that the agents have to aim at solving the problems concerning the practical matter in question – act communicatively. If some of the agents involved in the discussion are not genuinely interested in solving the problem then a rational solution to the problem will not occur. Sooner or later it will become clear that these agents are not interested in solving the problem but rather act in accordance with a hidden agenda.

Apel argues that it may not be *responsible* to enter a moral dialogue with - pass information to - such strategic acting agents (Apel[a]: 2001: 83). I shall give two examples of when it is *irresponsible* to enter a moral discourse. The first example is imaginable within a *Rechtsstaat*. The second example concerns how to act morally in societies that are not democratic regulated by the rule of law.

The first example: One can imagine that it may not be *responsible* for a politician to reveal his view concerning a political practical problem to other politicians if these other politicians cannot be expected to act morally. It would not be responsible to pass informations that may be used against him.

The second example: One can imagine that in a country, led by a despotic elite, it may be impossible, without getting hurt, to engage in moral discourse concerning which norms should govern this country. Hence, it would not be "responsible" to try to apply U^{norm} under such circumstances.

The problem that application of U^{norm} may not be responsible indicates for Apel that the ideal moral principle U^{norm} has to be *supplemented* by another principle.

"It seems clear that, after all, we need a *supplementation principle* for the ideal principle of discourse ethics, in order to say what one *ought* to do in cases where the ideal procedural norms of settling moral problems by practical discourses cannot be applied" (Apel[a]: 2001: 86).

Hence, Apel argues in favour of a two-fold structure of the discourse ethics. He argues that it is necessary to distinguish between two discourse ethical dimensions.

On the one hand, he argues for a part A of the discourse ethics. This part is concerned with reflexively demonstrating the transcendental presuppositions of argumentation and the moral principle implied by these presuppositions (the principle U^{norm})[102].

This part of the discourse ethics is deontological in the sense it operates with imperatives of the form: "you shall allow all agents to take part in discourses" and "you shall respect the outcome of rational discourses" or "Handle (stets) so, als ob du Mitglied einer idealen Kommunikationsgemeinschaft wärest" (Apel: 1992: 36).

On the other hand, the moral principle U^{norm} has to be *supplemented* by a principle which can guide agents with moral intentions in situations where U^{norm} cannot be applied in a responsible way (Apel[a]: 2001: 92). In Apel´s terminology this brings a *teleological*[103] dimension into an otherwise *deontologically* conceived discourse ethics (Apel[a]: 2001: 93). Thus, he claims that a part B of the discourse ethics is necessary to the extent that conditions that make the application of U^{norm} possible are not present. If conditions that allow a responsible application of U^{norm} are not present agents should act according to a "supplementation principle" (Ergänzungsprinzip).

This problem concerning how to proceed if it is not *responsible* to apply U also affects Habermas´s theory (even if he does not argue for a deontological theory). In his moral theory it is argued that morally right norms even in principle can only be found if certain ideal conditions of inclusion and mutual recognition are approximately active. This, however, does not answer the question of how to perform if these conditions are not implemented. The same is the case in relation to Habermas´s concept of "legitimacy". As we have seen the only way legitimate political rule is even approximately possible is if a state with executive institutions, a legally regulated public sphere and so forth exist. These institutions, among others, make it possible to adopt rational and hence legitimate norms. Citizens are guaranteed protection by the law when they exercise their rights to speech.

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[102] This program was outlined in II.2.0
[103] Apel remarks that this way of using the terms ´deontology´ and ´teleology´ is not identical with the analytical standard terminology on the issue (Apel: 2001: 94).

There are, however, two different problems. The first problem is that even under such democratic legal conditions it may not be morally *responsible* to engage in rational discourse concerning which norms should be adopted. The second problem concerns how to act if a democratic rule of law is not present.

In one of Habermas´s early major works "*Erkenntnis und Interesse*" this issue was addressed in the light of the historical possibility of *reason*. Here it was argued that because of limited resources all societies put necessary limits on the personal freedom of their members. These limits are determined by the economic and technological level of society and manifest themselves as an unequal distribution of chances and goods. However, as societies become wealthier aspects of the necessary inequality ceases to be necessary and the possibility of a more equal distribution emerges. The privileged classes are, however, rarely disposed without further ado to give up their privileges. These privileges are among other things defended by ideology i.e. myth about why certain groups of people deserve certain goods. In response to this sort of ideology it was Habermas´s thesis at the time that critique of such ideology, even though this critique could not provide any interpretation of society which itself was correct, was somehow a priori valid (Habermas: 1968: 258).

However, nowadays Habermas no longer addresses the moral problem concerning how one should proceed if rational moral dialogue is not possible. Rather, he resignedly argues that:

"In unseren Breiten sind diese Fragen einer revolutionären Moral, die auch innerhalb des *westlichen* Marxismus niemals befriedigend beantwortet worden sind, glücklicherweise nicht aktuell" (Habermas: 1991: 28).

