Jürgen Habermas' *Between Facts and Norms*

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Abstract

Modern societies are characterized by groups of people sharing a common space but upholding a plurality of "lifeworlds." On this account Habermas claims that modern law should assume the role of being the primary medium of social integration in modern society. Although both traditional and modern law possess instrumental power of enforcement on their subjects the normative source differs greatly. The secular modern society generally looks for normative sources in the realm of rationality. This search yields to uncovering the two internal dimensions of law: facts and norms. The stipulation of the law is the fact of law and what makes it acquire a binding or a coercive force is the norm of law. Habermas claims that it is rational discourse which takes place in the communicative process that bridges the gap. The legitimacy is bestowed on the fact of law by its being justified by reason through a normative claim. Moreover, Habermas attributes the foundation of real democracy, which he calls "substantive democracy" to the exercise of the discursive process or what he calls communicative democracy. In the light of Habermas' theory of law and democracy emerging from the communicative process, the article makes a critique of how democracy is expressed in the Philippine scenario, from the popular exercise of voting to the political exercise through our institutions. In doing so, it hopes to raise awareness of our present state of "formal" democracy and what it takes to achieve a genuine "substantive" democracy.

Keywords: Jürgen Habermas, modern law, modern society, communicative process, democracy

Jürgen Habermas' lifetime rumination on matters concerning the nature of democracy and law which was ushered in 1962 with the publication of *The Structural Transformation of the Public Sphere* culminates in this book, *Between Facts and Norms.* His treatment of political issues strongly bears the character of the emerging Critical Theory of the Frankfurt School where he belonged. [1] This theory holds the view that political inquiry is an integral aspect of a total process of social change. In fact, political inquiry cannot be severed from actual historical, social, and political processes inasmuch as theorists are not merely "describing" the society under scrutiny but are in fact affecting it by their inquiries. Habermas, in this work as well as in an earlier book,[2] reaffirms the "unity of theory and 'praxis' perspective."[3]

Aided by some claims Habermas makes in *Between Facts and Norms*, this article traces the socio-political development of societies from traditional to modern. It highlights the importance of the communicative process in building structures and institutions in a democracy. Considering modern societies as generally secular in nature, the communicative process serves as the rational source of legitimacy of laws and the ensuing powers. Drawing from these ideas, the article concludes that democracy in the Philippines is a mere "formal" democracy in Habermas' terms. The ideal is to be able to institute a substantive democracy constituted through the communicative process which becomes the bulwark of a sovereign democracy.

Finally, the article also uses Habermas' doctrine to criticize the manner Philippine politics puts to life the principle of *popular sovereignty*. In light of the idealization he makes concerning the implementation of procedural democracy in constitutional states, we can appreciate the work we, as citizens of a nation, have to do in order to reach the level

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[1] "Critical Theorists have long sought to distinguish their aims, methods, theories, and forms of explanation from standard understandings in both the natural and the social sciences. Instead, they have claimed that social inquiry ought to combine rather than separate the poles of philosophy and the social sciences: explanation and understanding, structure and agency, regularity and normativity. Such an approach, Critical Theorists argue, permits their enterprise to be *practical* in a distinctively moral (rather than instrumental) sense." James Bohman, "Critical Theory" in *The Stanford Encyclopedia of Philosophy Spring 2010 Edition*, ed. Edward N. Zalta, http://plato.stanford.edu/archives/spr2010/entries/critical-theory/ (accessed May 12, 2010).
[2] Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge, Mass: MIT Press, 1992), 439 ff.
[3] Robert Goodin, ed., *A New Handbook of Political Science* (New York: Oxford University Press, 1996), 84.

of maturity which is required of a State ruled by what Habermas terms as "substantial democracy."

Bridging the fact-norm dichotomy of law

Habermas recounts that, historically, norms of personal and social behavior in traditional societies usually emanate from a common uncontested religious belief-system. These norms are usually sustained and reinforced by a designated sacred authority.[4] This system however cannot persist in highly urbanized modern communities characterized by heterogeneity. In these societies, peoples of very varied backgrounds are brought together within the confines of a determined geographical space. They are expected to live together peacefully and harmoniously following some form of social order.

Where to source this social order emerges as problematic. Modern societies nest a great variety of distinct intellectual traditions, cultural beliefs, social structures, and a gamut of technological innovations that have accumulated throughout centuries. Habermas describes human communities as possessing distinct "lifeworlds."[5] Each one defines the norms and beliefs of a people, in sum, their "way of life." This phenomenon leads to a concern of primordial importance for modern societies, that is, the issue of social integration. On this account Habermas claims that *modern law* should assume the role of being the primary medium of social integration in modern society.

