

LAW AS A MEDIUM OF DEMOCRATIC DISCOURSE

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The article proposes to argue a philosophical foundation of legal legitimacy descriptively basing it from Jürgen Habermas' idea of the discourse theory. It addresses two closely connected questions: firstly, how is legitimacy of law possible? Legitimacy of law is possible through the democratic medium. The second section briefly charts the differing viewpoints of Hobbes, Locke, Rousseau, and Kant on the lines of reconciling individual autonomy and collective autonomy. Further, similarly, justifications of legal legitimacy receive an internal reference of the legal system through its generation of internal norms. Accordingly, the third section of the article critiques Weber and Hart's ideas of legitimacy on the ground that the internal point of view of law excludes will formation suited for plural and democratic societies. Secondly, it prescribes how legitimacy takes shape? It argues that legitimacy derives from public contestation using the discursive model of democracy. It reasons and defends that law is a product of public conversation which is reflexive and self-correcting. The article argues that the revolutionary potential of law is realized in this emancipatory reconstruction where people are rights bearers. Therefore, law is a system of rights presupposing people as free and equal deliberators.

I. INTRODUCTION

“The modern conception of democracy differs from the classical conception in virtue of its relation to a type of law that displays three characteristics: modern law is positive, compulsory, and individualistic.”¹

Legitimacy is a precondition for a law to be acceptable. It is rooted in the tensions between freedom and coercion, individual and collective autonomy, popular sovereignty and human rights. The struggle to arrive at a comprehensive account of law’s legitimacy is due to the irreconcilability of these simultaneous forces.

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¹ Jürgen Habermas, *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?* 29 POLITICAL THEORY 766 (2001).

Legitimate law embodies the will of the people. The article proposes to argue a philosophical foundation of legal legitimacy descriptively basing it from Jürgen Habermas' idea of the discourse theory. It seeks to infuse a deliberative and participatory idea in legal theory. It addresses two closely connected questions: firstly, *how is legitimacy of law possible?* Legitimacy of law is possible through the democratic medium. Habermas' discourse theory dialectically reads Hobbes, Locke, Rousseau, and Kant. The second section briefly charts these differing viewpoints on the lines of reconciling individual autonomy and collective autonomy.

In this context, similarly, justifications of legal legitimacy receive an internal reference of the legal system through its generation of internal norms. If the earlier ideas were political, this is a legal understanding of validity. Accordingly, the third section of the article critiques Weber and Hart's ideas of legitimacy on the ground that the internal point of view of law excludes will formation suited for plural and democratic societies. Hart's account fails to consider autonomy of the human subject in its full and free capacity.

Secondly, it prescribes *how legitimacy takes shape*. It argues that legitimacy derives from public contestation using the discursive model of democracy. It reasons and defends that law is a product of public conversation which is reflexive and self-correcting. Deliberation draws its roots from the idea of public reason. So the Habermas and Rawls debate is vital to bring this idea to fruition. The last section defends deliberative rationality situating it in the scholarly debates of the exponents of deliberation: Habermas, Cohen, and Benhabib. It argues that law must be correctly understood as an idea of public deliberation. Law is obeyed because vulnerable people act on terms of freedom and equality as self-determining authors. This becomes preconditions to explain the vibrant relation between law, state, and the people. The article argues that the revolutionary potential of law is realized in this emancipatory reconstruction where people are rights bearers. Therefore, law is a system of rights presupposing people as free and equal deliberators.

A plausible flaw in Habermas' argument of communicative action is that it is reliant on language [communicative rationality] and deduces abstract perfect understanding resulting from it. The exact problem of multi-ethnic and unequal societies brings with it hard realities of how ideal speech among disparate positions is possible. However, the foundational critique of this theory is not covered here. At the outset, the discourse principle in law has to be construed as a theory about the deliberation of vulnerable people, this avoids depending on conditions of "ideal speech."