Apel, however, does not agree to this. He maintains that even within a democracy it may be irresponsible to act morally. He furthermore claims that if it is not responsible to act in accordance with the moral principle U^{norm} then agents should act in accordance with a "supplementation principle". The *supplementation principle* states that violence (or strategic argumentation) can legitimately be used against violence (strategic argumentation of others) in order to restore or create conditions under which the moral principle U^{norm} can be applied (Apel: 1992: 46).

He, moreover, argues that the political, the legal and the economic system seen as a whole constitute sub-systems of society justifiable by the supplementation principle. On the one hand,

these sub-systems are not fully moral. On the other hand, they are, so to speak, necessary steps on the path to morality. Apel argues that they constitute a mechanism "so *indispensable for the satisfaction of human needs* that all affected persons must *approve* of its (the sub-systems) core structure" (Apel[a]: 2001: 99). However, even though these sub-systems on the one hand satisfy fundamental needs, and are momentarily necessary for our civilisation, they, on the other hand, also induce immoral consequences. The political system is also a functional power system that seeks to maintain itself. On the international stage it is the rule rather than the exception that nations act immorally against each other. The legal system poses restrictions upon the individuals and is willing to back these restrictions up with violence (without dialogue). Finally, the capitalistic economic system favours strong agents but tends to neglect weak agents (Apel[b]: 2001: 81).

It is now Apel´s argument that even though these systems in certain respects produce immoral consequences it would not be "responsible" to simply try to undermine these sub-systems. Rather, they can be morally justified from by the supplementation principle.

According to Apel all of the three above mentioned sub-systems are morally justified because they contribute to making moral action, in the sense of U^{norm}, possible. I shall limit my analysis to the case of the legal system because my aim is to state how Apel understands the concept of ´legitimacy´. This legal system is morally justified by the supplementation principle because it constitutes the single most important reason why it is possible to act morally. Through the legal system agents are *relieved* (entlastet) from putting rights and norms through by means of violence: "Das Gewaltmonopol des Rechtsstaats (…) macht es ja erst möglich daß die einzelnen Bürger es sich weitgehend ohne Risiko leisten können, moralisch zu handeln" (Apel: 1992: 58). Exactly, because of this function the legal system becomes an *Instrument des Teils B der Diskursethik* and is justified because it contributes to bring about conditions where it is possible to act morally viz. in accordance with U^{norm} (Apel: 1998: 815).

This means, that laws are legitimate not because they are the result of a rational process but because they contribute to making a rational discourse *possible*. This argument seems to be very similar to Habermas´s discourse theoretical argument in favour of the system of rights. However, it differs in an important respect.

Habermas´s argument in favour of the system of rights, as I interpret it, is transcendental. It claims that *if* agents want to regulate their common lives with rational norms *then* they *have to* ascribe certain rights to each other. These rights constitute enabling conditions for rational discourse. As I see it they play the role the "ideal conditions of jusitification" or the "necessary presuppositions of argumentation" elsewhere play in Habermas´s moral epistemic theory. Laws are *legitimate* if they are passed in accordance with these rights. In my opinion, in the same way as moral norms are *right* if they are accepted under ideal conditions of justification viz. the necessary presuppositions of argumentation.

Apel´s classification of ´legitimacy´ does not rest upon a transcendental argument in the same way. Rather, it rests upon a *subjective* estimation of whether a given set of norms in the long run makes the implementation of U^{norm} possible. Though, it may be a transcendental norm that one should perform such an estimation and act according to it. It is still an individual agent or a defined group of agents who *estimate* that implementation of U^{norm} is not *responsible* and then further *estimate* that certain actions or norms are *valid* because they in the long run will contribute to making an implementation of U^{norm} possible. How such a *teleologically* justification of norms goes together with Habermas´s program of justification in *Faktizität und Geltung* and with a *deontological* discourse ethics I shall address now.

V.2.0 Problems with Apel´s moral teleological justification of law, politics and economics.

It is not clear whether the introduction of the "supplementation principle" in effect constitutes a critique of the Habermasian normative framework in *Faktizität und Geltung* (expressed in diagram 2 – III.3.1). Or whether it should be seen as constituting, indeed, a *supplementation* to this normative framework.

The reason why this is unclear is due to the fact that Habermas himself seems to be uncertain in regard to precisely how the normative framework of *Faktizität und Geltung* should be read. I suggested that it could be read in two ways but that both of these readings involve problems. I argued that the ´democracy principle´ could either be read as being different from U^2, and hence becomes too substantial, or it could be read as being identical with U^2 and thus becomes too pure (cf. IV.2.0). If the ´democracy principle´ is read in the first manner then Apel´s theory constitutes both a critique of and supplementation to the normative framework of *Faktizität und Geltung*. On

the one hand, it disagrees with Habermas´s claim that ´democracy´ is capable of constituting a procedure of validity (legitimacy) different from the moral procedure of U^2. On the other hand, it supplements Habermas´s normative framework by showing how it is possible to act morally in non-moral contexts[104]. However, if the ´democracy principle´ is read in the second manner then it merely constitutes a supplementation to Habermas´s normative framework. Because if ´democracy´ is read in this way then there seems to be no difference between ´the moral principle U^2´ and the ´democracy principle´ and since Apel argues that U^2 constitutes the heart of practical reason then there is no difference between Apel and Habermas in this respect either. In other respects, viz. in relation to how U^2 is justified as well as in regard to which implications this justification has, dissension remains. Apel, unlike Habermas, reads, as we have seen, U^2 in a normative manner.

