LAW AND DEMOCRACY IN HABERMAS'S POLITICAL THEORY: A CRITICAL SHIFT

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SATHEESE CHANDRA BOSE K.P

Centre for Political Studies
School of Social Sciences
Jawaharlal Nehru University
New Delhi – 110067
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CERTIFICATE

I hereby, declare that the Dissertation entitled, *Law and Democracy in Habermas's Political Theory: A Critical Shift,* submitted by **Satheese Chandra Bose K.P**, Centre for Political Studies, School of Social Sciences, Jawaharlal Nehru University, New Delhi, for the award of the degree of **Master of Philosophy** is my original work and has not been submitted in part or full for any other degree or diploma in any other University.

Satheese Chandra Bose K.P

This may be placed before the examiners for the evaluation for the award of the degree of **Master of Philosophy.**

Prof. Gurpreet Mahajan
(Chairperson)

Dr. Asha Sarangi
(Supervisor)

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Satheese Chandra Bose K.P

ABBRIVIATIONS

STP: The Structural Transformation of the Public Sphere

LC: Legitimation Crisis

TRS: Towards a Rational Society

BFN: Between Facts and Norms

NSMs: New Social Movements

TCA: The Theory of Communicative Action

CLS: Critical Legal Studies

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INTRODUCTION

INTRODUCTION

"...As theory interprets the world, it fabricates the world (*pace* Marx! especially Marx!); as it means desire it gives reason and voice to desire; as it codifies meaning , it composes meaning. Theory's most important political offering is this opening to a breathing space between a world of common meanings and the world of alternative ones, a space of political renewal for thought, desire and action".

Wendy Brown, 'At the Edge', *Political Theory*, 2002

"...The political is not what we are taught it is today by the cynical Machiavelliansm of politicians; it is rather, as the democratic Machiavelli tells us, the power of generation, desire and love. Political theory has to reorient itself along these lines and assume the language of generation".

Michel Hardt and Antonio Negri, *Empire*, 2000

The concept of the 'political' today has acquired an array of meanings and interpretations. The ambit of political theory has, thus, become widened and more inclusive of diverse categories such as social, economic, bodily, ethnic, sexual, environmental, global, and the local. The democratic realm of contemporary society consists of autonomous movements and conflicting values and interest positions. It is argued that these developments invite an 'identity crisis for political theory'[1] but, at the same time, it also offers a potential challenge to political theory to conceptualize the existing possibilities for exploring new meanings of democratic life with different perspectives and interpretations.

In the 1950s and the 1960s a discussion regarding 'the decline of political theory' was prevalent in the West because of the absence of original political thinking after Marx and Mill.[2] In 1961 Isaiah Berlin published his well known article "Does Political

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[1] Wendy Brown, "At the Edge", *Political Theory*, Vol: 30, No. 4, August, 2002, pp. 556-576, here p.560

[2] O M Bakshi, *Crisis of Political Theory: An Inquiry into Contemporary Thought*, Oxford University Press, Delhi, 1987, p. 13 quoted from Alfred Cobben, 'The Decline of Political Theory' , *Political Science Quarterly*, LXVIII (3: Sept., 1953), pp 321-337, here p. 229

Theory Still Exist?" in which he explicates that political theory will exist so long as there is a "rational curiosity". [3] He also argued that, as Stephen K White explains, the most robust form of political theory "can be pursued constantly only in a pluralist, or a politically pluralist society".[4] White goes on to argue that the production of paradoxes is the determining factor of western moral and political thought since the 1960s. These are mainly the challenges of feminism, multiculturalism, environmentalism, critical race theory, and novel claims on the part of both nationalism and cosmopolitanism.[5]

In the modern period, social democratic theories focus their attention on economic inequalities and class domination in the light of the existing mode of production and consumption. Theories of environmental politics question the very basic nature of the development of modernity and argue for a sustainable developmental model through which human relation to the environment is redefined in an ethical as well as constructive manner. The main attention of the feminist political theories is the existing man–woman relationship in the society and the subsequent forms of inequalities and tendencies of domination. They challenge the classical distinction between the private and the public, and try to radically politicize the private sphere which is hitherto considered as apolitical and personal. Feminist theories, especially, that dealt with the politics of sexuality, advocated by gays and lesbians, problematize the category of gender itself and question the basic structures of heterosexual society's moral consciousness.

The theories of multiculturalism and constitutional pluralism focuse on the struggle for the recognition of plurality of interests and values in culturally differentiated societies. These theories mainly examine possible ways of accommodating the 'struggle of differences' within the framework of a constitution or through other forms of inclusive democratic methods. The theories of empire and globalization deal with the challenges invited by the liberation of capitalist economy and the autonomous character of economic relations in the era of globalization. The decline of

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[3] O. M Bakshi, Ibid, p. 15

[4] "…Pluralist here refers to societies in which "ends collide" and there is some embodiment of this insight in moral and political practices." Stephen K. White, 'Pluralism, Platitudes, and Paradoxes: Fifty Years of Western Political Thought", *Political Theory*, Vol. 30, no. 4, Aug. 2002 pp. 472 – 481, here p. 473

[5] Ibid, p. 474

nation-states, the emergence of new forms of inequalities, and the emergence of local and global struggles and protests are also conceived in these theories. The post-colonial and postmodern theories question western modernity and metanarratives for concealing the forms of power and violence latent in the existing forms of relationships. [6] These theoretical interventions are attempts for comprehending the realities which constitute the existing relations of power.

In highly differentiated societies, as James Tully says, individuals are governed in a multiplicity of ways as well as through complex forms of indirect rules. [7] Individual identities and 'roles' are determined in terms of his/her membership in the differentiated social milieu.[8] These social dynamics, apparent in the later half of the twentieth century, was obviously a challenge to a political theory. For, the theoretical meta-narratives were questioned due to their inadequacy to interpret the power relations of dispersed society. Therefore the holistic concept of society also becomes redundant or irrelevant in conceptualizing the present-day realities.

One of the major changes taking place in political theory during this period is a new wave of exploration for conceiving different forms and possibilities of power apart from its negative and repressive character. The aspect of power becomes centre in defining the politics of gender, sexuality, body etc. In Foucault, power turns in to 'biopower' through which he discloses the link between power relations as well as the process of subjectification. While elaborating 'the disciplinary society', Mischel Hardt and Antonio Negri expound: "... biopower is a form of power that regulates social life from its interior, following it, interpreting it, absorbing it, and rearticulating it ... biopower thus refers to a situation in which what is directly at stake in power is the production and reproduction of life itself." [9]

Another important factor regarding power that determines political theory today is, as Brown explains, the development of capitalism. He points out that capitalism today is

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[6] For a detailed inquiry of these theoretical approaches, see James Tully, "Political Philosophy as a Critical Activity", *Political Theory*, Vol. 30, No.4, Aug. 2002, pp. 533-555, here pp. 536-537

[7] Ibid. p.538

[8] Tully explains that individuals are recognized and identified as members of religion, ethnicity, nation, free and equal democracies, civilizations, and others as nonmembers. Ibid, p.538

[9] Michel Hardt and Antonio Negri, *Empire*, Harvard University Press, Cambridge, London, 2000, p. 388

considered as an unchallengeable one, therefore possibility of viable alternatives are always declined. Capitalism produces pleasure which seems sufficient to satisfy the middle class of the first world. The capacity of its self-organization and the material development it produces become factors for providing an ethical face to capitalism. With the support of media, capitalism successfully alters its exploitative face and creates the 'political other' in the third world. As a result of these conditions, capitalism succeeds in shifting the focus of political theory to other forms of injustices or issues of multicultural politics, and protects itself from sheer critique. The shift of Anglo-American Marxist to postmodern identity politics results in the decline of Marxist critical project. [10]

After the second world war the sway of liberal democracy has increased. With the emergence of welfare state, the left or the socialist parties in the West began to accept the existing political system. The state became an instrument for removing economic inequality. It is believed that in liberal democracies the problems emanate from the society can be solved either through systemic means or through bargaining process. [11] These two developments, both of capitalism and liberal democracy, weaken the possibility of the critique of ideology.

THE IDEA OF CRITIQUE IN POLITICAL THEORY

It was in seventeenth century the idea of critique and criticism emerged in Europe as an intellectual endeavor. [12] The etymology of the word critique conveys three significant meanings. The meaning of the Greek word *diakrinein* is to distinguish or separate, and the word *krinein* means to cut or to cut through. [13] And the third meaning

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[10] Brown finds that the rise of professionalism in political theory also plays an important role in the victory of capitalism. Brown, op.cit. pp. 562-563

[11] Bakshi points out that liberal democratic ideology went beyond the limits of general political controversy. Its dominance therefore renders necessary condition for the politics of bargaining and adjustment which prevails in the contemporary west. Bakshi, op.cit, p.45

[12] Its main aim was the philological scrutiny of ancient text, including sacred texts. In the next century the range broadened into critique of politics, religion, and reason. In Germany, in the 1840s, criticism enjoyed further expansion, after decades of post-revolutionary reaction, in the form of philosophical critique of religion and politics. Goran Therborn, "Dialectics of Modernity: On Critical and the Legacy of Twentieth Century Marxism", *New Left Review*, January- February, 1996, No. 215, pp.57-81, here p.62

[13] "...As a diacritical model, critique aims to distinguish between true or just manifestations of a phenomenon and their inauthentic counterpart." Regarding the second meaning, Duzinos explains that it was the way Socrates cut through the common opinion (*doxa*) of the many and came up with his dialectical-maieutical conclusions. See, Costas Duzinos, "Oubliez Critique", *Law and Critique*, Spring 2005, pp. 47-69, here p.47

associated with the word critique is the concept of crisis.[14] The notions of critique and crisis have predominant role in modern political theory. In modernity, these concepts play an important role in the process of social transformation as well. Douzinas describes crisis as a turning point or a critical situation that can change the direction of existing state affairs. Critique is treated as a result of crisis that offers a way out for the existing condition.[15]

In critical German theoretical tradition one can find a close relationship between the concepts of crisis, critique and reason. In Kant, critique aims at developing 'free and autonomous intellect'. Contrary to Kantian monological approach, Hegel defines critique in terms of intersubjectivity. This is considered to be a form of immanent critique which Marx modified later.[16] In Marx, critique and crisis acquire a crucial role. For Marx critique is the core aspect in order to explicate the ideological underpinnings of capitalist development. Along with the economic interpretation of society's historical development Marx offers a powerful critique of ideology as well.