II. FREEDOM AND COERCION

The section outlines the justification of legitimacy of four philosophers: Hobbes, Locke, Rousseau, and Kant. Their ideas represent stages of improvement in the balance of freedom and coercion. Habermas distinctly reinterprets Rousseau and Kant which forms the foundation of the discourse ethics discussed later in this article.

Thomas Hobbes theorized what is a mechanistic relation between the sovereign and subjects. The only authority to make law is the common-wealth which is the power to keep people in awe.² The edifice of the Hobessian legal theory of law is the common-wealth—, the sole and exclusive sovereign. All rights are derived from the institution of the sovereign which is constituted by peoples' consent.

In the social contract, the author of all actions is the sovereign. The sovereign's will makes it a command for subjects to obey. Sovereign as a sole legislator is an absolutist version of sovereignty of the common-wealth. It explains that all law should be traceable back to the sovereign. Nothing is law if the legislator is not known and if it does not have its consent. This legitimization is achieved from the source of law ("sources thesis"). According to Hobbes, *law is law*, which "men are therefore bound to observe."³ The notion of *force* and *fear* characterize this law.

However, it signifies unilateral conferment of consent. Hobbes supposes that the subject is only *indirectly* the author of every act of the sovereign. This justification is narrowly constructed: it is external and indirect. People are authors of the law only through the fiction of the contract and not in any real sense empowered through a participatory justification.

In contrast, John Locke accounts for a voluntaristic understanding of law, where the union constitutes the body politic.⁴ He writes:

When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.⁵

It is a community discourse where the majority acts on behalf of the individual or any smaller group. However, majority rule can be a problem of tyrannical domination. This notion introduces the classical liberal account of law. It fulfills the objective of rights but what are the foundations of rights under this model remains unsettled. It does not justify law for all because it lacks a cohesive will. In this fashion: it fulfills only *facticity*.

A. The General Will

Rousseau takes a leap forward from Hobbes and Locke to trace law through the general-will. The formation of the social compact says Rousseau is

² THOMAS HOBES, LEVIATHAN, 12 (Richard Tuck ed., 1996).

³ *Id.*, 183.

⁴ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, 45 (CB Machpherson ed., 1980).

⁵ *Id.*, 52.

the collective association of people forming this general-will.⁶ Sovereignty is composed of the general will constituted from this voluntary association. This association of the general-will is the social contract.⁷ The general-will directs the state says Rousseau for the common good and interest of all. It follows public deliberation by binding subjects to the sovereign.⁸ It is a collectivist account of sovereignty where the body politic is empowered under the direction of the general-will for the common interest of all.⁹

Rousseau's account introduces the idea of popular sovereignty where people decree law to themselves through a common sovereign. He writes: "*Laws are properly speaking the conditions of civil association.*"¹⁰ This social contract thus is democratic and republican in quality. Rousseau stresses on self-legislation as a feature of the body politic saying: "*The people, being subject to the laws, ought to be their author: the conditions of the society ought to be regulated solely by those who come together to form it.*"¹¹ This interpretation of autonomy is an important and radical contribution in understanding the nature of rule guided actions.

Rousseau made the early promise of democracy through his contribution of the general-will of all the people. However, this subjectification seems to exclude private autonomy realized through basic minimum rights. Rousseau expressly states that the general-will is indestructible.¹² The rationality of this will can be achieved only by integrating the will of a private individual in her thinking capacity. Popular sovereignty in political terms is actualized only through basic individual rights or else it degenerates into majoritarianism. Self-government does not guarantee a motive to obey law if there are no rights of equal participation and freedom preventing tyranny. If Rousseau justifies collective autonomy, Kant then comes to rationalize individual autonomy.

B. Freedom through Mutual Recognition

The internal balance in legal norms of freedom and coercion receives special attention in Kant's philosophy. The presumption of legitimacy is not because of coercion, but because individuals agree to prevent encroachment on the other's freedom.¹³ This division is functionally applied by Kant who

⁶ JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES, 174 (GDH Cole, trans. 1973). He writes: "The problem is to find a form of association which will defend and protect...and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."

⁷ *Id.*, 184-185.