As it is evident to all, all laws possess characteristic coercive powers. Once under law, people are forced to conform their behavior to its prescription or prohibition. The law exercises, in the first place, this coercive power because of its claim to the *power of enforcement*. Laws have the power to extract obedience or compliance from its subjects. Pushed to the extreme, the use of this power of law can even lead to violence. Secondly, the law also has the effect of conditioning and uniformalizing behavior since it aims at making behavior conform to

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[4] Habermas cites this as an example where established institutions could represent a fusion of facticity and normative validity.

[5] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Massachusetts: MIT Press, 1996), 22-23.

the law's prescription. Non-conforming behavior is liable to be reproved or punished by the law. In terms of its effect on behavior, both modern law and "traditional law" exert the same "instrumental" power on their subjects.

However, the two would differ insofar as their "normative" sources are concerned.[6] As for traditional law, its normative justification issues from the authority of the very institution promulgating such law. It is generally taken that the "person who holds social power has *normative authority* as he oversees the implementation of sacred law" (italics in original). Aside from the authority, sacred law as the very source of justice itself likewise possesses a "self-legitimized" power, thus making such law self-binding.[7] However, modern law must look to other sources aside from "sacred law" for its normative justification. This is so considering the fact that it has to encompass and put under its subjection peoples possessing a variety of "lifeworlds." Thus has the modern phenomenon of secularization exposed two internal dimensions of law, namely, *facts* and *norms.* Moreover, Habermas argues that law is characterized by a constant tension between these two dimensions.

This dichotomy in law, the gap between the sheer facticity of the law and its normative claim to validity, is the raison d'être of the "discourse theory" as the rationalization of law. People do not conform their behavior to the law simply because it should be that way. There must be a more rational justification to following rules than merely evoking authority. Doing so implies that it is "such and such" authority, more often than not a "moral" authority, that gives legitimacy to such rules. The justification of something which "ought" to be from the statement of fact that something "is," is a philosophical issue that has been raised by David Hume in his work *A Treatise of Human Nature.* He observed that arguments involving moral propositions jump from "is" statements to "ought" without any form of rational justification.[8] In our present secularized society, an ever growing gap divides the

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[6] "Laws, policies and decrees have need of *normative* justification but they also function as *instruments* for and constraints upon the reproduction of power." Habermas, *Between Facts and Norms*, 482.
[7] Ibid., 142.
[8] David Hume, *A Treatise on Human Nature* (USA: Dover Publication, 2003), 334.

"lifeworld" (fact) and the "system" (norm) which progressively alienates one from the other. Especially after the Enlightenment, "reason[9] alone was supposed to provide a substitute for the sacred and self-authorizing law. As a substitute, reason was expected to reinstate true authority to a political legislator who was pictured as a power holder."[10] It is not the intrinsic "power" the law supposedly possesses that grants it legitimacy. Rather, legitimacy is bestowed by its being justified by reason through a normative claim.

Modern laws are secular in nature and have ceased to derive their legitimacy from the power of moral authority. In a modern pluralist culture, one anticipates conflicts of any sort arising from interaction as inevitable. In looking for a rational proposition to address potential conflicts in this setting, Habermas makes a distinction between law, ethics and morality.[11] He stipulates that one should apply this distinction between law as a political instrument affecting human behavior in a contextual manner and the moral precepts. In a modern pluralist culture, he argues, normative issues should be tackled from a perspective of equal respect and equal consideration for the interests of all. They should be separated from issues of my/our own good life. Issues affecting one's good life are the content of *moral discourses* while issues affecting the interests of all are taken up in *ethico-political discourses*. He states that only when the different ethical traditions which are usually internally regulated by customs and habits come into conflict with one another do normative issues arise. These normative conflicts however, are also considered public in scope for the mere fact of having implications for all those concerned.

In the past, normative conflicts were resolved by having recourse to sacred traditions or metaphysical doctrines. Even then, such resolutions had proven problematic in some cases because of their coercive or violent "effects." Habermas proposes that the best approach to resolving conflicts in modern societies is through the exercise of

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[9] By reason, Habermas means practical knowledge, or reason in the robust sense, as it is "embodied in cognition, speech and action." Jürgen Habermas, *The Theory of Communicative Action*, trans. Thomas McCarthy (Cambridge: Beacon Press 1984), 10.

[10] Habermas, *Between Facts and Norms*, 146.