In post- Marxist theory, especially in the Critical Theory of early Frankfurt school, critical practice takes a new turn. Critical Theory affirms to be critical through combining Marxian dialectical method and a philosophy of subject inspired by Kant. The Critical Theory offers a *meta-critique* in which "... its object is, as Nigel Pleasant points out, the ontology of the individual subject and social order, the relation between theory and human subjects and, above all, a critique of 'traditional' positivist

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[14] Ibid, p.47

[15] Ibid, pp. 47-48

[16] The idea of critique has a crucial role in Kantian philosophical system. "...Critique tries to bare the transcendental conditions of possibility of a phenomenon, a discourse or factuality the trans-historical presupposition that underlie knowledge, moral deliberation and aesthetic judgment". See Ibid, p.49. In Hegel "...it is reason that could transform the mere longing for previous unity into a recognition of all the basic changes that had secured people from one another and reason which could lead these alienated people to see how the nature of each was denied in the split-off existence of the other". Following Hegel, Marx "... conceptualized the absolute creativity of the human being through the example of art, but unlike Hegel he extended this into a more general analysis of labor...Marx's de4fetishising critique (developed especially in the chapter 1 of Capital) of the way the historically specific and humanly created categories of capital – labor, commodity, value – come to appear as quasi-natural, and indeed to dominate over the apparently more contingent-quality of human life. The refied categories of capital transform qualitatively differentiated human activity into oppressive uniformities and identities." See Carl Calhoun, "Social Theory and the Public Sphere", *The Blackwell Companion to Social Theory*, Bryan S. Turner(ed), Malden, Massachusetts, USA, 1996, pp. 505-544, here, p.516

theory and its 'instrumental reason'."[17]Instead of concentrating on the Marxian critique of ideology, the idea of instrumental reason, in Horkheimer and Adorno, extend to the very foundations of human history.[18] In order to elucidate the conditions of a totally administered society, they consider Max Weber's analysis of bureaucracy as the defining feature of instrumental rationality.[19]

Besides the Marxian influence, the early Frankfurt School thinkers were also influenced by the theories of Max Weber, Lukacs and Freud. In the post-Enlightenment era, Weber explicated that the process of rationalization along with the emergence of instrumental reason paved the way for the 'disenchantment of the world'. The Frankfurt School also shares the 'pessimism' of Weberian notion of the 'iron cage' of a highly bureaucratized society.'[20] They engage with Lukacs's reading of Marx that redefines Marxism from the standpoint of the proletariat class. Lukacs explicates the uniqueness of social position of class which is capable to provide understanding and bring about radical social change.[21] The Frankfurt School engages with Freud mainly for explicating the socio-psychological formation of the individual for the reinvigoration of human subjectivity.

The Critical Theory of Frankfurt School extends criticism to authoritarian state as well as one-dimensional development of capitalism. As a result of the development of capitalism, especially with the advancement of technology and the process of 'reification'[22], the role of human subject in the society was undermined. Critical Theory fails to identify the potential social agents capable to actualize the project of radical social transformation.[23] However, in this particular socio-historical context, Critical Theory affirms a crucial function. It replaced politics, as Dick Howard argues: "...the politics of theory replaced by the theory of politics", because, 'the Critical

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[17] Nigel Pleasant, *Wittgenstein and the Idea of Critical Theory: A Critique of Giddens, Habermas and Bhaskar*, Routledge, London, 1999, p.152

[18] Ibid, p.152

[19]Carl Calhoun, op.cit, p.517

[20] David Held, *Introduction to Critical Theory; Horkheimer to Habermas*, Polity Press, Cambridge, 1980, pp. 65-66

[21] Lukacs argues, by following Hegelian categories, that the standpoint of the proletariat, society's 'subject-object', is the only basis from which the totality can be grasped. Ibid, pp. 21-22

[22] David Held explains Lukacs's analysis of reification that involves a process whereby social phenomenon take on the appearance of things, it is not, he stressed, simply a subjective phenomenon rather it arises from the productive process which reduces, that is, the worker and his or her product to commodities. Ibid, p. 22

[23]Carl Calhoun, op.cit, p.521

Theory itself conceived to be politics where the politics of theory remains for radical thought.'[24]

HABERMAS'S CONTRIBUTION TO POLITICAL THEORY

The project of Habermasian theory, to put it simply, as David Held explains, is "...an attempt to develop a theory of society with a practical intension: the self-emancipation of people from domination."[25] Habermas locates the motives of his theory in four classificatory groups: "(1) attempt a theory of rationality, (2) to develop a theory of communicative action, (3) to develop a theory of modernity or dialectic of social transformation, (4) to develop a concept of society that brings together systems and action theory."[26] Unlike his predecessors at Frankfurt school, Habermas gives serious attention to bourgeois democracy as well

Habermas begins producing theory in a period when political theory turns its focus to democracy. After the Second World War the defeat of fascism and the experience of Stalinism under the banner of Communism and the emergence of authoritarian state insisted thinkers to think in terms of viable democratic models. The celebration of the victory of liberal democracy under the ever expanding capitalism necessitated the left thinkers in Europe to formulate alternative democratic models. The dissolution of class interest and the affiliation of the left and socialist parities into the existing liberal political system perpetuated them to search for radical democracy. It was a period in which the left intellectuals in Europe, including the Frankfurt School thinkers, found difficult to identify the declining tendencies in liberal democracy and crisis in capitalism.

In *Towards a Rational Society* Habermas finds a 'new constellation of economics and politics in a more independent society and state.'[27]As David Held explains, the intervention of administrators and technocrats in social and economic affairs along with the 'fusion of science, technology and industry' help to succeed in forming a new ideology. Within an authoritarian state that offers a technical-operational

[24] Dick Howard, "Political Theory, Critical Theory, and the Place of Frankfurt School" , *Critical Horizons* 1:2, Leiden, 2000, pp.271-280, here, pp. 272, 275
[25] Davis Held,op.cit,p.250
[26] Jurgen Habermas, *Autonomy and Solidarity*, Verso, London, pp.105-106
[27] Davis Held,op.cit,p251

administration.[28] By giving importance to the development of objective processes, Habermas understands democracy in a technologically advanced society:

> "...Technology to mean scientifically rationalized control of objective processes. It refers to the system in which research and technology coupled with feedback from the economy and administration. We shall understand democracy to mean the institutionally secured form of general and public communication to deal with the practical question of how men can and want to live under the objective conditions of their ever expanding power of control. One problem can then be stated as one of the realities of the technology and democracy."[29]

Considering the tension between the two, Habermas offers a democratic form of decision making which is rational and thereby rests on consensus coming out of discussions free of domination.[30]Habermasian critical theory fundamentally argues for human emancipation from all forms of coercion and domination and finds that technocratic conscience is capable of affecting the very foundation of human interest.

Habermas offers a serious investigation regarding the nature of human interest, action and knowledge in his work *Knowledge and Human Interest* and in *Theory and Practice*. For explicating the relationship between knowledge and human activity, he develops a theory of cognitive interest or knowledge-constitutive interest. As Bernstein explains, the theory of knowledge and rationality, developed by Habermas, is at once a social theory and is based upon three primary constitutive interests: the technical, the practical and the emancipatory.[31] As Habermas elucidates:

> "...Orientation towards technical control, towards mutual understanding in the conduct of life, and towards emancipation from seemingly "natural" constraint establish the specific view points from which we can apprehend reality as such in any way whatsoever. By becoming aware of the impossibility of getting beyond these transcendental limits, a part of nature acquires, through us, autonomy in nature. If knowledge could ever outwit its innate human interest, it would be by comprehending that the mediation of subject and object that philosophical consciences attributes exclusively to its own synthesis is produced originally by interests. The mind can become aware

[28] Ibid, p. 251
[29] Jurgen Habermas, *Towards a Rational Society*,Heianenannam,London,1971,p.51
[30] Ibid,p.10
[31] Richard J. Bernstein, "The Relationship of Habermas View to Hegel", in *Hegel's Social and Political Thought: The Philosophy of Objective Spirit*, Donald Philip Verene, Humanities Press, New Jersey, 1980, p.235

of this natural basis reflexivity. Nevertheless, its power extends into the very logic of inquiry."[32]

In Hegel, there is a logical relationship between the subject and the object. 'The object as well as the subject of knowledge is formed through the history of human species.' In contrast to this conception Marx (Kant as well) emphasizes the aspect that 'the otherness of the nature could not be eliminated.'[33] Habermas develops the concept of "self-reflection" which according to Bernstein "is the basis of his identification of reason and the "will to reason".[34] Self-reflection is reflection on the subjective conditions of the knowledge which is determined by an emancipatory cognitive interest.[35] 'It criticizes 'objectivism' and theories obliged to a world of facts whose continuation is independent of the activity of knowing subject.[36]

The aspects of emancipatory interest, autonomy and self-reflexivity play an important role in his later works where he tries to link theory and practice. Two basic agendas oriented towards this, as Calhoun points out, are; firstly, an attempt to go beyond hermeneutics and positivism and also to show how conventional social sciences fail to develop their critical potential. Secondly, he emphasizes the aspect of immanent critique of the actual historical institutions within which rational critical discourse achieves political significance.'[37]

In *The Structural Transformation of the Public Sphere,* Habermas offers an elaboration of the historically grounded immanent critique vests on the institutional structures of bourgeois society. The critical use of private reason in the public sphere, according to Habermas, is emancipatory and therefore succeeds in transforming the society from domination. This practice, however, made 'bourgeois democracy genuinely radical in its days.'[38] The decline of the bourgeois public sphere, hence, shows the degeneration of radical critique as well as genuine democratic character of bourgeoisie liberalism. The idea of public sphere has a significant role in political

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[32] Jurgen Habermas, *Knowledge and Human Interest,* (tr) by Jeremy J.Shapiro, Polity Press, Cambridge, 1986, pp.311-312

[33] Seyla Benhabib, Review of the Book: "The Critical Theory of Jurgen Habermas", by Thomas McCarthy, *Telos,* No.40, Sept.,1979,pp. 177-187, here, p.177

[34] Richard J Bernstein,op.cit,p.236

[35] Seyla Benhabib, ibid, p.177, and, Jurgen Habermas, *Knowledge and Human Interest,* op.cit, p.310

[36] Seyla Benhabib, ibid, p.117

[37] Craig Calhoun, op.cit, p.526

[38] Ibid, p.527

theory and in influencing political practices as well.[39] It has been a critical tool to analyze the limits of liberal democracy in advanced capitalism on the one hand, and to explore the possibilities of radical democracy exiting in the society on the other.

In *Legitimation Crisis* Habermas offers a critique of advanced capitalism and propounds a theory of crisis endemic to state-regulated capitalism. Habermas argues, as Bohman points out, that "...the demands of advanced capitalism limit the scope and significance of democratic institutions and norms." [40] In advanced capitalism economy merges into state, and as a result economic crisis transforms into the state and invites steering problems. It challenges democratic practices and norms and thereby threatens social integration. Habermas provides an alternative democratic practice of decision making through a process of participatory discursive will-formation.