Whether one favours the first or the second interpretation of Habermas´s ´democracy principle´ it seems clear that Apel, by introducing the "supplementation principle", has drawn attention to a type of problem that is not addressed satisfactorily within Habermas´s normative framework. Neither the Habermasian discourse theory of law and democracy nor his moral theory address the problem of how to act if it is not responsible to act *communicatively* i.e. in Apel´s terminology *morally*. Apel´s own way of solving this problem is, however, problematic. I shall mention two problems Apel´s "supplementation principle" seems to have difficulty in dealing with.

V.2.1 The tension between deontological and teleological moral norms

Firstly, the structural differentiation between a deontological and a teleological (Verantwortungsethisch) principle within the discourse ethics seems to be problematic. The deontological principle U^{norm} is, according to Apel and Habermas, transcendentally justified through reflection on presuppositions of argumentation. However, how is the "teleological supplementation-principle" (part B) justified? There seems to be two possibilities. It is, *either*, transcendentally justified as well, o*r* the "supplementation principle" constitutes a substantial moral norm beside other moral norms. If it is seen as a substantial moral norm among other moral norms it, like other norms, has to be justified in discourse. However, as Habermas remarks this means it has to be

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[104] This seems in fact to be the way Apel evaluates *Faktizität und Geltung*. Cf. his essay "Auflösung der Diskursethik? Zur Architektonik der Diskursdifferenzierung in Habermas´s *Faktizität und Geltung*. Dritter, transzendentalpragmatisch orientierter Versuch, mit Habermas gegen Habermas zu denken der Diskursethik?", in *Auseinandersetzungen. In Erprobung des transzendentalpragmatischen Ansatzes* (Frankfurt: Suhrkamp, 1998).

acceptable under conditions which at the same time are claimed not to be present[105]. This seems paradoxical.

In order to avoid this problem Apel has adopted an argument formulated by Dietrich Böhler according to which a transcendental justification of the supplementation principle is given[106].

However, even if one grants that such a transcendental justification of the ´supplementation princple´ can be given, a serious problem remains. This problem concerns the relation between the deontologically conceived "moral principle U^{norm}" and the teleologically conceived "supplementation principle". The problem is that it seems as if an action or norm at the same time can be both immoral (deontological) and moral (teleological). It is a fundamental norm in Apel´s version of the strong program that agents are morally obligated to find discursive solutions to the practical moral problems of the life-world. However, we now learn that if agents estimate that a *responsible* discursive solution cannot be found then they are allowed or obligated (it is not clear which of the two) to act immorally as long this action in the long run aims at making (genuine?) moral action possible. This means, that an action can be deontologically immoral, because it violates the command of solving moral problems discursively, but at the same time teleologically moral, because it in the long run aims at bringing conditions about that make discursive solutions possible in a responsible way. It seems, however, to be problematic that norms can simultaneously be moral and immoral.

Hence, it seems as if it has to be settled as to which of the two principles is superior to the other[107]. Apparently, Habermas´s paradoxical attempt to give *substance* to a pure *formal* discursive principle[108] in Apel´s theory becomes replaced by an equally paradoxical distinction between a part A (the fundamental norms and the universalizability principle U) and a part B (the supplementation principle).

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[105] "Das jedoch bedeuten, daß das Prinzip unter genau den Argumentationsvaraussetzungen geprüft wird, deren Nicht-Erfüllung es doch explizit behauptet" (Habermas: 1991: 197).

[106] Böhler´s highly interesting argument is developed in the paper *Diskursethik und Menschenwürdegrundsatz zwischen Idealisierung und Erfolgsverantwortung* (1992). It is, however, not possible to enter a detailed account of this argument in the present paper. Moreover, I shall argue that even if one grants Apel that the ´supplementation principle´ can be transcendentally justified this does not solve the problems involved by this principle.

[107] This point is emphasised by Micha Werner in the paper "Die Verantwortungsethik Karl-Otto Apels. Würdigung und Diskussion" (Werner: 2001: 134). It is not possible in the present context to discuss Werner´s interesting solution to this problem.

[108] The problems involved by Habermas´s attempt to bring ethical values and universal norms together in the democracy principle (IV.1.2).