[11] Ibid., 96-97.

communicative power. He claims that this "power" has a more unifying effect that is mainly due to the consensus-achieving force of communication. Communicative power aims at reaching mutual understanding and consequently empowers people to act in concert.[12] The exercise of communicative power within Habermas' discourse theory of democracy is the pivotal feature of his proceduralist paradigm of law in constitutional democracies. Insofar as law in the proceduralist model is the offshoot of the exercise of communicative power, Habermas then considers law as some sort of "meeting point" between ethics and morals, between the "lifeworld" and "sacred," between facts and norms. The ethical and the moral are but facets of the law but they do not constitute the law. It is communicative power that constitutes the law and provides society a sense of unity and stability.

Laws and moral precepts

In making such assertion, Habermas seems to imply that the law and the exercise of communicative power is "superior" to moral or religious precepts. If what Habermas proposes were to be true, then the law dictates the morals of a people. Such thinking cradles something sinister and dangerous in it. Does Habermas' claim that man takes morality into his hands? I do not think he means anything like that. Habermas states that law and morals regulate distinct spheres of human behavior. On one hand, law regulates specific behavior of citizens who freely form part of a legal order. On the other, morals regulate behavior of persons in relation to universal values, like justice for instance.[13]

Law impinges upon the *public autonomy* of individuals while morals is the guardian of one's *private autonomy.* However, in this duality, coercible law can be accepted as legitimate only if it guarantees two things. First, it must uphold the private autonomy of individuals pursuing their personal success and happiness. Second, it must also secure the public autonomy of rationally legitimate law so that the legal order can be seen as issuing from the citizen's rational self-legislation.[14]

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[12] Ibid., 148.
[13] Ibid., 152.
[14] Ibid., xxv.

For Habermas, morals is not subordinate to law inasmuch as *law is not subordinate to morals*.[15] By this he does not mean that law should be amoral or immoral. He is referring to the legitimizing process to which law and morals are subjected. He means that the process by which morals gains its own imperative power cannot in the same manner confer legitimacy upon law, that is, legitimacy cannot be inferred from morality. In saying that law is not subordinate to morals, Habermas attempts to avert the excesses of liberal democracy which puts premium on the individual's private autonomy at the expense of public morality and social responsibility. He states that the motivational foundation for public democratic action is often compromised at the altar of the liberal conception of human rights.[16]

Habermas sees the relation between the legal norms and moral ones as co-original. He sees them as equiprimordially presupposing each other.[17] Habermas expresses this idea in the following terms: "The principle of discourse can assume the shape of a principle of democracy through the medium of law only insofar as the discourse principle and the legal medium interpenetrate and *develop* into a system of rights that brings private and public autonomy into a relation of mutual presupposition" (italics in original).[18] Habermas here idealizes the situation whereby, in the practice of communicative democracy, law *actually reflects* moral values. As such, the rights and duties laws confer upon the citizens and the state carry the weight of legal as well as moral obligations. However, this presupposition does not hold true in all cases. We are just too aware of instances where proposed legal prescriptions conflict with moral norms in many "lifeworlds." Accepting prostitution as a profession by legitimizing its exercise and the acceptance of remuneration for rendering such "service" is just one among many examples. If such prescription were to be legitimated through communicative democracy, the claim of co-originality of legal and moral norms means that the very act of legitimation itself gives

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[15] Here, he differs from Kant who subordinates legal norms to moral ones.

[16] David M. Rasmussen, "Books in Review: Between Facts and Norms," *First Things,* April 1998, 52-55.

[17] Abdollah Payrow Shabani, "Habermas' *Between Facts and Norms*: Legitimizing Power?" Paper delivered at the Twentieth World Congress of Philosophy, Boston, Massachusetts, August 10-15, 1998, http://www.bu.edu/wcp/Papers/Poli/PoliShab.htm.

[18] Habermas, *Between Facts and Norms*, 128.

origin to prostitution's bearing a moral value. Thus, it is the law indeed that creates morality, and an enlightened morality at that. Would this be agreeable to Habermas? Maybe not all together and readily since Habermas also gives much consideration to the individual's responsibility in sustaining a decent level of public morality. This serves as the "safety feature" of communicative democracy. Hence, unless a consensus achieved on a basis of decency is achieved through the communicative process, no proposed legal prescription can actually gain legitimacy and therefore acquire the power of a law.

Religion and legitimizing laws

The communicative theory proposed by Habermas focuses on how law acquires legitimacy or the power to confer both negative and positive rights upon a legal populace. In this regard, an objection against the proposition can be raised since it gives the discursive process primacy over the actual content of the prospective law. In stating that it is the communicative process that *constitutes* the law, the substance of the law is merely of secondary importance. The issue raised here is whether the practice of communicative democracy is but a guise of moral relativism.