In *The Philosophical Discourse of Modernity* Habermas defends the normative content of modernity and argues that it still prevails and has serious implications today. He aims to subdue Neitzsche's critique of enlightenment rationality and extends his criticism to Heidegger, Derrida, Bataille and Foucault who follows Neitzsche's thought. Habermas introduces a theory of communicative action which, according to him, can provide a more comprehensive idea of reason. Based on this theory, instead of a philosophy of subject, he expounds a theory of intersubjectivity.

In the two volumes of *The Theory of Communicative Action* Habermas's political theory takes a linguistic or a procedural turn. With the theory of communicative action his theory turns into a pragmatic model. Habermas develops a theory of system and lifeworld and elucidates the prevailing tendencies of internal colonization. His focus is on the aspects of systemic colonization of lifeworld through the means of money and power. He addresses the crucial role played by law in the processes of colonization. It results the distortion of life spheres and normative values prevail in the lifeworld context. The theory of communicative action offers mutual understanding through the means of linguistic communication. He puts forwards the

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[39] Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", *Social Text*, No. 25/26, 1990, p. 56-80, here, p.57

[40] James Bohman, "Complexity, Pluralism,and the Constitutional State: On Habermas's Faktizitat und Gettung",*Law & Society Review*,Vol.28,No 4,1994,pp.897-930,here p.902

concept of an ideal-speech situation which is envisaged to be an ideal democratic discursive condition devoid of domination and coercion.

In his magnum opus *Between Facts and* Norms Habermas propounds a theory of procedural democracy .He endeavors to reinvent the civil society and public sphere in · contemporary plural society in the west. Discourse theory focuses on normative restructuring of liberal democratic societies through the reordering of existing powers structures. He explicates a two-track model in which, on the one hand, deliberative politics enriches the democratic public realm, and, on the other, the constitutional state ensures individual rights and enact democratic decisions in accordance with the legitimate public opinion emanating from the political public spheres of the civil society. Habermas develops a novel idea of discourse theory of law and deliberative politics which make sure the deliberative public spheres are inclusive and open to all the affected in the society.

Habermas's political theory takes the challenges of the time. He critically engages with different theoretical perspectives such as feminism, multiculturalism, theories of power, justice, democracy and law, systems theory, postmodernism and post structuralism. Habermas extends his theoretical enquiry into the Anglo-American linguistic and pragmatic philosophies. While explaining a normative theory of democracy, he does not exclude empiricist and positivist theories. He also attempts to provide psychoanalysis and hermeneutics with a crucial role in social theory. Habermas renders an inclusive model of democracy which aims to accommodate conflicting interests and voices as well as different forms of life styles under a discursive democratic platform. In order to formulate a theory of democracy, he considers historically developed institutional structures and explores wider possibilities existing in the plural liberal democratic societies.

Habermasian theory seems to be one of the most comprehensive and novel theoretical ventures in our times. Therefore it needs to be seriously studied and critically examined as to how he conceptualizes the multidimensional life forms and power relations existing in complex societies. Since Habermas's contributions are considered to be one of the most significant interventions in political theory as well as in

influencing political discourses of the society, it seems imperative to critically analyze the major shifts, continuities and the present day relevance of those contributions.

The aim of my work is to identify the shifts in the notion of democracy in Habermas's political theory. This shift, I argue, is a departure from a social democratic model to a liberal discursive one. With this conceptual turn, I go on to argue that his theory now forsakes the need of a 'critical politics' and confines into the limits of liberal democratic society. Another important factor contributing to this shift, I endeavour to analyze, is the development of the discourse theory of law in Habermas that constitutes the foundation of procedural democracy. I examine these problems mainly by critically analyzing the notions of law and democracy variedly described in the early and later works of Habermas.

In the first chapter, in order to explicate the notion of democracy in Habermas's early theoretical works, I elucidate the concepts of bourgeois public sphere and legitimation crisis. Here I examine the historical role of bourgeois public sphere in providing an ideal democratic realm and its relevance in radical democratic theory for contributing a radical democratic realm. While describing the notion of public sphere, I am giving special attention to the 'bourgeois private law' and its role in protecting the basic democratic values. By explicating Habermasian theory of crisis, I try to examine the importance of critical politics in a crisis-ridden social condition prevailing in advanced capitalism. The participatory model of democracy propounded by Habermas, in my work, is treated as a contribution to a radical democratic model that contravenes the liberal model. I also argue that, here to a certain extent, Habermas pursues the critical theory tradition of early Frankfurt School thinkers and that of Karl Marx, and also succeeds in modifying those theories and overcoming their dilemmas.

In the following chapter, an attempt is made to unpack the idea of 'discourse theory of law' and its relation to the democratic ideal offered by Habermas in one of his later works *'Between Facts and Norms'*. Here, Firstly, I try to find the theoretical shifts that take place in Habermasian theory. I also try to explain the Habermasian reconstruction of modern law and also attempt to bring various approaches and contributions to legal theory in the discussion. By explicating the alternative theory of law proposed by Habermas, I try to explicate the shift that takes place in the concepts

like public sphere, politics, legitimacy and law. My central focus, in this chapter, is to unpack the idea of discourse theory of law and later to examine how this theory of law facilitates a discursive model of democracy in plural liberal societies. Here, I try to highlight the shift in Habermasian theory into a model which is applicable only to a society where liberal political culture and democratic institutions are already exists.

In the third chapter, I offer a detailed examination of the new model of democracy based on the notion of discourse theory of law which is discussed in the second chapter. In this chapter, I try to explain the rediscovery of the ideas of civil society and public sphere in Habermasian theory, and also examine how it reshapes the notion of democracy in the later works of Habermas. The concern of my work is to explicate the inseparable connection between the discursive model of democracy and institutional and political structures of liberal democracy. The enquiry is also extended to the recent deliberative turn in democracy. Here I elucidate major discussions in deliberative democracy and Habermas's contribution to it. In order to examine the liberal nature of his theory, I extend my focus on the aspect of deliberative politics and the idea of proceduralization.

CHAPTER I
THE CONCEPT OF DEMOCRACY IN THE EARLY WORKS OF HABERMAS: AN INQUIRY INTO THE NOTIONS OF PUBLIC SPHERE AND LEGITIMATION CRISIS

THE PUBLIC SPHERE AND THE BOURGEOIS PRIVATE LAW

CONTRIBUTIONS OF CRITICAL THEORY IN ANALYSING
TECHNOLOGICALLY ADVANCED CAPITALISM

ACCOUNTS ON THE RECESSION OF BOURGEOIS VALUES AND THE
TRANSMUTATION OF THE MEANING SYSTEM

EXPOUNDING THEORY OF CRISES: HABERMAS'S CRITIQUE OF
ADVANCED CAPITALISM

CONCLUDING REMARKS

CHAPTER ONE

THE CONCEPT OF DEMOCRACY IN THE EARLY WORKS OF HABERMAS: AN INQUIRY INTO THE NOTIONS OF PUBLIC SPHERE AND LEGITIMATION CRISIS

The concept of democracy in Habermas is deeply rooted in the specific characteristics of the 'bourgeois public sphere' and the notion of 'private autonomy' which were foundational for nurturing the universal values that catalyzed the development of .capitalism during the period of western renaissance around 1700s. He tries to conceptualize the process of democratization in the light of an active and participatory bourgeois public sphere, which, he argues, had an emancipatory potential to set free the society from the clutches of feudal domination and local authorities. The developments took place during the period instigated the creation of a new society based on certain unique values and specific characteristics of the core features of a participatory democracy.

Habermas, in *The Structural Transformation of the Public Sphere*, focuses on the creation of the public and the private sphere and argues that the creation was a corollary effect of the coupling of state and society in the wake of the capitalist commercial economy, run by a newly emerged mercantilist class.[1] In its course, the mercantilist phase of capitalism produced two vital instruments; the civil society and the press,[2] which played a crucial role in the creation of a

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[1] Habermas elucidates, in the west, at that point of time "... the political order remained unthreatened by the new process which, as such, had no place in the existing framework, as long as the members of the old ruling stratum participated in them only as consumers ... with the rise of long distance trade, towns were the only bases of operations. They were consolidated in periodic trade affairs, and with the development of techniques of capitalist financing were established as stock exchanges... Later on, with the development of finance and trade, the old power structures were reshaped by a newly emerged mercantilist class and subsequently a new social order began to emerge." See Jurgen Habermas, *The Structural Transformation of the Public Sphere*, Polity Press, Britain, 1989, p.15 (here after *STP*)

[2] The press initially carried the impartial data for the merchants, and subsequently, for the need of commercial activity, 'news' began to be a commodity which gradually merged with the expansion of market. As early as the middle of the 17th century, journals came into the scene, they were called as 'political journals' contained current news about imperial diets, wars, harvest, taxes, transport of precious metals and reports on foreign trade etc. Ibid, p.20

new society in the west. As a result, a new public was emerged, consisted of educated and commercial class apart from the common people. The newly emerged bourgeois class (the merchants, bankers, entrepreneurs and manufacturers) created a new public sphere of civil society where they could dominate and establish their status and values, which, in effect, were antithetical to the then existing structures of power and domination. The new domain, situated in between the world of social labour and commodity trade, was free of all kinds of coercion and domination either from the state apparatus or from the competing capitalist interests persisting in the realm of civil society. Habermas expounds the formation process and its specific characteristics:

> "...the bourgeois public sphere as the sphere of private people, come together as a public. They soon claimed the public sphere regulated from the above against the public authorities themselves to engage them in a debate over the general rules governing relations in the basically privatized but publicly relevant sphere of commodity exchanges and social labor. The medium of this political confrontation was peculiar and without historical precedent; people's public use of reason."[3]

The private individual thus acquired self autonomy within the newly emerged civil society. In '*what is Enlightenment*', Kant problematizes the creation of an emancipated European society during the period of western renaissance, and argues that the individual's public use of reason alone is capable of bringing about enlightenment. On the contrary, Hegel stresses the inability of an 'antagonistic civil society' in the creation of a public sphere which cannot be kept itself aloof from domination and interference of power. Hegel therefore negates the possibility of the transformation of the 'political' into a rational authority with the public of private people.

Against this background, in contrast to Hegel, Habermas imagines a different form of society, wherein the private individuals could reproduce their life without being subjected to external domination. In the wake of the development of market economy, he explains, they began to create a new public sphere of private individuals. Through those forums of public discussions in clubs, cafés, newspapers, and journals of all kinds, they

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[3] Jurgen Habermas, *STP*, op. cit. p.27

succeeded in instigating the European literary and political enlightenment in the eighteenth century.[4] With the assertion of a new identity, the bourgeoisie started redefining their role in the changing society and brought about a polarization of state and society furthermore within the society itself. The process of doubling of the private sphere assumes the form of a kind of 'the home and the social labor' separation: the inner and the outer region of the private sphere, which led to the 'privatization of the life' of bourgeois individuals.