⁸ *Id.*

⁹ *Id.*, 188.

¹⁰ *Id.*, 193.

¹¹ *Id.*

¹² *Id.*, 210-212.

¹³ IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, 36 (John Ladd trans., 1999).

juxtaposes authorization to coerce and free choice of private orientation of an individual's conduct. Habermas being a strong Kantian, concludes that they provided a relation of facticity and validity which merge into each other.¹⁴ Although Kant tries to separates facticity and validity, these two perspectives are interrelated with morality.

Kantian legal theory is premised on individual action by mutual recognition of rights of one another.¹⁵ Free will is based on this unification of reciprocating limits on freedom. Seen this way, coercion and freedom are internally balanced in Kant's account. Rights are mutually conferred as limitations on freedom. Kant writes: "*The aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom.*"¹⁶ The legal order is combined with the political since autonomy is based on morally judging individuals. Kant analyzes the legal system as consisting of morally grounded orders resulting in obedience. The basis of enforcement was the mutual recognition of freedom which is the self-legislating aspect in the thesis.

The supreme law according to Kant is the moral law—thus making enacted law subordinate to morality. The highest universal law according to which individuals act is called the *categorical imperative*. The supposition of people as rational moral agents makes the Kantian subject intensely moral.

As a consequence, Habermas categorizes Rousseau's account as a republican [popular sovereignty] reading of political autonomy, and Kant's [individual liberty] as liberal.¹⁷ Human rights and popular sovereignty [constitutionalism and democracy] are criteria in legitimization, since the individual will and mutual recognition of rights are realized through the two conflicting conceptions. According to Kant and Rousseau, the idea of human rights and popular sovereignty mutually interpret one another—but [according to Habermas] they fail to achieve this result in theory.¹⁸ Rousseau explaining popular sovereignty and Kant explaining individual rights is a pattern tied to the reconstruction of legal theory.

¹⁴ JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, 28 (William Rehg trans., 1996).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Supra* note 14, 100.

¹⁸ *Id.*, 99-100. Habermas writes: "'Liberal traditions' conceive human rights as the expression of moral self-determination, whereas 'civic republicanism' tends to interpret popular sovereignty as the expression of ethical self-realization. From both perspectives, human rights and popular sovereignty do not so much mutually complement as compete with each other."

III. LEGAL DUALISM

Weber and Hart infuse normative functions within the legal medium itself—which the previous philosophers did not conceive. The internal point of view of law is an empirically observable conduct. In what follows, this section critiques the thesis on the ground that basic conditions of free-will and autonomy are not met, thus, resulting in a democratic deficit. It raises the question: is the Hartian participant merely a bystander? The balance of freedom and coercion are still left hanging in the dualistic enterprise.

The social scientist, Max Weber, theorized law in terms of legitimate orders obeyed by people organized in a social group.¹⁹ Weber spoke of external and internal properties of law. He stressed on the orientation of conduct to mark the validity of legal orders. It comprises of behavioral motivation of members to act in a given way. It begs the question: does it forecast behavior pure and simple, or does justify individual will?

Concerning law's formal properties, Weber suggests that validity is possible in terms of *ought* [and *is*] commands. The regularity of duty characterizes conformity.²⁰ Law is held in the minds of members in a community.²¹ Weber writes: “*through the ‘remonstrance’ by members of a limited group of persons, and often without any means of physical coercion.*”²² Its validity is derived through coercion and social pressure.

Weber advances the sociological point of view based on “empirical regularities” orienting conduct.²³ According to him, conduct is not from an unreflective habituation but rational action.²⁴ This conforming behavior lends validity to make legal orders legitimate.

Weber was conscious of the number of alternative sources that generate law. Habermas states that there is a “methodological point” of sociology of law where validity is based on a “consensus on legality” presupposed in modern legal systems.²⁵ Hart comprehensively recast this initial analytical account into a description of law as a system of social norms.

¹⁹ MAX RHEINSTEIN, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (1969).

²⁰ *Id.*, 3-4.

²¹ *Id.*, 13.