The assumption in raising this contention is that moral discourse is deliberately kept out of the political communicative process because it covers the realm of private autonomy and lends more to division than to integration. Habermas maintains that focusing the discourse in moralistic terms is divisive not because it incorporates religious values but because such discourse tends to be favorable to matters related to private autonomy, e.g., in the form of human rights. Moral self-determination is in its very concept unitary and subject-bound. Each person freely submits himself to the dictates of certain norms that he considers binding according to his own impartial judgment. In doing so, he concurrently subjects himself to public discourse. The discourse principle, as a model of legitimation, precisely intends to undercut the liberal-republican split as it considers both the private as well as the public autonomy of citizens.[19] Legitimate law must pass a discursive test

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[19] Ibid., 450

that potentially engages the entire range of types of discourse: moral, as well as ethical and pragmatic.[20]

Habermas does not in any way recommend that morality as a source of values be done away with even as he makes the previous claims. The prescription he makes in relation to the proceduralist legitimation of law through the discursive process is based on a common observation, a typical description of modern secular democracies. This sentiment of sympathy he holds for moral or religious values was evident in a public dialogue that took place on January 19, 2004 at the Bavarian Catholic Academy in Munich.[21] Jürgen Habermas and then Cardinal Joseph Ratzinger both agree on the idea that religion ought to play a greater role in public affairs and is an indispensable source of social solidarity.[22] In addition to that, they both agree that the contemporary State requires religion as a resource for regenerating forms of solidarity lost to the growing influence of globalized markets and expanding bureaucracies.[23]

Religion as a source of moral norms cannot be lost in the discourse among people. It may be true that historically, discourse involving religion had created rifts which no rational discourse was able to satisfactorily patch up. It is understandable in a way that discourses are entrenched in "lifeworlds" and the attempt to include religion in discourse would necessarily entail bringing religion into the sphere of the "here and now." But because the very matters that religion is concerned about transcend the boundaries of "lifeworlds," religion

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[20] Ibid., xxvi-xxvii. "Reasons are employed with different objects: pragmatic ends, the interpretation of common values, and the just resolution of conflicts and thus also reason recognizes different forms of validity which make often democratic discourses mixed and complex, including various asymmetries of knowledge and information." Jonathan Bowman, "Extending Habermas and Ratzinger's Dialectics of Secularization: Eastern Discursive Influences on Faith and Reason in a Postsecular Age," *Forum Philosophicum: International Journal for Philosophy* 14, no. 1 (2009): 39-55. EBSCO Web *Academic Source Premier* (accessed Apr. 29, 2010).
[21] See "The Dialogue between Naturalism and Religion" in the article by James Bohman and William Rehg, "Jürgen Habermas" in *The Stanford Encyclopedia of Philosophy Summer 2009 Edition*, ed. Edward N. Zalta, http://plato.stanford.edu/archives/sum2009/entries/habermas/ (accessed May 12, 2010).
[22] Jürgen Habermas and Joseph Cardinal Ratzinger, *Dialectics of Secularization: On Reason and Religion,* trans. Brian McNeil (San Francisco: Ignatius Press, 2006).
[23] Bowman, "Extending Habermas and Ratzinger's Dialectics of Secularization."

holds some kind of polarity in relation to what belongs to the "here and now." But the very transcendence of religion and the moral values derived from it may be the fount of a "force" that unites "lifeworlds" to it and subsequently unites the various "lifeworlds" among themselves. In this case, religion does not have to be excluded from democratic discourses. As a source of common grounding and therefore of consensus, its inclusion is seen vital to the discourse.

Given this scenario where religious values are inserted in the discursive process, concepts bearing religious connotations penetrate into laws through the communicative process. Religious values are assimilated into the discourse and eventually into laws as food is assimilated into the body, contributing to giving it its form or its life. Laws, though they are "brought to light" through the exercise of communicative power, possess the life breathed into them by that which unites the "sacred" with the "lifeworld" and the "lifeworlds" among each other. And this is religion expressed through the "medium of law." [24] Thus, there cannot be any "contradiction" between law and ethics and morals. Indeed, the exercise of communicative power can highlight this reality.

Habermas' discursive theory of democracy does not actively espouse an anti-religious kind of secularism and thus pose a grave threat to any religion. To start with, some of the most important secular ideas that inform constitutional democracy—ideas of inalienable individual rights, liberty, and the like—partly originated in Christianity and have crept in the rational discourse in the manner described above. The challenge for those who intend to incorporate religious reasons to the discourse is in the task of translating such reasons to "secular" terms and propositions accessible to public reason. If, in the course of the discourse non-believers do agree to the "secular" arguments drawn from religious reasons raised, the concord is primarily given to the secular arguments. These then form part of public reason moving towards the formation of a public will. The religious reason from whence these arguments originate[25] will figure as the law's remote