The institutional criterion of the new form of bourgeois representation, as Habermas explains: i) 'they preserved a kind of social intercourse that, far from presupposing the equality of status, disregarding the status altogether, ii) in discussion within such a public presupposed the problematization of areas that until then had not been questioned and, iii) the process that converted culture into a commodity (and in this fashion constituted it as a culture that could become an object of discussion to begin with) established the public as in principle inclusive.'[5]

These specific characteristics of the bourgeois public sphere convey certain basic tenets. First of all, the scope of a rationally motivated discursive will-formation which could produce legitimate public opinion on matters of general interests. Secondly, the critical nature inherent in discursive practices, when individuals are free to exercise their private autonomy in the public sphere. Thirdly, a political act of interrogation by the public of private individuals against the authoritative interventions from the above on their freedom and self-autonomy, and finally, the potential force inherent in the discursive will formation oriented towards action and social change.

The autonomous individuals, within the domain of civil society itself, in the historical process, exercised their free will to construct a new form of society which embodies emancipatory values. This led to the flourishing of a literary public sphere as well as a critical press for nurturing self-reflexivity of the

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[4] "The formation of the public sphere in Britain, mainly critical discussions in the coffee houses, paved the way for creating political unrest in the 1670s'. See, David Held, *Political Theory and the Modern State*, Polity Press, Britain, 1984, p79

[5] Jurgen Habermas, *STP*, op.cit. pp.36-37

bourgeois individuals through reading, writing, listening and taking part in public discussions.[6] The public sphere thus became more inclusive and open ended.

Habermas sublimates the characteristics of the bourgeois public sphere, mainly the notions of self reflexivity, private autonomy and critical deliberation, vested on the rational disposition of private individuals, as fundamental to the ideal democracy. In his account, the notion of self-reflection represents analytical knowledge. It consists of 'the moments of the cognitive, and the affective and motivational equally.'[7] It is also conceived as critique, he explains "...in the sense that the analytic power to dissolve dogmatic attitudes inheres in analytic insight".[8] Private autonomy is a necessary category without which individuals cannot exercise their free will. Critical deliberation signifies transformatory politics through which democratic will is formed. These rudiments, in the domain of a democratic public sphere, are exercised on the basis of a legitimate private law.

I. THE PUBLIC SPHERE AND THE BOURGEOIS PRIVATE LAW

It is within the ambit of a system of law, according to Habermas, which has its origin from the public sphere itself, the basic rights of autonomous private individuals can be exercised. And, Habermas adds, under capitalism "...the positive meaning of the private emerged precisely in reference to the concept of free power of control over property that functioned in capitalist fashion."[9] Hence, the situation became ripe to form a private law for protecting the liberties of freely competing owners of commodity with respect to the ideal exchange relationship existing in accord with the laws of free market.

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[6] Habermas explicates these developments by describing the changes took place in Britain. 'With the emergence of the literary public sphere, all the private people as readers, listeners and spectators could take part in the discussion. Music came out of churches and noble society became accessible to the common people, as a commodity in the market for the interest of all. Art became public and an object of free choice and changing preferences. The artist, therefore, had to work for the market.... People thus began to approach art through discussions and it really mooted the forms of discussion vibrant.' Ibid. pp.57-67

[7] Jurgen Habermas, *Knowledge and Human Interest*, Polity Press, Cambridge, 1986, pp.233-234

[8] Habermas elucidates "...Critique terminates in a transformation of the affective-motivational basis, just as it begins with the need for practical transformation. Critique would not have the power to break up false consciousness if it were not impelled by a *passion for critique*". Ibid, p.234

[9] Jurgen Habermas, *STP*, op.cit. p.74

Under the capitalist mode of production, social relationship was in turn reshaped into a form of exchange relations; hence, in the expanded domain of market commodity owners gained private autonomy. The private law was made exchange relationship, between free owners of commodities, in the form of private contract. The status of commodity owners and the educated class, therefore, came under a common legal status. It conceived of the principles of equality and fundamental liberty of private individuals.[10] Public sphere acquired the role of a medium in creating legal codes. The legal codes evolved out of the critical public scrutiny of the private people came together as public. Habermas explains: "...through price competition and through questioners, pubic opinions contributed to legal codification even where parliamentary bodies did not exist or remained ineffective as in Napoleonic France."[11]

With the establishment of constitutional state, the public sphere could preserve its heavy influence on defining and determining the constitutional law. As in the case of parliament discussions in Britain, the constitutional law (in Germany and France) was also a reflection of the liberal values mooted by the public sphere.[12] Instead of a political will of the centralized authority, legislations came out of rational discussions. As a result, a set of basic rights were codified to protect the autonomy of the private individuals, that consists;[13]

1. Rights to protect the sphere of the public engaged in rational critical debate- freedom of opinion and speech, freedom of press, freedom of assembly and association etc.

2. Rights to protect the political functions of the private people in the public sphere – rights to petition, equality of vote etc.

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[10] For instance, in Britain, the freedom of Control, trade and of inheritance occurred within the framework of the common law.

[11] Jurgen Habermas, *STP*, op.cit. p.76

[12] In the parliament the exercise of private autonomy took the form political discussions. The critical public has restrained the aristocratic domination prevailing in the parliament. The parliaments change in function bounded by the 'Bill of Rights' was denoted to a king in parliament...later; the critical debate of the public took the form of parliament discussion between the governing and the opposition parties. The voice of the general public has thus been discussed in the parliament and the public opinion gradually got prominence to regulate it. This made the public discussions politically relevant and active. Ibid. p.63

[13] Ibid, p.83

3. Rights to protect the standard of the individuals as free human beings grounded in the sphere of the patriarchic conjugal family – right to personal freedom, inviolability of the home etc.

4. Rights to protect the transactions of the private owners of property in the sphere of civil society – equality before the law, protection of private property etc.

The private law, in its course of action, was a replica of the will of bourgeois individuals. In Habermas' words "...The bourgeois idea of the law based state, namely, the binding of all the states' activity to a system of norms, legitimated by public opinion, already aimed at abolishing the state as an instrument of domination."[14] But, the changes took place in the nineteenth century especially with the development of welfare state and the emergence of advanced capitalism; the bourgeois values and the private law began to deteriorate. The growth of science and technology precipitated this move towards the establishment of instrumental rationality over the inner-domain of the society. Accordingly, the public and the private sphere eventually lost its political significance.

II. CONTRIBUTIONS OF CRITICAL THEORY IN ANALYSING TECHNOLOGICALLY ADVANCED CAPITALISM

The early Frankfurt school thinkers, Pollock, Horkheimer, Adorno and Herbert Marcuse are critical of the 'totalitarian' nature of enlightenment reason. In *Dialectic of Enlightenment*, Adorno and Horkheimer put forward a critical view of history in which they attempt to deal with the rise and domination of instrumental rationality. Defining the aspect of culture and its transformation under mass democracy and technologically advanced capitalism is also one of the major projects of critical theory. The theories of 'culture industry' and 'one-dimensional man' offer significant contributions to it. They mainly extend their concern to the permeation of instrumental rationality into various spheres of human life. In *One-Dimensional Man*, Marcuse explains that:

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[14] Ibid, p.82

"...Prevailing forms of social control are technological in a sense...today the private sphere has been invaded and whittled down by technological society...technological rationality reveals its political character as it becomes the great vehicle for better domination, creating a truly totalitarian universe in which society and nature, mind and body are kept in a state of permanent mobilization for the defense of the universe."[15]

The Frankfurt School, while dealing with the idea of rationalization, receives conceptual resources from Max Weber's analysis on capitalist development and the theory of bureaucratization. To Max Weber, the development of technology is to produce the means of survival, and the creation of administrative bureaucratic system is to regulate social life. These two systems are the prime motors of the process of 'rationalization' of modern society. Through the rationalization of human life, modern man begins to be controlled within an 'iron cage of commodities and regulations'. Weber elaborates:

"...No one knows who will live in this cage in the future, or whether at the end of this tremendous development entirely new prophecies will arise, or there will be a powerful rebirth of old ideas and ideals, or if neither, mechanized petrification, embellished with a sort of convulsive self-importance. For then it might be said of the "last man" of this cultural development: for the last stage of the cultural development, it might well be truly said: "specialists without spirit, sensualists without heart, this nullity imagines that it has attained a level of civilization never before achieved."[16]

Habermas, critically following the early Frankfurt School theories and the Weberian notion of rationalization, examines the 'rational shift in history' by describing the emergence of welfare state and advancement of technology which caused for the deterioration of public sphere and its values. He goes on to argue: "...with the growth of market economy arose the sphere of the fetters of domination based on landed estate and necessitated forms of administration invested with state authority "...the dialectic of progressive 'societialization' of

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[15] Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society*, Bacon Press, Boston, 1964, pp.9-18

[16] Max Weber, *The Protestant Ethics and the Spirit of Capitalism*, Unwin University Books, London, 1886, p.182

the state simultaneously with an increasing 'stateification' of society gradually destroyed the basis of the bourgeois public sphere."[17]

Habermas argues for a state which is totally steered by the society. The 'societialized state' acquires legitimacy from the normative realm of public sphere. As Hohendahl argues, Habermas here attempts to further develop the task of critical theory by offering a theory of public sphere which is conceived as a model for unraveling the political and social elements in the concept of culture.[18] Unlike Adorno and Horkheimer, Habermas offers a socio-historical understanding of the dialectic of enlightenment through which he unfolds the contradictions prevailing in liberal capitalism.[19] Taking these aspects into consideration, Hohendahl identifies two major functions of the public sphere; on the one hand, it provides a paradigm for analyzing historical change and, on the other, together it serves as a normative category for political critique.[20]

Since the emergence of the state in nineteenth century, its authorities began to spread onto vital areas of the society. The rise of the state on the one hand, constitutinalized the political public sphere and, on the other, adopted the interest of the civil society as its own. The political conflicts could no longer be resolved within the private sphere; as a result, the public authority expanded its power onto the private realm. The development of such a new 'repoliticised social sphere' thus erased the distinction between the public and the private.