²² *Id.*, 14.

²³ *Id.*, 26.

²⁴ *Id.*

²⁵ HABERMAS, *supra* note 14, 71.

A. HART'S INCOMPLETE PROJECT

Hart formulates a thorough going critique of *law as command* of the sovereign advancing the Weberian social model. He critiqued the term *habits* saying that they indicate regularities of human conduct; such as the habit of going for an early morning walk. It can become a habit after observing it over a period of time. He calls this a mere convergence in regularity of behavior which is not subject to social enforcement.²⁶ Deviation from this habitual conduct will not incur any social sanction. Hart argues this is a difference between social rules and habits.

Social rules draw criticism and reproach for resulting violation, unlike a passing habit. Since habits are mere external behavior, the critical reflective attitude qualifies something as a rule.²⁷ Hart observes that in the event of deviation, conformity to this kind of rule is backed by social criticism.

The idea of *obligation* expounded by positivists before Hart such as John Austin, carry the predictive meaning. They mischaracterize the *gun-point* situation of being *obliged* as having an *obligation*.²⁸ They [Austin] ignore the internal elements: rules acting as guides of behavior. He uses a sharp analytical distinction stating: “*the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge.*”²⁹ Hart concludes that the predictive theory of command fails to include the aspect that deviation from them may result in sanction because of a *reason* for such sanction that follows. It is a bit like saying: “*Follow the rule as it is the right thing for you to do and by doing this you are being rational.*” In this manner, the situation of the person at gun-point lacks the notion of a proper obligation.

The standard of obligation is connected to the argument about the critical reflective attitude discussed previously. Together they indicate the existence of a rule in a social situation. To differentiate a rule of obligation from another form of rule the distinction between habits and rules are relevant. It serves to explain the participant-observer perspective through the internal and external points of view. Hart refers to the external observer’s view citing the example of a stop light. Here the observer describes the scene that the stop sign implies predictability of vehicles to stop when the signal turns red. But in this description, he finds that the observer misses out a “whole dimension of the social life.”³⁰

Hart argues that the interplay between primary and secondary rules form the elements of the legal system. Primary rules are the rules which confer

²⁶ HLA HART, THE CONCEPT OF LAW, 52 (2002).

²⁷ *Id.*, 56-57.

²⁸ *Id.*, 83.

²⁹ *Id.*, 85.

³⁰ *Id.*, 90.

duty and obligation and secondary rules confer powers for the enforcement and identification of primary rules.³¹ In an effort to separate laws from other type of social rules: legal legitimacy is grounded in the union of primary and secondary rules. The primary rules are accepted in social structures having customary rules. He reckons that this “simple form of social control” is ineffective and requires “supplementation.”³² The problems of uncertainty, static character of rules, and inefficiency of primary rules are resolved by introducing secondary rules.³³

The most important category of secondary rule is the rule of recognition. It is a rule to identify primary rules.³⁴ The rule of recognition plays an indispensable role in modern legal systems. Hart emphasizes that this introduces legal validity. He writes: “*identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.*”³⁵ He refers to this as an authoritative mark of validity. The primary rules reinforce the internal point of view and the secondary rules the external. He is silent about legitimacy and it is not clear if he drew a conceptual distinction between legitimacy and validity as some writers put forth.

Now, the Hartian dualism removes intentionality and autonomy from the internal point of view. His persuasive insights do not meet the vigor of his argument. The internal point of view resounds the external viewpoint drawing legitimacy of a logical formalism. Why should people observe this law as an internal standard? Why do people obey it merely because obedience is a rational thing to do? A proper internal perspective must satisfactorily explain these questions. Hart’s theory is deficient on this account.

The critical reflective attitude is uncritically justified to warrant reproach or social criticism. Why should a rule fundamentally invoke such sanction? Does this tell us anything about the rule or just the resulting behavior it evokes? These difficult questions make the participant a mere bystander in Hart’s account. The social group does not engage with the individual person to be internally binding. Rules as rules: read, understood, and held, by officials: is not an argument for legitimacy but coercion.