Secondly, Apel´s approach to the issue of political legitimacy from a Habermasian radical democratic (critical theoretical) perspective seems to be overly *sectarian*. In the discursive reconstruction of law and democracy Habermas sought to examine the phenomenon of *social order* through a theory of political and legal legitimacy. In effect, he argued that social order in a community only is possible if the norms, which regulate this community, are valid. However, on post-metaphysical premises, it was argued, ´practical validity´ can only be seen as ´discursive validity´. Only those norms which citizens themselves adopt in a rational dialogue are candidates for being valid legal norms. This leads to the sociological problem that apparently all manifestations of alleged legitimate authority are permanently in danger of being refuted by better reasons. This problem Habermas solved by arguing in favour of the idea of a basic institutional framework of democracy, which is excepted from this risk of refutation. It is excepted from criticism because it constitutes *the* enabling condition for criticism and dialogue. The argument of this reconstruction naturally proceeded at two distinct levels of abstraction. On the one hand, it was demonstrated how ´communicative rationality´ and ´communicative rights´ at a conceptual level could be reconciled. This was done under the heading that ´popular sovereignty´ and ´human rights´ could be unified. On the other hand, this conceptual argument had an institutional correlate. It was argued that the institutions that made rational democratic dialogue possible were a priori valid.

Apel would like to reject altogether this methodology of linking together "political legitimacy" and "the idea of democracy". Instead of sharing Habermas´s conviction that ´legitimacy´ should be viewed as a result of citizens´ autonomous legislation he insists on viewing the institutions of law and democracy as being justified by the teleological supplementation principle. These sub-systems have to be justified this way because they are "quasi-immoral". On the one hand, they constitute necessary sub-systems of society. On the other hand, they also induce immoral consequences. Because of this "quasi-immoral" status their legitimacy consists in the fact that they in the long run (as a result of continuously moral critique?) may evolve into perfect moral institutions.

In one way, this argument is not that different from Habermas´s argument about why democratic institutions are valid. Habermas argues that the legitimacy of democratic institutions depend upon whether they reflect a constitution of basic communicative rights. These rights are themselves justified because they constitute necessary enabling conditions for rational discourse. If the democratic institutions do not reflect these rights they are illegitimate and should be corrected.

This argument does not differ greatly from Apel´s argument. This argument says that if suitable communicative conditions (conditions that make an application of U^{norm} possible) are not present then we should seek to bring about such conditions.

In effect these two arguments *look* identical. They both state that suitable communicative conditions should be in force. Habermas specifies the communicative conditions in the system of rights.

Apel further claims that the present institutions (sub-systems) of western democracies in fact do not fully enable moral action and because of this these institutions stand in need of correction. The claim that the present institutions do not generate suitable communicative conditions is empirical and has to be settled in dialogue. However, Habermas would *have to* agree that if they do not fulfil their function (express the system of rights) then they stand in need of correction. Thus, it seems as if the difference between Apel´s and Habermas´s positions is minimal. According to both positions, norms and institutions, which do not duly reflect the basic communicative rights, have to be altered.

Though, in fact Habermas and Apel only *negatively* agree that such institutions are illegitimate. Habermas does not agree with Apel´s *positive* argument that such institutions can be, so to speak, provisionally morally right (the supplementation principle). Practical validity can only be determined in a rational discourse under ideal conditions of justification. This Habermas maintains even though he is very much in doubt how to understand these "ideal conditions of jusitification". We have in this enquiry seen that he understands them in at least three distinct ways: (i) the ideal speech situation in the strong program; (ii) the necessary presuppositions of argumentation – U^2 – in the weak program; (iii) the system of rights in the program of *Faktizität und Geltung*.

Hence, according to Habermas, it may be the case that a contemporary set of institutions and norms, because of pragmatic or other reasons, do not adequately express the system of rights. However, this just means that these institutions and norms are not valid. According to Habermas nothing more can be said and as Wittgenstein, admittedly in a different context, proclaims *worüber man nicht reden kann darüber muß man schweigen*.

If one says that actions aimed at restoring the balance between rights and norms are morally valid then one leaves the very idea of a discourse ethics. The discourse ethics claims that *moral rightness* has to be determined within a universal discourse. The supplementation principle, however, claims

that it is possible for agents to *monologically* estimate what is morally right. In this way the Apelian supplementation principle, according to Habermas, becomes too *sectarian*. Thus, Habermas argues that "Hinter dem einsamen Politiker, der Apel vor Augen steht, verbirgt sich der Philosophenkönig, der die Welt in Ordnung bringen will – jedenfalls nicht der Staatsbürger eines demokratischen Gemeinswesens" (Habermas: 1991: 197).

This Habermasian criticism of Apel´s supplementation principle I agree to. The problem, as I see it, does not consist of the claim that it is possible to transcendentally derive an obligation to restore conditions that enable rationally moral discourse. The problem is rather that Apel gives this "obligation" a criteriological interpretation. Hence, he argues that it is possible for *certain* agents to estimate which norms are morally right. The very attempt to supplement the discourse ethics with a criteriologically interpreted teleological principle is, however, in my opinion misplaced. This does not mean that one cannot be transcendentally obligated to aim at bringing conditions that make an application of U^{norm} about. It does, however, mean that one should not try to make the supplementation principle into a criteriological principle which can determine when actions and norms are right or wrong. If one tries to this two problems follow. On the one hand one ends up with a paradox – norms can be both moral and immoral; On the other hand the "democratic" universalizability principle gets replaced by a monological principle which metaphorically only the *Philosophenkönig* can make use of.