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[24] This accounts for religion as a "discovery" of the postsecular age. This is somehow implicit in Habermas' theory, though initially it may have seemed to project otherwise.
[25] See Bowman, "Extending Habermas and Ratzinger's Dialectics of Secularization."

source. This knowledge may be useful to keep in mind, especially by those religious groups who are against the passage of bills legitimizing the use of artificial contraceptives, divorce and same-sex marriages. They should be aware that in the public sphere they are engaged in a discourse with subjects who may not share the same "lifeworld" with them. Their primary objective of the discourse is to enjoin these others in a process of common opinion-and-will-formation. Ultimately, such communicative process would affect the public autonomy of all individuals involved in the discourse. Their arguments, therefore, should pass the test of *reasonableness* encompassing issues not merely of moral questions alone but also involving empirical, pragmatic and ethical aspects, as well as issues concerned with the fair balance of interests open to compromise.[26]

Power of law

Now for Habermas, law and power reinforce each other. Law borrows its coercive character from power and at the same time bestows on it the legal form that provides power with its binding character. These two codes require their own perspective. Law requires a normative perspective and power an instrumental one. Laws, policies and decrees have need of *normative* justification but they also function as *instruments* for and constraints upon the reproduction of power. It is by virtue of the power law possesses that it is able to extract obedience from its subjects. As power alone cannot grant law its legitimacy in modern society, law must derive its validity from another source. Habermas claims that the validity of law emanates from the consent of the very same subjects it governs. Thus it is imperative that we distinguish between *communicatively generated power* and *administratively employed power.* Legitimation of law through communicative power yields a normative approach to law.[27] Once law has been adjudicated, the normative "action-upon-itself" character of law bestows upon it a self-programming circulation of power. The administration rides on this

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[26] Habermas, *Between Facts and Norms*, 452.
[27] Habermas takes off from Hannah Arendt's definition of "power" as non-coercive and non-violent. *Communicative power* is a consensus-achieving force of communication aimed at reaching understanding. Ibid., 148.

peculiar characteristic of law in "steering the behavior of the voting public, preprogramming the executive branch and legislature and functionalizing the judiciary."[28] That is why the communicative power has to cut into the *administrative power* so that the latter self-programming circulation of power is not unabatedly perpetuated. For this, participatory democracy based on the rights of individuals and guided by reasoned discourse remains the best hope in contemporary politics.

Habermas' claim that law is a source of power is clear to most people. One can think of how the application of some laws give "power" in the form of entitlements. This is seen in the case, for instance, of Filipino citizens being entitled to the privilege to invest in the Philippines. Other laws confer some kind of "coercive power" on people, like the imposition of taxes demands one to pay a large sum of money. We observe how laws confer unequal "power" on certain actions, as in the case that legislators can approve a bill but only the President can sign it to become a law.

Laws are indeed powerful. But how do these laws acquire the power they have? Are all enacted laws legitimate? How are laws legitimized? Are they done by this designated group of "elite" people exclusively? If so, why is democracy called the rule "**of** the people, for the people and **by** the people"? How do "the people" figure in the legitimation of such "powerful" laws which are, presumably, **for** them? Let us see what Habermas has to say about this.

In modern society, law derives its validity from the consent expressed by the people governed through the exercise of communicative power. Habermas points out that legitimate lawmaking is itself generated through a specific procedure of "public opinion-and-will-formation." Communicative power, he claims, is also the source of political power, "jurisgenesis," since it enables those engaging in it to create legitimate laws that ultimately found institutions ("systems").[29]

Habermas claims that no (modern) law possesses prior legitimacy or validity. No law is to be considered a norm prior to being subjected

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[28] Ibid., 482.
[29] Ibid., 148.

to the people's communicative power.[30] It is the rational process of "public opinion-and-will-formation" that legitimizes the particular law in question and gives it its normative value. It is vital for citizens to participate in this discursive activity where they engage in public argumentation. This exercise promotes universalizable interests because it heavily relies on the force of the better argument. It is the communicative power that ultimately creates the law as it gives both legitimate and normative "powers" to such laws.

The consideration of the origin of law as theorized by Habermas heightens once again the tension between facticity and validity but this time it appears at different levels.[31] The internal aspect of this tension can be seen between two dimensions of law. On the one hand, law's restricting effects on social facts inasmuch as it limits the range of one's actions and choices. On the other, its expanding effect as the universalizable principle of rights from where law derives its legitimacy and normative power. This legitimacy is justified by the use of the communicative power which is the very application of the discourse principle which states: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse."[32] In the case of the use of communicative power, the discourse principle is followed by the principle of universalizability[33] and the principle of democracy[34] in the legitimation of law or the constitution of rights.[35] In the exercise of communicative power as a process of legitimizing law, the democratic principle which secures public autonomy coexists with the principle of universalization which secures private autonomy.