Hart does not justify modern law which operates in pluralistic societies where there is consensus and dissensus. The internal point of view suffers from a deficit of democracy; accomplishing reciprocal conduct on legality. He focuses on the group as a whole, and there is no balanced account of individual and collective autonomy. The image of the individual in this is that of a social moralist. A sound theory must reflect co-authorship for a normative legal basis.

³¹ HART, *supra* note 26, 81.

³² *Id.*, 92.

³³ *Id.*, 92-93.

³⁴ Hart intended this as an explanation of the transition from pre-legal to legal society.

³⁵ *Supra* note 26.

The primary rules are amorphous and incalculable. Moreover, according to Hart, the rule of recognition lends validity to rules. This is proof that Hart's thesis rests on legality as legitimacy. It is a tautological exercise in legitimization resulting in self-referentiality. What exactly is the rule of recognition? Where does this rule of recognition stem from — author? Is the rule of a fixed nature or does it evolve through time? How does the rule of recognition identify the primary rules? This is a serious flaw: if validity is posited on the rule of recognition it makes law validate law.

Habermas bases his criticism on a systems theory of communication, stating that the positivized legal system becomes a “closed circuit of communication that self-referentially delimits itself from its environment.”³⁶ He refers to the conception of *autopoiesis* [from Niklas Luhmann]: condition where systems describe its own components.³⁷ The positivized notion becomes self-referential creating an independent autonomy from any other environments.³⁸ He argues that “legal communication is robbed of its socially integrative meaning.”³⁹ The upshot of this is that law is self-enclosed in formal aspects of recognition.

Hart's logical positivism is an important critique to the command theory of law. However, it is unsuited in modern pluralistic and democratic societies where law takes shape from public argument. It omits the functional reconciliation between *facticity* and *validity*.

IV. DELIBERATION AS DEMOCRATIC BASIS OF LEGITIMACY

Justification of the discourse theory relates with the second question: how does legitimacy take shape? Legitimacy of law is based on the discourse principle hinged on collective participation. This section argues that legitimacy gets shape in the medium of peoples' deliberation. Deliberation is a process of imparting information in a collective manner.⁴⁰ Social actors enter the dialogue with an open frame of mind to debate through conceding and contesting viewpoints. Democracy of the deliberative kind includes a substantive ideal which skeptics question as lacking guarantees to protect the vulnerable and those who do not have the capacity or resource to voice. No doubt, these are challenges, but the deliberative project as a whole is both idealized and constitutive in ways that present itself. So, deliberation fills that gap between people and the democratic norm through responsive exchange.

³⁶ HABERMAS, *supra* note 14, 49.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*, 50.

⁴⁰ See Bernard Manin, *On Legitimacy and Political Deliberation*, POLITICAL THEORY 3 (1987) 338-368.

Recall the precondition of the discourse principle: laws must be approved by affected people acting equally and independently.⁴¹ It is premised on *self-legislation* which Habermas explains as follows:

Correctly understood the idea of self-legislation engenders an internal relation between will and reason in such a way that the freedom of everyone—that is, *self-legislation*—depends on the equal consideration of the individual freedom of each individual to take a yes/no position.⁴²

This makes the discourse principle a rule of legitimacy and democracy its hinge. Habermas recognizes the addressees of law both as subjects and authors of law.⁴³ Law is an inter-connected network of social forces in an abstractly inward and outward manner.

Rawls offered the way for modern society to function with his justification based on the “original position”: cooperation of citizens as free and equal persons.⁴⁴ Habermas critiques the Rawlsian position on the ground that it gives primacy of liberal rights over idealized discourse.⁴⁵ The seminal Habermas and Rawls debates throw light on the comparison of the *discourse ethics* approach and *justice as fairness*. It is not clear from the debate if Rawls’ thesis stands as a substantive normative version whereas Habermas’ depicts a procedural account of “public use of reason.”⁴⁶ It is pertinent to consider Rawls’ reply that Habermas’ account is as much a substantive version for content embedded in its idealization.⁴⁷ Despite Habermas’ denial, Rawls defends his view of the political conception of justice; and critiques Habermas’ idea of legitimacy as a weaker one where democracy legitimates democracy, thus falling into an infinite regress.⁴⁸

However, debates on the *political* versus *comprehensive* theses’ turn on the deliberative theme expounded by Habermas.⁴⁹ It emerges from their different conceptions of public reason in a democratic society. Rawls conceives of *public*

⁴¹ *Supra* note 14, 126.