Conclusion

In this enquiry I have addressed the discourse ethical (-theoretical) question of how ´practical validity´ can be conceived within a post-metaphysical paradigm.

I have argued that according to Apel and Habermas this means that ´practical validity´ has to be seen as constituting a discursive property. More specifically they argue that the term ´practical validity´ only applies to those norms which would be accepted under ideal conditions of justification. Apel and Habermas agree that these ideal conditions of justification can be transcendentally derived. They furthermore both wish to interpret these "ideal conditions" in a way that makes them *morally relevant* (substantial) and *formal* at the same time. The attempt to provide such an interpretation is, however, very problematic.

The problem is that discourse ethics, on the one hand, reduces *practical validity* to be the *outcome* of a pure formal procedure. On the other hand, it strives to give *substance* (moral relevance) to this *formal procedure*. It is, however, impossible coherently to hold these two claims simultaneously. Another problem concerns how transcendental fundamental norms can play a significant role in regard to all the substantial norms that are not transcendentally justified. I have argued that these two problems constitute *the* central immanent problems of discourse ethics

Apel and Habermas do not agree in relation to how these two analytically distinct problems should be overcome. I have distilled three different discursive programs of moral justification. These programs were Apel´s and Habermas´s strong program of justification, Habermas´s weak program of justification and the program of *Faktizität und Geltung*. Apel´s program is homogeneously presented in Apel´s texts. The three different programs found within Habermas´s philosophy are, however, not clearly separated in Habermas´s own writings. Having clarified these different programs I also believe to have solved the hermeneutic problem of distinguishing between Apel´s and Habermas´s positions, mentioned at the beginning of this enquiry.

I will briefly recapitulate these three different programs concerning moral justification and the problems they involve.

The basic idea of the strong program is that certain transcendental *moral* norms can be reflexively uncovered. I will shortly address Apel´s and Habermas´s versions of the strong program before I recapitulate in what way they are unable to solve the mentioned problems.

In Habermas´s strong program it is attempted to spell out the necessary and sufficient conditions for rightness (and truth). The conditions made explicit in this epistemic theory of validity Habermas terms "the ideal speech situation". The point of this program is that the "ideal speech situation" performs two tasks. On the one hand, it lists the conditions, which have to be present in order for a moral discourse to take place. It is argued that moral right norms will be the result of a discourse under such conditions. On the other hand, the "ideal speech situation" in itself constitutes a set of a priori valid moral norms. This program is not very thoroughly worked out and is mainly of exegetical interest. It is instructive to note that Habermas once held this program and this makes it possible to understand his motivation to formulate the weak program of moral justification. It is

furthermore of exegetic interest because I have argued that he returns to this *structure* of justification in the program of *Faktizität und Geltung*.

A structurally similar program though much more elaborated and persuasive, is found in Apel´s strong program of moral justification. Apel argues that it is possible to reflexively recognise certain transcendental necessary presuppositions of argumentation. He furthermore claims that two moral norms can be derived from these necessary presuppositions of argumentation. All rational agents must acknowledge each other as having equal rights in representing their interests by arguments. Moreover, all rational agents are morally obligated to engage in discourse and attempt to establish norms that have consequences which (probably) all affected would accept. This last norm he sometimes identifies with a normative interpreted version of Habermas´s universalizability principle U.

In my enquiry I have, however, argued that none of the versions of the strong program are capable of providing satisfactory answers to the two central problems mentioned earlier in this chapter. Neither of the versions of the strong program are capable of justifying why transcendental necessary presuppositions of an argument should be read in a *moral* manner. Thus, in this respect the strong programs rest on a *petitio principii*. Furthermore, only little moral significance can apparently be gained from the, in Apel´s terminology, fundamental norms. Basically, these norms only say that rational agents are obligated to enter discourse in cases of moral conflict and that they should allow all other rational agents to enter as well. However, this does not help us to determine which of all the non-transcendental norms are right. It is even in principle not possible to imagine that all rational agents could agree on one specific norm. Even though it may help us to determine that some social norms are wrong viz. those that explicitly are not in the interest of all agents (e.g. racism).

I further argued that Habermas´s weak program of moral justification is not able to solve the two mentioned problems either. The weak program agrees with the strong program in that certain morally *relevant* transcendental presuppositions of argumentation can be reflexively recognised. However, in contradistinction to the strong program, it claims that these necessary presuppositions do not contain any moral substance. The weak program hence argues that only those norms which agents rationally agree upon are right. The transcendental norms that constitute the procedure in which the agents argue are themselves not morally substantial. Only a formal procedure can be

transcendentally derived viz. the universalizability principle U. This principle basically stated that all rational agents have to agree to a norm if it is to be valid. I interpreted the principle U as constituting an abbreviation of the "necessary presuppositions of argumentation" and termed this interpretation U^2.