The intervention of new parties, like administrative interference in the matters of business, in the repoliticized social sphere accelerated the process of transformation of the existing social relationship. Habermas elucidates, along

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[17] Jurgen Habermas, *STP*, op.cit, pp.141-142

[18] Liberal theory clearly separates the aspect of culture from politics. In Marxism culture is considered to be a part of the superstructure. Critical theory, especially with the theory of culture industry, makes an attempt to find a discernable link between culture and politics. It argues that, with the emergence of 'popular culture', culture is no longer an independent realm in the society but it has an objective link to politics as well. In Habermas 'culture legitimates itself as a medium of self-understanding and self-liberation,. See, Peter Uwe Hohendahl, "Critical Theory, Public Sphere and Culture: Jurgen Habermas and his Critics", *New German Critique*, No. 16, winter, 1979, pp. 89-118, here, pp. 89-91, and, David Held, *Introduction to Critical Theory*, Polity Press, Cambridge,1980, pp.77-81

[19] Hohendahl argues that "...faced with the choice between objectified, democratic and authentic but elitist culture, Horkheimer and Adorno decisively support the latter, since for them emancipation cannot be expected from the realm of reification". He goes on to argue that 'the weakest point in Habermas's investigation is those where he uncritically accepts Adorno's results and thereby makes himself into an advocate of a cultural elitism.' Peter Uwe Hohendahl, Ibid, p.91

[20] Ibid, p.92

with that, the economically weaker sections who recently gained political power began to use political means against the economically stronger section in the market. The ultimate result it produced was the violation of the law of equality of opportunity and the private autonomy of individuals in market. The trade unions and socialist political parties mediated this process. Thereby, the increasing political intervention in the domain of private sphere thus facilitated to translate the economic antagonism into a form of political conflict.

The growth of industrial capitalism reconstructed the notion of equality with a discernible form of domination and subordination. The welfare state at this juncture had to provide with special incentives to the weaker sections through 'the legislation governing industrial relations', 'collective contracts', 'home projects and domestic regulations.'[21] The original notion of equal opportunity in the civil society, emulated by the bourgeois individuals and activated through the bourgeois private law, was thus ruined. These developments contributed to the decline of the normative values in liberal capitalist societies. The impacts of these new changes were instrumental for bringing about significant transformation of cultural institutions. Adding to the impacts of state interventions the expansion of commercial interests also contributed to this transformation.

III. ACCOUNTS ON THE RECESSION OF BOURGEOIS VALUES AND THE TRANSMUTATION OF THE MEANING SYSTEM

According to Habermas, the proliferation of commercial interest and its penetration into the private sphere of the conjugal family also resulted in the decline of the political character of bourgeois family. As a result it fell into the realm of 'pseudo-privacy' or the 'private world of cultural consumption.'[22] The

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[21] Jurgen Habermas, *STP*, op.cit, p.149

[22]The family or the intimate sphere, Habermas delineates, was the scene of a psychological emancipation that corresponded to the political economy one. It is the realm of self-preservation wherein the individuals enjoy their private autonomy. The core features of the privatization of life can be observed even in the architectural model (especially in 17th century Britain). The process of privatization made the house a home for each individual, but left less room for family as a whole. The family room became a reception room in which private people gather to form a public. The line between private and public sphere extended right through the home. They formed the public sphere or a rational critical debate in the world of letters within which the subjectively orienting. But after the permeation of commercial interest and entertainment literature private sphere lost its emancipatory political character and reshaped their identity as that of a consumer of culture. Ibid, pp.43-51, Here

potential platforms of the literary family periodicals and the avant-garde which supported the emergence of an entertainment literature were subsumed to popular advertiser-financial illustrated magazines; and correspondingly the critical discussions also lost its political content. The role of the press, as the primary vehicle of public opinion, was altered by the domination of commercial interest which prompted the publishers to channelize their way purely in terms of business.

This transformation resulted in two major shifts: firstly, the monopolistically organized press agencies began to homogenize the news services; secondly, the sizable portion of the space of news papers was appropriated by advertisements. Accordingly, the press became 'a gate through which privileged private interests invaded the public sphere'. Habermas expounds: "...the institution of social-convivial interchange, which secured the coherence of the public making use of its reason, lost their power or utterly collapses; the development towards a commercial news circulations press had its parallel in the recognition of the parties run by dignitaries on a mass basis."[23]

Commercial interest percolated into the domain of politics and influenced the delegates and the political parties; as a result, they lost their non-partition character in rational discussions. Thereby, parliament discussions lost its rational and critical role in the process of will-formation. Mass media succeeded in hindering the communication flow of a rationally debating public through the process of advertisement. Later, the political parties began to use the techniques of advertisements for influencing voting decisions leading to the emergence of an 'industry of political marketing'. With the emergence of the 'industry of political marketing' the political realm became apoliticized. As corollary effect, state and society entered into a symbiotic relationship which in fact remained as a semipublic-semiprivate relationship in a social welfare state. Hence, the societal organizations began to be active in matters related to

Habermas also attempts to explain the transformation of cultural institutions through change in the political system, whose development in turn is conceived through changes in economic system. From the 18th and early 19th century the contents of culture are clearly separate from the market. In contrast, in the 19the century, the production and reception of culture are defined under the new metrics of capitalist market where culture became a commodity and was consumed accordingly as leisure-time entertainment.' See Peter Uwe Hohendahl, op.cit, p.90
[23] Ibid, pp.202-203

state in the public sphere of the political realm wherein the public administration came under the influence of cultural and religious forces. Habermas continues: "...the competition of organized private interest in the face of the neomercantilism leads to a refeudalization"[24] of the society. It prevented the state from taking independent and rational decisions. The process of refeudalization undermines the original notion of public opinion. The intervention of large number of organizations in the terrain of political public sphere opened up possibility for political compromises. Hence, the entire process of the creation of public opinion was delegitimized.[25]

In 'mass democracy', Habermas elucidates, the consensus formation takes place on account of opinions created by media, political parties and other organizations through the process of opinion management. With the non-public opinion, the communicative domain came under the domination of quasi-public opinion, formed by political parties, interest groups, bureaucracy etc. It eventually left the existing system completely devoid of legitimation. The possible solution he suggests is the creation of a legitimate public opinion through the reinvigoration of the critical publicity inherent in the 'intra-organizational public sphere.'

The development of science and technology, in the nineteenth century, instigated substantial changes in the realm of production and the structures of state and society. Habermas explains: "...an increase in the state intervention in order to stabilize economic growth and the growing mutual dependence of research and technology, which has turned the science into a leading force of production."[26] Consequently the economy had to depend more on the progress of technology; and, therefore, the tensions prevailed in capitalist economies such as resources allocation, unemployment and economic stagnation were conceived as technical problems solvable only by experts; and thus politics acquired a singularly negative character.[27]

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[24] Ibid, p.231
[25] "...Creating and probing of public opinion through publicity, public relations works and public opinion research replaced the discursive will-formation." see, David Held, (1980), p.262
[26] Jurgen Habermas, *Towards a Rational Society*, Heinemann, London, 1971, p.100 (here after *TRS*)
[27] David Held, (1980), op.cit. p. 264

However, these developments made heavy impact on the existing form of legitimation and brought about new forms of demands. This new form of legitimation guaranteed sufficient room for state intervention to protect both the private institutions of capital and loyalty of masses to the system, and the result was 'depoliticisation of practical issues.'[28] In order to protect the state from risks and dangers the focus was shifted "...not towards the realization of practical goals but towards the solution of technical problems."[29] The legitimation system of advanced capitalism thus acquired a technocratic character.

Caused by the systemic intervention (or non-normative steering mechanism) along with the decline of the public sphere, the technocratic values established domination over the 'lifeworld' (or the realm of symbolic interaction).To analyze the features of advanced capitalism. Habermas introduces the concepts of 'system and lifeworld'. Society realizes crisis mainly in two situations; on the one hand, crisis arises due to the inefficiency of the existing structures to solve the steering problems, and, on the other, when the members of the society feel their social identity threatened and therefore need to alter the existing structures.[30] But, Habermas finds that these two conditions are mutually related and therefore pursuing either of them would be wrong. As a result, in order to understand the prevailing crisis tendencies properly, according to Habermas, it is essential to understand the connection between 'social integration' and 'system integration.'[31] 'Social integration refers to the systems of institutions in which speaking and acting subjects are socially related. System integration means the specific steering performances of a self-regulated system.'[32]

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[28] Ibid, p.264

[29] Jurgen Habermas, *TRS*, op.cit. pp.102-103

[30] Jurgen Habermas, *Legitimation Crisis*, Heinemann, London, 1976,op.cit, pp.3-4 (here after *LC*)

[31] "...Crisis occurrences owe their objectivity to the fact that they issue from unresolved social problems. Identity crises are connected with steering problems. Although the subjects are not generally conscious of them, these steering problems create secondary problems that do affect consciousness in a specific way- precisely in such a way as to endanger social integration." Ibid, p.4

[32] Ibid, p.4

In order to connect these two aspects Habermas introduces the 'system perspective' and 'life-world perspective.'[33] According to the 'system theoretic approach' identity change entails alteration in the structures of a society to stabilize and retain certain specificities, for example: the wage-capital structure in capitalism. Under the 'lifeworld perspective', on the level of social integration, crises are considered as threats to social identity of an individual or an impetus for individuals to actively change that identity.[34] As Kellner also points out, that 'Habermas believes, individuals experience crisis of social integration as a threat to their identity and society, and constitute vulnerabilities to continued social reproduction, and thus open for structural transformation in post-capitalist direction.'[35] Habermas attempts to explain the nature of contemporary capitalist societies constituted to be sites of crisis, and in contrast to his predecessors in the Frankfurt school, he argues that contemporary capitalist societies are still challenged by certain crises and it is liable to transformation.

Habermas closely pursues Marx while analyzing liberal capitalism. However, while analyzing advanced capitalism, he declines Marxian categories due to several reasons: a) the increasing role of state has altered the forms of the production of surplus value; b) the quasi-political character of the wage structure determined by the bargaining between opposing parties;[36] c) state replaced the market and turned out to be a dominant steering mechanism of society and imposed a political counter-control on the economic logic prevailed in the society. d) the labour theory of value which previously explained a traditional fall in the rate of profit is inadequate in its account of the 'reflexive value' created by science and technology. Thus the unproductive labour of scientists and teachers actively heightened the productivity of labour in general.[37] These conditions are specific to advanced capitalism.