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[30] Ibid., 149.

[31] The designations *fact* and *norm* are used as "relational" terms and thus can be "attached" to one reality. For instance, "lifeworld" can be considered fact in relation to the "sacred" as source of norm. At the same time "lifeworld" can be considered source of norm in relation to "system" as fact.

[32] Habermas, *Between Facts and Norms*, 107.

[33] Universalizability here means the validity of norms in question presupposes that compliance to its prescriptions encompasses all individuals under its scope. This is a Kantian moral concept.

[34] "The democratic principles state that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of *all citizens* in a discursive process of legislation that in turn has been legally constituted." Habermas, *Between Facts and Norms*, 110.

[35] Abdollah Payrow Shabani, "Habermas' *Between Facts and Norms*: Legitimizing Power?"

Popular sovereignty in a democracy

Legitimate lawmaking can thus be understood as the result of institutionalized procedures that convert citizens' exercise of self-determination in the form of communicative power and democratic rights into binding decisions. What is originally a rational activity of engaging in argumentation is transformed into an exercise of political power capable of conferring mutual rights on the participants.[36] Modern law as a system of rights shows the co-originality of private and public autonomy.[37] It brings together popular sovereignty through the exercise of communicative power in application of the principle of democracy and human rights as the legitimizing outcome of the discourse. Once more we find here the tension between facticity and validity of law. We had earlier discussed this as tension between the positivity and legitimacy of law. But this time it comes in the form of a system of rights which operationalizes the balance between both private and public autonomy.[38]

This idea is a very potent idealization of the powers of rationality on the one hand and of the individual as a power broker on the other. What confidence Habermas puts in rationality, making it the ultimate arbiter of the dispensation of "power" taken as both an instrument and a norm. He assumes that the exercise of communicative power would eventually lead to some form of consensus, shared opinion or common will. It is conceivable that this takes place if the people involved in the "discourse" belong to a homogeneous sector. Granted that the exercise of rationality would vary greatly among those involved in the "discourse" and no use of coercion is admitted, agreement can only be reached in either of two ways. One, if people with dissenting views suppress their opinion and "freely" align themselves to the opinion of the majority in the public will-formation.[39] Two, if those involved are adequately equipped to engage in such rational "discourse."[40] Habermas favors the latter's doctrine as a procedure more appropriate for

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[36] Habermas, *Between Facts and Norms*, 119.
[37] Ibid., 122.
[38] Ibid., 129.
[39] This is what the social contract theories present, of which Rousseau is a representative thinker. Ibid., 473.
[40] This is elaborated by German democrat by the name of Julius Fröbel. Ibid., 474.

contemporary democracies. He envisions such people who participate in such discourses to be of "enlarged mentality" and unencumbered by pursuit of individual interests.[41]

Setting these requisites as criteria for those who can fruitfully engage in "discourse" and join the exercise of communicative power ends up disqualifying the vast majority of Filipinos and acceding the "privilege" to a few qualified individuals. The ordinary Filipino does not have the level of skill and training in argumentation that would allow him to engage in discourse and participate in a meaningful public opinion-and-will-formation. He still has to be equipped in this to enable him to participate as a citizen belonging to a political order. And maybe for as long as the rigor of education and training given in our educational institutions is sacrificed in favor of responding to contingent exigencies, like fielding people in jobs that are "in demand," it may take them even longer to be equipped for this.

Habermas conceives the democratic processes of opinion-and-will-formation in the public sphere as the procedure whereby laws are legitimated. This is supposedly operationalized in a broader discourse of citizens through their elected representatives in the legislative branch. But this set-up hardly fits the bill. For one, the ordinary Filipino citizen is more often than not unaware of the goings-on in the House of Representatives. This is unfortunate since those elected to represent the people, in principle, should carry the mandate of their votes. The *principle of popular sovereignty* stipulates that all governmental authority *derives from the people.* For this reason the individual has the right to an equal opportunity to participate in democratic will-formation. In the Congress, this individual participation is presumably combined with a legally institutionalized practice of civic self-determination when electing representatives.[42] Habermas sees that in this exercise of opinion-and-will-formation, public discourse "is not merely cognitive exercise but mobilizes reasons and arguments that draw on citizens' interests, values, and identities."[43] In short, it would supposedly help the Filipinos reflect on themselves and hopefully from there derive a

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[41] Ibid., 148.
[42] Ibid., 169.
[43] Ibid., xxviii.