The weak program of moral justification, however, leads to two overwhelming problems. On the one hand, U^2 does not seem to constitute a moral principle after all. Habermas insists that the necessary presuppositions of argumentation do not constitute moral norms. Hence, breaking them does not constitute a moral violation. However, since U^2 only constitutes an abbreviation of the necessary presuppositions violating U^2 cannot constitute a moral violation. This means that U^2 cannot constitute a special transcendentally justified moral principle after all. This I called the *problem of arbitrariness*. On the other hand, even if one grants that it constitutes a moral principle it is even more empty of moral relevance than Apel´s fundamental norms. Habermas claims that the principle U^2 plays a role in justifying moral norms. However, the weak program, unlike the strong program, cannot provide any meta-norms that substantial norms have to respect in order to be valid. Thus, even a norm like "racism" cannot be judged a priori immoral by U^2. This I called the *problem of emptiness*. Hence, the weak program only escapes the problem of making a petitio principii at the expense that it ceases to be a moral principle. Furthermore, the universalizability principle cannot play any role in determining which substantial norms are right and which are not. Thus, it is not morally relevant.

In order to make his strong program more morally relevant (substantial) Apel has tried to show the relevance of the fundamental norms in relation to law, democracy and economics. I have mainly addressed the issue of how the fundamental norms may be of relevance to law i.e. to a theory of political legitimacy. The starting point for Apel´s theory of legitimacy is the fundamental norm that rational agents are morally obligated to engage in practical discourses when confronted with moral conflicts.

Apel notes that it *sometimes* seems implausible that agents should be obligated in this way. The problem is that it often is *irresponsible* to act morally in situations where other agents (discourse partners) cannot be expected to act morally. Apel argues that in such situations where an agent cannot engage in a rational discourse in a *responsible* way she can act morally in accordance with a different principle. This principle he calls the "supplementation principle". The supplementation

principle claims that it is allowable to act in contradiction with the fundamental norms (i.e. immorally) in immoral situations. However, only if these acts in the long run aim at bringing about conditions that make the application of the fundamental norms possible. In effect, Apel argues that the *deontologically* conceived fundamental norms have to be supplemented with a *teleological* principle in certain situations. In this way he introduces a highly morally relevant principle. It now becomes possible for agents *monologically* to determine which actions and norms are right and which are not.

Moreover, Apel argues that the sub-systems law, democracy and economics are justified by this teleological principle. Thus, ´legal validity´ or ´legitimacy´ is explained teleologically.

I, however, agree with Habermas that if Apel´s supplementation principle is turned into a criteriological principle then two problems follow. On the one hand, one ends up with a paradox – the same norms and actions can be both moral and immoral at the same time; On the other hand, the "democratic" universalizability principle is hereby replaced by a monological principle which only the *Philosophenkönig* can make use of.

Hence, I found Habermas´s program in *Faktizität und Geltung* more interesting. This program constitutes in my opinion the most promising contemporary discursive program of practical justification. In this program Habermas ceases to use the term "discourse ethics" and begins to use the term "discourse theory" instead.

The core thesis of the program of *Faktizität und Geltung* is that a reconciliation of human rights and popular sovereignty constitutes a procedure that makes rational *legitimate* norms possible. Habermas couches this procedure in political terms. He thus claims that a reconciliation of human rights and popular sovereignty constitutes a democratic procedure that makes legitimate legislation possible.

It was one of my exegetic points that the justificationary program of *Faktizität und Geltung*, though much more elaborated, should be seen as a return to the strong program of moral justification. At the same time it constitutes a program which is capable of solving the problem of emptiness. In the strong program it is essentially argued that certain norms are a priori justified because they are *constitutive of* the rational discourse in which valid substantial norms can be established. The same

structure of argumentation is found in the program of *Faktizität und Geltung*. Here, a whole "system of rights", because it *enables* rational discourse, is claimed to be a priori justified.

This way of understanding ´legitimacy´ made it possible to outline the fundamental institutional structure which a society has to respect in order to be valid (legitimate). Furthermore, since *social order* is only possible in a legitimate society the question of how *social order* is possible in a complex pluralistic society could also be answered. Hereby, the sociological problem of *social order* involved by the moral epistemological *problem of emptiness* could be *overcome*.

I, however, have argued that it is not fully clear how this relationship between human rights and popular sovereignty should be interpreted. As a response to Habermas´s ambiguity in relation to the status of these concepts I have offered two revisions to the program of *Faktizität und Geltung*. On the one hand, the a priori status of the system of rights should be stressed more strongly than Habermas does. On the other hand, it should be understood that the "human rigths" and the "popular sovereignty" have a *universal* scope. Hence, unlike what Habermas thinks, no distinction between the discourse principle, the democracy principle and the universalizability principle can be drawn. After having made these two revisions explicit I will introduce a third necessary revision concerning the petitio principii introduced in section II.3.0. These three revisions constitute in my opinion subjects the Habermasian discourse theory has to address in the future.