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[33] From the system perspective thematize societies steering mechanisms and the extension of the scope of contingency. From the life-world perspective thematize the normative structures (values and institutions) of a society. see Jurgen Habermas, *LC*, pp.4-5
[34] David Held, (1980), op.cit. p.285
[35] Douglas Kellner, *Critical Theory, Marxism and Modernity*, Polity Press, Cambridge, 1989, p.197
[36] David Held, (1980), op.cit , pp. 288-289
[37] Philip K. Lawrence, 'The State and Legitimation: The Work of Jurgen Habermas', in Democracy *and the Capitalist State*, (ed), Graeme Duncan Cambridge University Press, Cambridge, 1989, pp.136, 137

IV. EXPOUNDING THEORY OF CRISES: HABERMAS'S CRITIQUE OF ADVANCED CAPITALISM

In late-capitalist society the polity and the civil society are not distinct spheres. Therefore the crisis tendencies are not restricted to the economic realm only.[38] Hence, Habermas refutes the competency of Marxian base/superstructure analysis to explicate the possible crisis tendencies shown by advanced capitalism. The crises tendencies, endemic to advanced capitalism, are associated with three basic sub-systems: economic, political and the socio-cultural systems.[39]

Habermas enlists the possible crisis tendencies in the following table:[40]

Point of origin	System crisis	Identity crisis
Economic system	Economic crisis	--------------
Political system	Rationality crisis	Legitimation crisis
Socio-cultural system	----------------	Motivation crisis

The early Frankfurt School theories of 'one dimensional society' and notions of 'organized' or 'state' capitalism postulate a situation which presumes that capitalism overcomes its fundamental contradictions and is capable of handling its fundamental problems and conflicts.[41] Pursuing the Marxian method of problematizing capitalism, contrary to the approach of the early

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[38]Habermas distinguishes between the stages of 'liberal capitalism' and 'late-capitalism' , and between 'system crisis', the sort of economic and political crises endemic to liberal capitalism, and 'social crisis', are particular symptomatic of 'late capitalism'. See Kellner, op.cit, p.197

[39]The economic sub-system consists of three sectors: the public sector oriented towards state production and consumption, and the private oriented towards market competition and an oligopolistic sector considerably free from market competition. See, David Held, (1980), op.sit.pp.286-287

[40] Jurgen Habermas, *LC,* op.cit. p.45

[41] Douglas Kellner, op.cit, p.203

Frankfurt School thinkers, Habermas formulates a crises theory prevalent in advanced capitalism and opens up the possibility of social transformation.[42]

Advanced capitalist societies always latently carry at least one possible crisis tendencies. Habermas distinguishes four types of possible crisis tendencies in advanced capitalism which is embedded in the functioning of economy and administration, and also in the needs for Legitimation and motivation. Any one of these tendencies, most probably a combination of them could, he holds, bring about an actual crisis.[43] In contrast to the Marxian theory of crisis in capitalism, Habermas claims that the crises, endemic to advanced capitalism take place within the sub systems of the society. These crises are, at its core, steering the problems related to exchange relationships in the market. This can be seen as the resurrection of the Hegelian question of 'market plus the administration of justice'. The end result, he argues, is the tendency towards a legitimation crisis. But, the mutual dependence of the sub-systems brings about the internal transfer of the crisis tendencies.

The converged existence of political and economic system caused by the percolation of the instrumentalities of administration obliterates the laws of market. The political intervention of the state regulates the spontaneously working economic law and it results in the fall of profit. At the same time, the state is unable to overcome this economic condition. Instead, it can only mediate it. State interventions replaced the spontaneously working market mechanism and obliterated the specific conditions of liberal capitalism. State-regulated capitalism repoliticised the relations of production which, according to Habermas, increases the need for legitimation.[44]

Habermas reformulates the Marxian concepts of 'labour' and 'value', in the light of an interventionist state in advanced capitalism. Now, the state acquires

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[42] 'Habermas turns to a crisis theory in the 1970s is in response to both the militance of 1960s social movements and the economic crisis of 1970s; yet he never really attributes much of a role to social movements or struggles are factors of social change, and tends to engage in rather abstract theoretical analysis of crisis tendencies, rather than more concrete historical analysis.' Ibid, p.200
[43] Thomas Mc Carthy, *The Critical Theory of Jurgen Habermas*, Polity Press, Cambridge, 1978, p.359
[44] Jurgen Habermas, *LC*, op.cit. p. 36

diverse functions: it protects the private property and freedom of contract through the system of a civil law (by fixing the normal working day, anti-trust legislations and the stabilization of the value of currency) and it also provides with the inputs for the productions such as education, transportation, and communication. By explicating the role of the state as the provider of necessary inputs in the creation of productive labor, Habermas here tries to redefine the Marxian notion of surplus which is defined in terms of 'wage-labour relationship'.

Along with the process of production, the state in advance capitalist society has also to intervene in the process of reproduction by improving the use value of capital, regulation of taxes, enactment of business policies etc. Through the enactment of a system of legal code and necessary policies, state determines the operation of the law of value. With the market and complementary mechanisms, it performs a decisive role in precipitating the crisis tendencies exhibited by the economic system.

The question of legitimacy in a state regulated capitalist system is no longer centered on the working of market mechanism, but in turn it is associated with the process that comes under the political and administrative functions. In relation to the functions of the market, the state has a dual role to play; on the one hand, it functions as a market complementary mechanism, and, on the other it assumes the role of a market replacing mechanism – through the creation of surplus value. The state simultaneously facilitates and represents the market mechanism. Since it intervenes in the specific functions of the market mechanism, it obliges to act in order to mediate the class antagonism through the act of price setting. Thus the extension of economic activities of the state to the conflict ridden domain of the market, together with the limits of administrative planning to meet the organized special interests, lead to an economic crisis.

The crisis in the economic sphere is closely associated with the steering capacity of the administrative system. A deficit in administrative rationality will therefore intensify the crisis. A rationality deficit, according to Habermas, can be raised "...because contradictory steering imperatives, which cause the

unplanned and its nature-like development of an anarchistic commodity production and its crisis ridden growth, are then operative within the administrative system."[45] As a result, the state absorbs contradiction in its action; on the one hand, the state has to fulfill the role of a collective capitalist and, on the other, it has to consider the demand for elimination of the freedom of investment on the part of competing individual capitalists to carry forward a collective will. The spontaneous growth of capitalism is thus threatened by the expansion of planning capacity of the state and its antagonistic form of collective capitalist planning.

Adding to that, advanced capitalism is also threatened by the presence of certain foreign bodies such as the political patterns of evaluation on business decisions, the goal oriented professionalism or the labour oriented use value in the private sphere (concrete labor) and the presence of an inactive portion of population which receives income, but unable to reproduce themselves in the market (teachers, children, welfare recipients house wives etc.).[46] Along with these challenges, the contradictory steering performances by the members of administration challenge the system and social integration; hence the result is a rationality crisis.

With the repoliticisation of the class relationship, state reconstitutes the civil society; as a result, the class domination gets detached from the law of value. The public sector instead begins to play a role of the provider of surplus value. Therefore, syndromes of economic crisis move towards the administrative system. To overcome this tension, the state has to expand its areas of intervention to the hither to untouched 'socio-cultural system'. The administrative system in advance capitalist societies penetrates into the inner regions which were traditionally assigned to the private sphere. As a result, the state needs legitimation, which is according to Habermas, "...is a political orders' worthiness to be recognized."[47]

[45] Ibid, p.62
[46] Ibid, p.67, and David Held, (1980), op.cit. p293
[47] Jurgen Habermas, *Communication and the Evaluation of Society*, Heinemann, London, 1976, p.178

With the expansion of the purposive rational intervention of political system to the socio-cultural system, cultural affairs begin to fall into the arena of administrative planning. Hence, the crisis moves into socio-cultural system. The structures of the common meaning system, by which cultural traditions bind their individuals together, loose their power of integration. The conscious manipulation on the part of state destroys the cultural specificities of the lifeworld.

Legitimation crisis is a corollary of two contradictory conditions persistent in advanced capitalism. It emphasizes the need of the state to increase supplies of legislatives to protect mass loyalty for its new functions and to expand its machineries to encompass on the areas that were previously part of the domain of the civil society.[48] The incapability of the administrative system to meet conditions of the contradictory class interests, through its participatory planning process, contributes to the loss of mass loyalty to the state and its administrative interventions, or rather to the legitimation system itself.[49]

The concept of legitimacy in a normative perspective always seems to emulate certain normative values produced by the bourgeoisie during their quest for autonomy in the public sphere; that are justice, equality and personal freedom. The prevailing normative system, in a society, is assessed in terms of the dialogues take place between the state and its citizens. The failure of the state to invigorate these essential values results in the decline of legitimacy.

While analyzing the question of legitimation in detail, Habermas goes into the genesis of the meaning system prevailing in late capitalist society. He finds that the persisting crisis of meaning in these societies leads to another complex form of crisis: 'the motivation crisis'. The proper functioning of the economic

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[48]Philip K. Lawrence, op.cit.p.145

[49] It is important to know the difference between rationality crisis and legitimation crisis. The former is an output crisis arises when the state apparatus does not adequately steer the economic system, and it is a threat to system integration. The later is, on the contrary, an input crisis arises because of the lack of adequate level of mass loyalty and compliance while the steering imperatives are taken over from the economic system. Since it is a threat to social integration, it is called an identity crisis. For details, see, McCarthy, pp.366-367

and political sectors rests on individual's motivation to act in ways consistent with the system's imperatives and value, and the legitimacy of the system is also determined by these motivations. What is meant by this notion is that the cultural sphere also plays an important role in the functioning and the reproduction of the system.[50]

The motivation or the meaning generating function is contributed by the existing socio-cultural system. In an advanced capitalist society, two major tendencies basically provide meaning for social action that is 'civil privatism' and 'familial-vocational privatism'. Civil privatism is an attitude of not being participated in society's active will-formation. Habermas explains: "...civil privatism denoted an interest in the steering and maintenance performances of the administrative system but little participation in the legitimizing process, albeit participation appropriate to institutionally provided opportunities."[51] This is seen as a structurally bonded and pessimistic attitude towards the social will-formation. Habermas here tries to denote the lack of the bourgeois privateness, and the character of a life molded by the state and formal law.

The 'familial vocational privatism' is a positive counterpart to civil privatism because it requires what fills the empty spaces in the political culture.[52] It perpetuates the basic characteristics of bourgeois individualism such as privateness and competition. These values are transported from the sphere of traditional ethos such as education and childrening. This competitive system is mainly achievement oriented, but Habermas is pessimistic to the sustainability of this system because of the decline of the generation of necessary action motivating meanings. He explains, "...the socio-cultural system will not be able, in the long run, to reproduce the privatistic syndrome necessary for the continued existence of the system."[53]

The core bourgeois ideologies such as achievement principle, possessive individualism and the orientation to exchanging values are being destroyed by the changes take place within the advanced capitalist societies. The

[50] Douglas Kellner, op.cit, p.198
[51] Jurgen Habermas, *LC*, op.cit. p.75
[52] Philip K. Lawrence, op.cit. p.145
[53] Jurgen Habermas, *LC*, op cit, p.78

achievement ideology is altered by the demise of the privateness and the character of competitiveness,[54] which changes the nature and meaning inscribed on the objective structures. With the fall of private freedom and the notion of bourgeois equality, the ideology of possessive individualism, the core of bourgeois individualism, loses its supremacy in the society. Personal achievement is then no longer considered as an inevitable component of material life. The changing laws of the market and the individuals' dependency on grants and other benefits from state thus redefine the material basis of individual existence, and results in the complete violation of the law of value.