⁴² *See supra* note 1, 767-768.

⁴³ *Supra* note 14, 120. Habermas elaborates: “those subject to law as its addresses can at the same time understand themselves as authors of law.”

⁴⁴ *See JOHN RAWLS, POLITICAL LIBERALISM* 136-137 (1993).

⁴⁵ Jürgen Habermas, *Reconciliation, Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism*, 92 THE JOURNAL OF PHILOSOPHY (1995) 109.

⁴⁶ *Id.*, 118.

⁴⁷ John Rawls, *Political Liberalism: Reply to Habermas*, 92 THE JOURNAL OF PHILOSOPHY (1995) 132, 175-178.

⁴⁸ *Id.*, 175-178 (Rawls observes that democracy need not guarantee justice).

⁴⁹ *Id.*, 139. Rawls argues that his notion is a political conception, not philosophical. Rawls refers to the comprehensive philosophical as a rational discourse which includes within itself “*all the apparent substantial elements of religious and metaphysical doctrines*.”

and *non public* reasons.⁵⁰ The Rawlsian public reason excludes from its purview individual self-reflection and implies [instead] simple electoral representativeness.⁵¹ His view is rather restrictive and has far too many qualifications. Benhabib appropriately terms this as “liberal misgivings about deliberative democracy.”⁵² Therefore, Habermas lays the theoretical foundation for a deliberative democratic model. In what follows, the rest of this section evaluates the Habermassian idea of deliberative democracy.

The idea of the discourse principle explains the horizontal association of people acting in the capacity of citizens as equal participants in law-making. A philosophical reconstruction was required to arbitrate self-determination on one hand and human rights on the other.⁵³ There is discordance that can be understood at the level of private and public autonomy with human rights representing private autonomy, and popular sovereignty public autonomy. Habermas refers to this as the divide between the “freedom of the ancients” and “freedom of the moderns.”⁵⁴ Habermas proves that private and public autonomy reciprocally presupposes one another with neither being superior to the other.⁵⁵ Interestingly, even Rawls argues that his account of justice as fairness necessarily includes the co-originality of public and private autonomy.⁵⁶

Self-determination is founded on basic principles of equality and freedom. For achieving political autonomy private autonomy is a precondition. People acting freely and equally connotes individualized rights as autonomous beings in voluntary associations. Habermas states that without these “there is no medium for legally institutionalizing those conditions under which citizens can make use of their civic autonomy.”⁵⁷ This realization of self-determination is made possible through the guarantee of human rights.⁵⁸

⁵⁰ John Rawls, *The Idea of Public Reason*, DELIBERATIVE DEMOCRACY: ESSAYS ON REASONS AND POLITICS 93. (James Bohman & William Rehg ed., 1997). Further, Rawls states: “*Limits imposed by public reason do not apply to all political questions but only to those involving constitutional essentials and questions of basic justice*,” *id.*, 94. On the other hand, another way of looking at it is to ask: if we extend the Rawlsian view do we arrive at the same point that Habermas makes?

⁵¹ *Id.*, 95.

⁵² Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 67, 74, 75 (Seyla Benhabib ed., 1996). Benhabib outlines the Rawlsian agenda as more restrictive than the deliberative model which stresses on the “*openness of the agenda of public debate*.” See also Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 CONSTELLATIONS (1994) 26-52.

⁵³ *Supra* note 14, 141.

⁵⁴ *Supra* note 1, 766-777.

⁵⁵ *Supra* note 14, 142.