In relation to the first revision I have argued that the program of *Faktizität und Geltung* should be conceived as a normative project. The problems implied by the weak program clearly illustrated that Habermas´s "meta-ethical" approach to discourse ethics leads to overwhelming problems. It became clear that a discourse ethical (-theoretical) program of justification cannot rest upon "discourse" alone. Any theory of *practical validity*, which exclusively defines ´validity´ as "discursive agreement", will be confronted with the problems of *arbitrariness* and *emptiness*.

Therefore, the program of *Faktizität und Geltung* constitutes a better approach to the idea of discursive justification of norms. This theory is not inflicted by the problems of *arbitrariness* and *emptiness* because of the transcendentally justified system of rights.

It is this idea of a transcendentally justified normative substantial system of rights which makes it possible to provide a basic institutional structure which all democracies have to respect. The system

of rights constitutes an ultimate limit[109] that no legitimate laws can overrule. Hence, this justificationary program should, in my opinion, be read in a more liberal fashion (natural rights) than Habermas seems prepared to do. It is the system of rights, which makes the discourse theory *morally relevant*. It makes it possible to justify a set of institutions viz. those institutions implied by the system of rights. Of course, this system of rights, as Habermas emphasises, does not exist in *tranzendentale Reinheit*. The question of exactly which rights can be reflectively uncovered, and how they should be interpreted, has to be settled in a substantial discourse. Furthermore it cannot be settled once and for all but has to be interpreted again and again. In this way the system of rights, in Kantian terminology, seems to constitute a kind of *tranzendentaler Schein*[110]. However, even with these reservations, it is this system of rights, which makes it possible to reconstruct the modern *Rechtsstaat*.

In this way the "transcendental a priori aspect" (the rights) has to be favoured over the "discursive aspect" (discussion among agents) in order to produce an *informative* theory of legitimacy. I use the term "informative" in the sense that it is because of this system that the program of *Faktizität und Geltung* can say something substantial about how a legitimate society should be.

In relation to the second revision I have argued that Habermas´s new normative framework in *Faktizität und Geltung* is not consistent. Mainly because of sociological reasons Habermas argues that the democracy principle and the moral principle constitute two different procedures of practical validity. I have, however, argued that no distinction between a strong normative interpretation of U^2 and the discourse democracy principle can be drawn. Legal norms in legal communities do, just as moral norms, raise claims of universal validity. These claims can, furthermore, only be *redeemed* in a universal rational discourse. Hence, ´popular sovereignty´ and ´rational discourse´ as well as ´system of rigths´ and ´implications of necessary presuppositions of argumentation´ are equivalent concepts. This does not imply that Habermas´s idea that a genuine democracy constitutes a procedure of validity is false. However, it does mean that ´democracy´ has to be understood as ´world democracy´.

The third revision concerns an underlying problem, which I have not addressed explicitly since its introduction in section II.3.0. This is the urgent but complex problem that the discourse ethics (-

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[109] Habermas would not agree to this formulation because he insists that the rights constitute enabling conditions and that such conditions cannot constitute a limit to what they enable.

theory) rests upon a petitio principii. This problem is identical with the first of the two problems mentioned at the beginning of this conclusion. It consists of the problem of identifying transcendentally justified norms of rationality with *moral* norms. It concerns *all* of the three mentioned programs.

In section II.3.0 I emphasised that it has to be explained (justified) why rational handling of moral validity claims constitutes a moral procedure. This is a premise both Apel and Habermas tacitly presuppose without justifying. In a certain sense, one can see Habermas´s weak program as *implicitly* directed against this problem. However, as we saw, his attempt to solve it resulted in a cancellation of the discourse ethics (problem of arbitrariness). The problem, however, has to be faced.

The obvious way to justify this premise would be to state that we simply *conceive* "ideal communicative agreement" as constituting the property of morality. In this way, however, Apel and Habermas have to *presuppose* a certain ethos or value that explains why we identify ´communicative rationality´ with ´morality´. It could be argued that this ethos or value is valid because it would be accepted in an ideal rational discourse. However, this would be a circular argument which claims: (i) "ideal communicative agreement" constitutes morality because we (value) conceive it that way; (ii) the value that we conceive "ideal communicative agreement" as constituting morality is valid because we ideally communicatively would agree to this.

However, the conclusion that the discourse ethics (-theory) rests upon either a petitio principii or a circular argument seems problematic in the light of the intention of the discourse ethical approach. Such a conclusion would be inconsistent with: both versions of the strong program, with the core theses of the weak program as well as with the program of *Faktizität und Geltung*. Even the most modest version of these programs of justification, viz. the weak program, still pretends to "explain the moral point of view, and – as far as possible – justify the claim to universality of this explanation, showing why it does not merely reflect the moral intuitions of the average, male middle-class member of a modern Western society" (Habermas: 1986: 160).

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[110] Interestingly, Habermas compares "the ideal speech situation" of the strong program with a *transzendentaler Schein* (Habermas: 1973: 259).