In advanced capitalism, Habermas indicates, three possible sources from which the necessary action motivating meanings can be produced. The three residues, he denotes, are: "...scientism, modern art and universalistic morality."[55] Among them Habermas gives pivotal emphasis on universal moral principles which, he argues, are discursively redeemable. The moral and legal codes developing alongside the material evolution of capitalism share one fundamental principle: universalism.[56] The principle of universalism has its origin from bourgeois privatism. The self legitimizing capacity of the free market is emerged out of the idea of equality of opportunity and private autonomy upheld by the bourgeois individuals in the civil society. This form is universally justifiable; because the foundation of this development is based on the principle of equality.

The political significance of Habermas' claim about the universal morality explicates that 'the moral self-development' of the individual can be regarded as the index of historical evolution of the normative structures of social systems. Thus the attainment of moral consciousness, to justify actions in the light of universal principles is achievable for all individuals.[57] But, in advanced capitalism, the ideal existence of these principles is undermined. Nevertheless, Habermas beholds the possibility of emancipation of the existing system through the reinvigoration of universal moral norms, as Lawrence also

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[54] For example, Habermas denotes that the market and the system of education have lost its individual oriented criteria to determine the value of the existence of the objective structures.

[55] Jurgen Habermas, *LC*, op.cit. p.84

[56] Philip K. Lawrence, op.cit. p.154

[57] Ibid, pp.152-153

remarks.[58] The redeemability of universal moral principles can be materialized through the practice of discursive will-formation. As Hohendahl argues, legitimation crisis demands the reinvigoration of a functioning public sphere in which through political discussions individual can exercise their autonomy in forming free will.[59] To overcome the existing crises and social contradictions in advanced capitalism, Habermas suggests a form of a new principle of organization, involving a principle of universalistic morality rooted in a system of 'participatory democracy providing the opportunity for discursive will-formation.'[60]

V. CONCLUDING REMARKS

Habermas argues for reinvigoration of the universal moral principles which provided with motivation for human emancipation through the exercise of free will of the bourgeois individuals in the domain of public sphere. He endeavors to instigate this practical or action motivating role played by the bourgeois individuals in the realm of public sphere. In advanced capitalism, wherein the state plays the central role in planning and administration, Habermas' theory envisages reordering the politico-administrative structure through the creation of a dynamic public sphere. A model of participatory democracy rooted in the process of discursive will formation to provide a space for individuals to exercise their free will or private autonomy is also one of the inevitable components.

Pursuing his predecessors at Frankfurt school, Habermas explores the possibility of a critical theory, aiming at human emancipation, by expounding an alternative perspective of the notion of human rationality as well as a theoretical encounter with the economic aspects of advanced capitalist system. His is an approach, following Marx in framing a critique of development of capitalism in the changed socio-political conditions and to articulate the possible crisis tendencies prevailing in it. It also opens up the possibility of social transformation through a process of participatory democratic will-

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[58] "...stabilize the moral identity at a point where there is correspondence between the official morality of the nation-state and the morality of individual citizens." Ibid, p.153
[59] Peter Uwe Hohendahl, op.cit, p. 114
[60] David Held, (1980), op.cit. p.295

formation. Even though his theory lacks an identifiable 'agent of social transformation,' it could surpass the level of pragmatic politics. But, with the introduction of the notion of a 'democracy based on law', Habermas begins to shift towards a pure pragmatic echelon.

CHAPTER II
LAW AS THE BASIS OF DEMOCRACY: A STUDY ON HABERMASIAN RECONSTRUCTIVE APPROCH TO LAW

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A CRITIQUE OF THE LIBERAL AND THE WELFARE STATE PARADIGMS OF LAW

CONSIDERING FACTS AND NORMS: EXAMINING MAJOR CONTRIBUTIONS TO LEGAL THEORY

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CHAPTER TWO

LAW AS THE BASIS OF DEMOCRACY: A STUDY ON HABERMASIAN RECONSTRUCTIVE APPROCH TO LAW

By considering plurality of interest positions, Habermas reconceptualizes modern society and offers a normative theory of democracy based on a discourse theory of law. Moving away from his early theoretical position based on the ideal notion of 'bourgeois public sphere' and theory of crises in state-capitalist system, Habermas in his later works tries to find out ideals within modern institutions existing in liberal democratic societies. In highly differentiated modern societies, social integration is one of the most imperative needs. Therefore, without negating the 'social facts of complexity', a theory of democracy should attempt to elevate certain ideal democratic norms. Theory of law in Habermas, therefore, functions to fill the gap existing in between these 'facts and norms'. In the changed social condition, this new theoretical turn necessitated him to reconsider certain key theoretical notions expounded in his early works.

Habermasian theory of bourgeois public sphere is seriously criticized by liberal, Marxist and feminist thinkers. Liberal critiques argue that Habermasian theory of bourgeois public sphere is both historically as well as systemically insufficient. From the liberal side, Wolfgang Jager, Peter Glotz and Niklas Luhmann challenge the ideal notion of bourgeoisie public sphere and its disintegration. Jager negates the concept of a powerful public opinion which directs parliamentary politics through the means of consensus. Instead, he argues that it is dominated by compromises between interests. Both Jager and Glotz take critical standpoints on the 'disintegration thesis'. By pursuing J.S. Mill, Tocqueville and Marx, Jager argues that the disintegration of the public sphere was not caused by the development of organized capitalism. Glotz denies the disintegration thesis and argues that it is the result of idealization of bourgeois public sphere and the empirically inadequate critique of mass society.[1]

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[1] Glotz argues that the notion of liberal public sphere is still basically intact and would function if literary intellectuals exploited the possibilities of modern mass communication. See Peter Uwe Hohendahl, "Criticality, public Sphere and culture: Jurgen Habermas and his Critics", *New German Critique*, No. 16, 1979, Pp.97-98. (Habermas in his later works comes closer to this argument).

Luhmann, from a 'systems theoretical' perspective, rejects the possibility of collective social function and public opinion in a society where specialized social systems exist. Therefore, public opinion depends on authority institutionalized in organizations such as parties, bureaucracies, interest groups etc. Luhmann rejects the foundation of enlightenment as well as the idea of legitimation. Enlightenment rationality, according to Luhmann's system theory, is a formal rationality only, and legitimation is an illusory concept.

From a Marxian perspective, Oskar Negt and Alexander Klug offer a critical analysis of Habermasian notion of bourgeois public sphere and attempt to provide an alternative to it. They argue that Habermasian ideal notion of bourgeois public sphere excludes the realm of production and explain as to how the domain of public sphere assumes contradictory values and thereby not proceed with value consensus or synthesis. The system is therefore unstable and, in advanced capitalism, the only potential alternative is a proletariat public sphere.[2] Habermas answers to these critiques, by elucidating his theory of crises prevalent in advanced capitalist societies. He denies the idea of an alternative public sphere as well as the possibility of a social revolution in an advanced capitalist society where state has already appropriated possible economic crises.

Nancy Fraser, Mary P. Ryan and Geoff Eley analyze the Habermasian ideal notion of bourgeois public sphere and explore as to how far his model has potential enough to make an inclusive democracy possible in western plural societies. Habermas is criticized for failing to consider the intervention and articulation of new social identities and 'new forms of nationalist political addresses.'[3] From the feminist point of view, Fraser offers four major criticisms following Habermas' notion of the liberal model of bourgeois public sphere. Initially she stresses the bracketing of the status differentials *as if* they were social equals and thus ignores social inequality. But, she argues that social equality is a necessary condition for participatory democracy. Secondly, the comprehensive model of bourgeois public sphere fails to see the parallel discursive arenas created by the 'subaltern counterpublics', which are opposite to as well as critical of the dominant model. Thirdly, the bourgeois public sphere restricts the matters of deliberation on the 'common good'; and

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[2] The goal of the proletarian public sphere is for the masses as working people (not as a party) to constitute their own experience; in other words, for them to gain an autonomous sphere in which they can formulate their own needs. Ibid, p.107

[3] Geoffe Eley, Nations, Publics and Political Cultures: Placing Habermas in the Nineteenth Century, in *Habermas and the public sphere*, (ed), Craig Calhoun, MIT Press, Cambridge,1992, p. 305

in such a condition private interests and issues are always ruled out, and, finally; Fraser thus argues that the sharp division between the state and civil society only promotes laissez-fair capitalism.[4]

In response to these critiques, Habermas accepts the limitation of his ideal notion of public sphere and attempts to revise it in accordance with the changed socio-political conditions. He acknowledges the existence of plurality of publics, apart from the bourgeoisie model, and accepts the importance of those publics in forming a possible form of democracy in complex societies. Despite the fact that the unprivileged men and women are excluded from the dominant public sphere, Habermas argues that "...bourgeois publicness, in contrast, is articulated in discourse that provided areas of common ground not only for the labor movements but also for the excluded other that is the feminist movement."[5] The point Habermas makes is: these tensions endemic to the liberal public sphere must be seen as a potential condition for its self-transformation.

Responding to the question of social plurality, Habermas moves away from the Hegelian and Marxian concept of social totality and rejects the holistic concept of society and also admits that the opinion and will formed in the bourgeois public sphere is the will of the majority only. The decline of the bourgeois public sphere is depicted as the transformation of 'the culture debating public into a culture consuming public'. While reconsidering the notion in the light of a plural society, Habermas makes a shift from Adorner's theory of mass culture and takes hold on the resisting power and critical potential of internally differentiated mass public.

In summary, Habermas forsakes the philosophy of consciousness as well as the theory of 'macro subject of history'. Hence, the realm of civil society is rediscovered as the domain of associations, movements and organizations, wherein the private life spheres of individuals acquire its public character. It is no longer a sphere of market forces, as seen in Hegel and Marx. By considering the plurality of publics in civil society, Habermas replaces the theory of subject with a theory of intersubjectivity, and formulates a new

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[4] Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy", in *Habermas and the public sphere*, (ed), Craig Calhoun, MIT Press, Cambridge, 1992, pp.114-115

[5] Jurgen Habermas, "Further Reflections on the Public Sphere", in *Habermas and the public sphere*, (ed), Craig Calhoun, MIT Press, Cambridge, 1992, p. 429

theory of democracy on the basis of discourse ethics in which all the possibly affected should be included in the process of discursive will-formation aimed at mutual understanding between the actors. The theory of communicative action is an endeavor to provide a theoretical pedestal for the new model.