⁵⁶ *Supra* note 47, 163-168 (The difference, Rawls notes, is their competing conception of *political* against the wider notion of *comprehensive*).

⁵⁷ *Supra* note 14, 118.

⁵⁸ *Id.*

The above argument proves the reciprocal relation of public and private autonomy with its co-relations of popular sovereignty and human rights. Democracy and rule of law are inter-subjectively explained through securing rights of private autonomy and rights of political self-determination.⁵⁹ This he posits in a two stage process of people reciprocally granting each other horizontal rights equally and freely; and then the second step of the constitutional process of institutionalization in law.⁶⁰ This thesis is referred as “co-originality.”⁶¹

Let us proceed to understand the principle of co-originality as the groundwork for a deliberative model of democratic legal theory. The aim is to prove that deliberative practice is the precondition for legal legitimacy—without it both democracy and law is content-less.

Deliberative rationality is a process of collective decision-making characterized by arguments through consultation. It employs reflexivity and self-correction as methodologies in free and open conversation. Joshua Cohen describes a substantive version of this principle as *ideal deliberative procedure*.⁶² He lists five main elements⁶³: 1) ongoing and independent association; 2) commitment shared by all members to deliberate; 3) pluralistic association; 4) manifested in institutions, and; 5) each recognize the other as having deliberative capacities.

Public articulation conveys that nothing is beyond reexamination. It is characterized as much about dissensus as about consensus. Benhabib argues that deliberation is open to revision on the highest common goods and values that society commonly unites.⁶⁴ A society after all rarely ever retains one linear conception of the good at different points in time. Deliberation captures this flux in peoples’ reasoning.

Conceding deliberation as a vehicle for legal legitimacy invites a twofold critique. Firstly, deliberation presupposes the people to enact Socratic dialogues, or assumes them to be self-styled intellectuals. In the real world people are seldom flexible and supple enough to accommodate differences. There is hardly any back and forthness leave alone self-doubt in our general natures. It is difficult to identify the forum or constituents belonging to a public sphere of reason? Is it the city council, local assembly, family, or workers’ union? It raises

⁵⁹ *Id.*

⁶⁰ *Id.*, 144.

⁶¹ *Id.*, 168-69.

⁶² Joshua Cohen, *Deliberation and Democratic Legitimacy* in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67, 72-73 (James Bohman & William Rehg ed., 1997).

⁶³ *Id.*

⁶⁴ Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 73 (Seyla Benhabib ed., 1996). See also a defence of this conception in relation to its application in the contemporary world, AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004).

problems of implementation; sounding more utopian than pragmatically feasible. Michelman opposes the deliberative model casting it as infinitely regressive owing to what he calls its recursiveness.⁶⁵ By the same token, his alternative of deep democracy (“right reasons”) is more constitutionalist than democratic.⁶⁶

Secondly, rational consensus is likely to lead to hegemony and exclusion by those powerful within the association, thereby, persecuting the voiceless. Recalling Cohen’s last condition: do all people truly bear the same capacity as free and equals? Marion Young points out that deliberation does not protect the weaker voices from political domination.⁶⁷ In this context, she observes that deliberation does not account for cultural and social differences.⁶⁸ In the same vein, Young advances an interesting alternative conception of *communicative democracy*. It draws from Socrates and Plato’s rhetorical techniques to foster dialogue. Her novel idea requires more thought in future as it suggests *greeting, rhetoric, and storytelling* as some ways sharing narratives.

The criticisms raise concerns about its practical functioning. However, it does not warrant doing away with the deliberative project all together.⁶⁹ Deliberation must be seen as fulfilling the promise of democracy. Democracy results in the rule of elites without a proper deliberative framework for people converging and diverging in the act of self-governance.

Contrary to criticism it does not expect innate intellectualisms from people. Its model is simple and directly confronts problems of the life world. It develops an ethic of citizenship that is based not on epistemic grounds, but on pooling one’s expertise together in a reasoned manner. There need not be a finite venue or forum delimited for these iterations and reiterations since it confers legitimacy to the inevitable communications in today’s social sphere. These communications take places in various ways inter-systemic and beyond. The task of the deliberative model is to reason outcomes. There is a heuristic value in deliberation which prevents status quo and hegemony in associations. It does not require any code or regulation as each forum has its distinct internal code.