sense of ownership and commitment over matters resolved through consensus. As this process generates a communicative power, it can be held that citizens' participation in such a public discourse could represent the final institutional expression of the popular political "will." Here, we have a possible venue for linking informal discursive sources of democracy with formal decision-making institutions which Habermas considered as required for effective rule of law in complex societies.[44]

This is how Habermas envisions the materialization of popular sovereignty which emphasizes the "genuine participation of citizens in political will-formation."[45] This exemplifies a "substantive democracy" as against a so-called "formal democracy" generally understood as the rule of the majority. Furthermore, he grounds what he calls "procedural democracy" on the intersubjective "discourse." Citizens engage in a public forum where the claims to validity of prospective norms are tested through reflective and reciprocal communication. At present, Habermas continues to work on defining democracy as the situ for cooperative, practical and transformative activity. He attempts to determine the nature and limits of "real democracy" in complex, pluralistic, and globalizing societies.[46] By insisting upon popular sovereignty as the outcome of the generation of communicative power in the public sphere, Habermas tries to save the substance of radical democracy.

The unresolved difficulty is that in a complex society, as Habermas asserts, "public opinion does not rule." Rather, public opinion points administrative power in particular directions such that it does not "steer" but "countersteers" institutional complexity.[47] Ordinarily, members of civil society do not hold a direct control over social and political processes. As members of civil society though, they exert ample political influence through mass media as particular institutionalized mechanisms and channels of communication.[48]

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[44] Ibid., xxviii.
[45] Jürgen Habermas, *Legitimation Crisis* (Boston: Beacon Press, 1975), 32.
[46] James Bohman, "Critical Theory."
[47] Habermas dedicates Chapter 8.3 of *Between Facts and Norms* to the use of communicative power in civil society.
[48] James Bohman, "Critical Theory."

Substantive democracy is seen here as well insofar as rationality in a communicative process is applied in a procedural and discursive manner. It is developed by means of the procedural properties of communicative power that make public will-formation rational and thus ensue in a genuine rather than merely de facto consensus.[49] Habermas has demonstrated that, theoretically, the sovereignty in a substantive democracy is ultimately vested upon the people. Democracy may literally be taken as "people power."

Reflections on the Philippine scenario

It makes one wonder why in the local scenario, candidates for elective positions covet these posts as if they were in themselves the very source of power. It appears that the self-programming circularity of power inherent in administrative positions has generated more and more power. Not even a change of administration has helped to empty these administrative positions of accumulated "power." When elected officials evoke the "will of the people,"[50] they hardly allude to the concept of popular sovereignty as the source of mandate, as what they actually refer to is the number of votes they received that landed them in office. Since they really worked hard getting themselves "elected" to a position, they may end up thinking that, in a way, they have "earned" for themselves the authority and power of that elective position legitimately. After elections then, what motivation do they have to respect the "mandate" of the people?

Granted that administration and citizenry are linked to each other as Habermas theorized, the case of Philippine politics only goes to show that not enough interventions have been made to transition communicative power into administrative power. Historically, the concept of popular sovereignty has evolved from reference to the rule

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[49] Ibid.

[50] "The president of the Philippines should be the president as determined by the people, not (by) things other than the people," Mr. Joseph Estrada said when raising his contentions against the accuracy of the election tallies done by PCOS machines during the May 1, 2010 elections. Kimberly Jane Tan, "Estrada Camp Claims Having Proof of Poll Discrepancies," *GMA News Online,* May 13, 2010, http://www.gmanetwork.com/news/story/190873/news/nation/estrada-camp-claims-having-proof-of-poll-discrepancies.

of the people in an emancipatory sense to a participatory one. But as citizens progressively enjoyed political autonomy and self-reliance, the holistic concept of popular sovereignty has also lost luster and motivating power. Early democracies worked hard on institutionalizing equal participation of all citizens in political will-formation according to the rule of law. But then the built-in contradictions to the concept of popular sovereignty began to surface. "The 'people' from whom all governmental authority is supposed to derive does not comprise a subject with will and consciousness. It only appears in the plural, and *as* a people it is capable of neither decision nor action as a whole" (italics in original)[51] And up to this very day, Philippine politics suffers from this malaise. Together with Habermas, I wish that as a people we may engage in this project of injecting "substantive democracy" into our political culture as a way to cut through the vicious cycle of administrative power. It is a project he describes as "both permanent and quotidian."[52] Is this a workable project?