In a way the fact that discourse ethics (-theory) rests upon a petitio principii simply implies that no *Letztbegründung* and no genuine *pure procedural theory* of *morality* and *legitimacy* can be given. This, however, does not mean that no pure procedural theory of *communicative rationality* can be given or that this procedural theory cannot be *Letztbegründet*. It merely means that such an ultimately justified pure theory of *communicative rationality* only becomes morally relevant to the extent people are willing to understand it in a moral fashion.

This is, however, not necessarily problematic. Instead of understanding the discourse ethics (-theory) as if it rests upon a petitio principii or a viciously circular argument one could argue that it rests upon a fertile hermeneutic circle. In this way the normative status of discourse ethics would, on the one hand, be dependent upon whether it expresses the ideas of justice and morality existent among empirical agents. On the other hand, the normative status of these "ideas of justice", "values" or "democratic virtues" would be dependent upon whether they can be justified in discourse. An admission of the fact that discourse ethics (-theory) rests upon a hermeneutic circle, however, would imply that the ideas of a *Letztbegründet* (Apel) or pure (Habermas´s weak program) *moral theory* would have to be abandoned.

However, even in the light of these necessary revisions I maintain that the discourse ethical (-theoretical) approach to practical validity constitutes a fertile and innovative research project. However, the future task of this project, in my opinion, has to pursue a clearer understanding of the status of its basic theses and arguments. I have argued that the program of *Faktizität und Geltung* constitutes the most fertile approach to the idea of discursive validity but that it has to be revised in at least three respects. In this way it will be able to *overcome* both of the mentioned problems. It will be able to justify how transcendental derived norms also constitute *moral norms* and it will be of great moral-political relevance as well. The three revisions were:

-The system of rights introduced in *Faktizität und Geltung* has to be spelled out. In *Faktizität und Geltung* it is rather dogmatically introduced. It has to be explained in what way the five categories of basic rights listed by Habermas constitute necessary enabling conditions of discourse. It also has to emphasised that it is *because* of this system of rights that the program of *Faktizität und Geltung* becomes morally relevant and informative.
-The setting of this system of rights has to be specified. Habermas seems to think that it is possible to conceive ´validity´ in a local manner. I have, however, argued that validity - qua the universal

validity claims – has to be conceived in a universal manner. No difference between the moral principle U^2 and the democracy principle can be established. Hence, the system of rights has to express *universal rights of a world democracy*. This has to be made explicit.

-The whole ambitious discursive approach to practical validity has to be brought into "hermeneutic balance" with the fact that it rests upon a petitio principii.

Danish summary

I dette speciale har jeg forsøgt at kombinere en eksegetisk med en systematisk tilgang til Karl-Otto Apels og Jürgen Habermas´ begrundelser af moral, lov og demokrati.

Det *eksegetisk* aspekt har bestået i at forsøge dels at afgrænse Apels og Habermas´ forskellige tilgange til praktisk gyldighed i forhold til hinanden og dels at ”systematisere” tre forskellige begrundelses-programmer inden for Habermas´ overordnede teori om praktisk gyldighed.

Det *systematiske* aspekt har bestået i at rekonstruere og diskuterer argumenterne for de forskellige begrundelses-programmer Apel og Habermas har formuleret. Begge filosoffer har som udgangspunkt, at det ikke er muligt at begrunde social praksisser eller normer med metafysiske eller religiøse doktriner. De er enige i, at vi er gået ind i en post-metafysisk tidsalder. I denne tidsalder hævder de, at det kun er muligt at begrunde normer og praksisser (eller videnskabelige teorier) med grunde, dvs. kommunikativt / diskursivt. De er således enige i at opstille et diskursivt proceduralt gyldighedskriterium for praktisk gyldighed. Således er en norm gyldig, hvis den ville blive accepteret under ideelle epistemiske betingelser. Disse ”betingelser”, hævder de, kan begrundes transcendentalt. De er imidlertid uenige om, hvorledes disse transcendentale betingelser videre skal fortolkes. I denne forbindelse sondre jeg mellem tre forskellige begrundelses-programmer. (i) Det stærke program (Apel, Habermas); (ii) Det svage program (Habermas) og (iii) Programmet i *Faktizität und Geltung* (Habermas).

Disse tre programmer udgør tre forskellige tolkninger af disse transcendentale betingelser. De tager alle, om end implicit, stilling til navnlig to problemer: (i) Hvorledes kan det gøres plausibelt, at transcendentale betingelser for rationalitet også udgør *moralske normer*; (ii) Hvorledes kan disse få transcendentalt begrundede ”moralske” normer spille en rolle for alle de substantielle normer, som *ikke* er transcendentalt begrundede.

I specialet hævder jeg, at ingen af de tre nævnte programmer formår at give et adækvat svar på det første problem. Endvidere argumentere jeg for, at programmet i *Faktizität und Geltung* på bedst vis giver et svar på det andet problem. Dette program rummer imidlertid mange uklarheder. Jeg hævder, at disse uklarheder bedst overvindes ved at fortolke dette program som værende *universelt* og *transcendentalt* anlagt.

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