⁶⁵ See Frank Michelman, *How can the People Ever Make the Laws? A Critique of Deliberative Democracy* in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 145 (James Bohman & William Rehg ed., 1997). See further, Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, 10 CAL J & JURISPRUDENCE (1997) 2.

⁶⁶ See Bonnie Honig, *Between Decision and Deliberation: Political Paradox in Democratic Theory*, 101 AMERICAN POLITICAL SCIENCE REVIEW (2007) 1. Honig refers to this as the paradox of constitutional democracy stating: “We cannot have democracy *with* constitutionalism, and we cannot have democracy *without* constitutionalism, either.”

⁶⁷ Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 120, 122 (Seyla Benhabib ed., 1996).

⁶⁸ *Id.*

⁶⁹ Benhabib points out the logic of understanding deliberation not as a theory about a practice but one to further democratic rule. *Supra* note 65, Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, 84-85.

The self-correcting mechanism of these codes is exactly what makes deliberation fundamental and vital to the practice of democracy itself.

On the overall, deliberative democracy establishes a form of legitimacy which is transcendental. The co-originality is the normative core of the deliberative paradigm conferring the discourse as *idealized* and *constitutive*. It is *idealized* since law is a dialectical medium: it participates in resolving these differences functionally through dialogue and public reason. The constitutional process envisaged in the Habermassian model is ongoing across time. Similarly, the idealized version is also *constitutive*. It lays down the basis of freedom and equality as basic terms for any negotiation thus making it constitutive (all *must* have the *capacity* to deliberate). Thus, co-originality is the basis for resolving the tension between democracy and constitutionalism.

People in a free and equal society aspire for stability and continuity. The aim in a civil society is to reach a stage of social perfectibility where each is able to maximally realize their free selves. Law as deliberation is a reconfigured notion of legitimacy having adequate counter-majoritarian safeguards because it answers how freedom is possible in law [and not antithetical to one another].

The peoples' revolution is an idea appearing reflectively through the discourse theory of law. It foresees the spectrum of law-making originating through numerous regional and global intermediaries: agents share law-making powers. In modern context, law-making is increasingly creeping from disparate spheres opening potentially wide *legislative crevices*. These crevices are perpetuated by globalization, markets, non-governmental agencies, interest groups, media, and other actors in a complex inter-connected web. Public reason articulated through the discourse principle reflects the democratic idea which gains acceptance through contestation and challenge. This is revolutionary: affected people are procedurally empowered to reason and act for themselves. It captures the Kantianism: '*argue as much as you want and about what you want, but obey*'⁷⁰ The foundations of free-will in legal obligation is a radical retheorization of the Hobbesian contract into a *social treaty*. In the social contract, a person obeys because of contractual obligations to the state. On the other hand, per the discourse theory, person obeys because she reciprocally confers this right to others through self and collective legislation.

V. CONCLUSION

Society requires law for stability and order. This depends on the social mechanism capable of self-organization in the pursuit of common good. Its formal properties are achieved when society transforms into a state. Here the transformation cannot override the self-governing identity of the social formation. This is why positive law receives a steadfast philosophic and sociologic

⁷⁰ IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS, 45 (Ted Humphrey trans., 1992).

justification through the engagement of affected people. Habermas reminds us that modern law needs to restage a justification. The discourse theory embodies rational deliberation and self-corrective elements in law. It is an important hinge blending democracy and constitutionalism creating a public context model of legal justification.

There remain some knotted ends in the discourse theory of law which require further debate. It is too closely derived from the theory of communicative action which is itself desperately in need of a rescue justification. The foundational idea of recognition through language is an onerous condition for any dialogue. On this point, the discourse theory needs to find a better justification to reckon as a reconstruction; based on the insightful idea of vulnerable and affected people as authors of law through a process of open deliberation.