Is it worthwhile involving **all** citizens as an expression of popular sovereignty? Let us look at what happens every time there are elections. We end up putting the "popular choice" in positions where their qualifications would not merit them to be.[53] Definitely, with the vast majority of the voting populace coming from the socio-cultural cluster that suffers poverty of different kinds, e.g. economic, educational and health-related, to name a few, asking them to vote using criteria oriented toward the achievement of higher goods for the next six years may be a rational exercise too abstract for them. Habermas states that the democratic procedure that relies on citizens' making use of their communicative and participatory rights *also* with an orientation toward the common good, is an attitude that can indeed be politically called for but not *legally compelled*.[54] For these reasons, the democratic exercise of voting for leaders turns from the manifestation of popular sovereignty into a perpetuation of some kind of a "tyranny of the majority."

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[51] Habermas, *Between Facts and Norms*, 469.
[52] Ibid., 471.
[53] In the 2016 national elections, Davao Mayor Rodrigo Duterte won the presidential race with political credentials objectively inferior to a number of other presidential contenders. Also, a number of celebrities made the big jump from "showbiz" to Congress and the Senate.
[54] Habermas, *Between Facts and Norms*, 461.

For real popular sovereignty to prevail there should be public discourse which would provide the venue for a process of opinion-and-will-formation, and this mediates reason and will.[55] I am not referring to the voters' education focused simply on giving information about the candidates and their purported platform. This public discourse is meant to serve as the safeguard against falling into the same gross errors of the past such as putting the good of the entire country in the hands of the "wrong people." This initiative has to come from the citizens and not from the ones who are part of the political system, for through administrative power they can steer the production of "reasons" toward their favor. In proposing this, I bank on the hope that democratic procedures such as the exercise of communicative power through a discursive process are also meant to institutionalize forms of communication necessary for rational will-formation. "Informal public opinion-formation generates 'influence'; influence is transformed into 'communicative power' through the channels of political elections; and communicative power is again transformed into 'administrative power' through legislation."[56] This institutionalization takes place within the political system, but it can also take place in extra-political venues such as in the means of social mass communications.[57]

This process of public opinion-and-will-formation can best be initiated by those who possess more skills and knowledge to be able to engage meaningfully in a rational discourse. Easily, people can gravitate around individuals or groups espousing ideas and opinions they agree with. These individuals or groups end up representing or speaking (and thinking) on behalf of their sympathizers. Some may exaggerate their following and claim that they have the majority in their camp. Once put in positions of "power," they end up espousing a kind of "elitist" interpretation of the principle of representation with the intention of shielding organized politics from the danger of being forever gullible to popular opinion. But the channels of structured political will-formation should always be open and sensitive to the surrounding environment of

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[55] Ibid., 474-475

[56] Jürgen Habermas, "Three Normative Models of Democracy," *Constellation* 1, no. 1 (1994): 8. As quoted by Shabani, "Habermas' *Between Facts and Norms*: Legitimizing Power?"

[57] Habermas discusses the relationship of communicative power and the political institutions in *Between Facts and Norms*, chapter 8.

unstructured processes of opinion-formation to maintain a healthy symbiosis. The former issues in decisions which most of the time carry serious consequences, while the latter remain informal and incidental. However, the exercise of communicative power as a democratic procedure can lead to a rational will-formation only insofar as organized will-formation represented by decisions within government bodies embody the free-floating values, issues, contribution and arguments of surrounding political communication. Unless this condition is met, democracy cannot be organized as a whole. In this context, the public sphere, where "lifeworlds" crystallize in public discourse, functions as a normative concept.[58] Again we see how administrative power derives its force and vigor from communicative power and thus upholds popular sovereignty.

These are some reflections elicited by the ideas presented by Habermas in his work *Between Facts and Norms* as I see their relevance in some aspects of contemporary Philippine politics. These observations are also channeled towards responding to a call to reassess and rethink the roles of the State's public authorities and the powers they possess. In the words of Benedict XVI:

> In our own day, the State finds itself having to address the limitations to its sovereignty imposed by the new context of international trade and finance, which is characterized by increasing mobility both of financial capital and means of production, material and immaterial. This new context has altered the political power of States.
>
> Today, as we take to heart the lessons of the current economic crisis, which sees the State's *public authorities* directly involved in correcting errors and malfunctions, it seems more realistic to *re-evaluate their role* and their powers, which need to be prudently reviewed and remodeled so as to enable them, perhaps through new forms of engagement, to address the challenges of today's world. Once the role of public authorities has been more clearly defined, one could foresee an increase in the new forms of political participation,

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[58] Habermas, *Between Facts and Norms,* 485.

nationally and internationally, that have come about through the activity of organizations operating in civil society; in this way it is to be hoped that the citizens' interest and participation in the *res publica* will become more deeply rooted.[59]

[59] Pope Benedict XVI, *Caritas in Veritate*: Encylical letter on Integral Human Development in Charity and Truth (June 29, 2009), no. 24, http://www.vatican.va/holy_father/benedict_xvi/

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