I. THEORY OF COMMUNICATIVE ACTION: A TURN TO PRAGMATISM

Habermas formulates the theory of intersubjectivity in the background of the 'linguistic turn'[6] in critical social theory. As a result of this theoretical turn, the philosophy of consciousness is transformed into the philosophy of language. Language, for Habermas, "...is a medium of communication that severs understanding, whereas actors, in coming to an understanding with one another so as to coordinate their actions, pursue their particular aims."[7] The process of action coordination comes out of rational argumentation oriented towards mutual understanding between the 'speaking and acting subjects'.

Habermas conceives 'rationality' in terms of its two modes of existence that shape knowledge to guide action: one is cognitive instrumental and the other is communicative.[8] Communicative rationality is inherent in social practices in the form of interpersonal linguistic communication aiming at mutual understanding pertaining to the matters of common interests. The concept of communicative rationality, according to Habermas, "...carries with its connotations based ultimately on the central experience of the unconstrained, unifying, consensus bringing force of argumentative speech, in which different participants overcome their merely subjective views and, owing to the mutuality of rationally motivated conviction, assumed themselves of both the unity of the objective world and the intersubjectivity of their lifeworld."[9] Through a 'theory of speech act'[10]

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[6] The linguistic turn in philosophy is marked by the theory of 'language game' propounded by Wittgenstein .Later, for many, consciousness is described as a linguistically organized one and is only accusable in and through language. David Held, *Introduction to Critical Theory: Horkheimer to Habermas*, Polity Press, Cambridge, 1980, p.131

[7] Jurgen Habermas, *The Theory of Communicative Action Volume 1: Reason and the Rationalisation of Society*, Heinemann, London, 1984, p.101 (here after *TCA Vol.1*)

[8] Cognitive instrumental rationality is oriented towards achieving private goals. It has two forms of action: instrumental and strategic. Instrumental action is directed towards achieving given ends by means of technical rules which are based on empirical knowledge. This form of action is revealed through labor. The later is guided by strategies to achieve given ends through the relation of appropriate means in order to influence the decisions of other actors. This form of action lies in relations of domination. See Julius Sensat, Jr., *Habermas and Marxism: An Appraisal*, Sage Publication, Beverly Hills, London, 1979, p.18, and Mathieu Deflem, *Habermas, Law and Modernity*, Sage, London, 1996, p.2

[9] Jurgen Habermas, *TCA Vol.1*, p.10

[10] The theory of speech act is developed by Austin and Searle. Later Habermas modifies these theories on the basis of his theory of communicative action. Austin distinguishes three kinds of acts, namely; locutionary,

Habermas offers a synthesis of language and action. In the process of speech acts different validity claims are raised which in turn can be redeemed through rational communicative action. The intersubjectively recognized validity claims bring about mutual understanding on the basis of consensual norms.

In different modes of communication, validity claims acquire specific forms. In communicative action actors raise claims regarding objective, social and subjective worlds of reality.[11] In discourses on the world of external nature (includes events and circumstances) actors raise an 'objective claim to the truth'. Towards the social world (includes community of people) actors raise 'a normative claim to rightness'. And in relation to the world of internal nature or the inner world of subjectivity, expressive and evaluative claims to truthfulness and sincerity are raised.[12] Habermas states that, similarly that of empirical statements, moral statements can also raise truth claims which can be redeemed through rational communicative discourses.

While exposing the rational character of normative and subjective validity claims, Habermas challenges positivism and redefines rationality in terms of the lifeworld-context of every day life. The 'post-metaphysical reason'[13], expounded by Habermas, endeavors to define the aspect of 'critique' within a pragmatic discursive context with a sheer absence of an identified historical subject. The pragmatic turn in Habermasian theory is to be

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illocutionary and perlocutionary acts. "Through locutionary acts speaker expresses states of affairs; he says something. Through illocutionary acts the speaker performs an action in saying something. The illocutionary role establishes the mode of sentence ("Mp") employed as a statement, promise, command, avowal, or the like...finally through perlocutionary acts the speaker produces an effect upon the hearer...he brings out something in the world". By developing five types of speech acts, Searle sharpens Austin's theory. Searle classifies speech acts; assertive, commissive, directive, declarative and expressive. He "introduces assertive (constative, representative) speech acts as well defined classes. Then he takes over from Austin the class of commissive and contrasts these with the derivatives. Whereas the former the speaker commits himself to an action, with the later he tries to get the hearer to carry out a certain action. Among the derivatives Sarele counts order, command, and request, invite, as well as, pray, and entreat. He does not discriminate here between normatively authorized imperatives- such as petitions, reprimand, order, and the like- and simple imperatives, that are nonautharised expressions of the will. Habermas refers J. L Austin, *How to do Things with Words*, Oxford, 1962, and, J Sarele, 'A Taxonomy of Illocutionary Acts', in *Expressions and Meanings*, Cambridge, 1979. See Habermas, *TCA Vol.1* , pp, 288-299, 320

[11] The objective world is described as "the totality of all entities about which true statements are possible." The social world refers to the totality of all legitimately regulated interpersonal relations. And the subjective world is explained as "the totality of the experiences of the speaker to which he has privileged access." See *TCA Vol.1*, p.100, and Matheu Deflam, op.cit, p.3

[12] These claims are addressed in respective discourses as well: 'theoretical discourse on truth; moral- practical discourse on normative rightness; and aesthetic and therapeutic critique on authority and sincerity". See Mathieu Deflem, op.cit, p.3, and David Held, op.cit, pp.332-335

[13] The post-metaphysical condition refers to a rational turn from religion and metaphysical doctrines, the turn now centered on morality and non metaphysical premises.

considered as a reconstruction of critical theory. This new turn marks a shift from the approaches of early Frankfurt School thinkers. Horkheimer considers pragmatism as one that undermines objective and critical reason. In his analysis, pragmatism 'represents a positive apologia for capitalism' where subjective reason is undermined. Since it is defined in terms of its instrumental characteristics, expression of critique is not possible.[14]

The proponents of pragmatism consider it as a creative human action in which moral and other forms of truth claims are redeemed through a social and linguistic approach of the philosophy of consciousness.[15] By turning attention to pragmatism and also to hermeneutics, Habermas explicates "...pragmatism and hermeneutics oust the traditional notion of the solitary subject that confronts objects and becomes reflexive only by turning itself into an object. In its place they put an idea of cognition that is mediated by language and linked to action."[16] By considering this turn in Habermasian theory, Cook argues that, Ray quotes, "...it is reasonable to view that it focuses on the *use* of language (on speech act rather than semantics) and develops a decentered view of the world in which actors take up different attitudes to the world- objectivating, normative, and expressive corresponding to objective, social and subjective worlds."[17] Pragmatism thus conceives politics as a phenomenon relevant only to overcome crises specific to contexts. Problems arises from complex societies now seek pragmatic solutions. Habermas identifies the process of internal colonization as the central problem challenging social integration in contemporary liberal societies.

II. THEORY OF SYSTEM AND LIFEWORLD: A CRITICAL APPROACH TO MODERN SOCIETY

In order to analyze modern society, Habermas elaborates his two dimensional model, based on the 'system' and the 'lifeworld'. Modern society is characterized by a split that took

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[14]Larry Ray, 'Pragmatism and Critical Theory', *European Journal of Social Theory*, Sage Publication, London, 2004, pp. 307-321, here, p.310

[15] Ray explains that "...philosophy begins with persons living in the world, which entails the capacity for reason, common experience and mutual understanding through recognition, interpretation and action. Attempting to overcome both Cartesian and Kantian 'metaphysics', pragmatism is committed to an anti-reductionist philosophy in which experience is the site of truth and knowledge and there are no transcendental truths. This, it rejects Cartesian radical doubt and the subject-object dichotomy on which this is based, along with Kantian philosophy of consciousness and postulates about the unknowable thing-in-itself." Ibid, pp. 307-308

[16] Jurgen Habermas, *Moral Consciousness and Communicative Action*, Polity Press, Cambridge, 1990, p.9

[17] Larry Ray, op.cit, p. 313, he refers Cook. M, *Language and Reason: A Study in Habermas's Pragmatics*, MIT Press, Cambridge, 1997

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place between its material and symbolic reproductive functions. As a result, at the former level, two systemically integrated institutions are created; the economy and the political system, run by money and power respectively. At the level of the lifeworld, two socially integrated institutions are formed: the nuclear family and the political public sphere governed by intersubjectively shared values and norms. Society's material reproduction transpires through the process of social labor, and its social reproduction takes place through the process of socialization. Habermas uses 'system' and 'lifeworld' as concepts of social orders that differ in their mechanisms of social integration, that is, in the intermeshing of interventions.[18]

Social integration is differentiated on the basis of socially and systemically integrated spheres of action. The lifeworld is a linguistically constituted realm where meaning patterns and cultural knowledges are preserved through a process of communicative action. The 'rationalization of the lifeworld' is possible with the reproduction of its three structural components consisting of culture, society and personality. At the level of culture, reproduction takes place through the interpersonal transformation of consensually shared norms. At the level of society, through the intersubjectively shared norms, human relations are organized in a legitimate manner, and finally, at the level of personality, the process of socialization fosters the interactive capacities of persons.[19] The lifeworld is, thus, formed as a normative realm where individuals relate each other through intersubjectively shared values and norms.

The system, in the course of history, has uncoupled from the lifeworld and functions independently through the steering medias of money and power. Contrary to the lifeworld, systemic rationality is strategic and instrumental. Therefore, its penetration results in the distortion of the communicative potentialities immanent in the lifeworld. The instrumental and strategic actions permeate into social relations of everyday life. The process of systemic penetration into the lifeworld is called as 'the internal colonization of the lifeworld'. As a result, society's internal conditions and organizational patterns get transformed into new dimensions. The demands of lifeworld, thus, fall prey to the control of bureaucratic and monetary organizations.

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[18] Jurgen Habermas, *Justification and Application*, Polity Press, Cambridge, 1995, p.166
[19] Mathieu Deflem, op.cit, p.4

It is through the medium of law that the system regulates the functions of society. After the uncoupling of the system and the lifeworld, the functions of institutionalized law turned in favor of systemic needs. On the one hand, property and contract laws began to regulate the monetary exchange relations, and on the other, power medium of political system became bureaucratized. Systemic intervention resulted in the bifurcation of law into public and private laws. Modern law functions as a medium through which the system penetrates into the lifeworld; accordingly, the lifeworld is colonized internally by means of law. This, according to Habermas, is a process of 'juridification.'[20] Therefore, in the changed socio-political condition, law fails to guarantee social integration.

Habermas observes that society has entered into a new phase where politics of labour movement is replaced by politics of New Social Movements (here after NSMs). This shift in politics offers a potential challenge to the Marxian understanding of revolutionary agent in social change. He goes on to argue that labor movements are already incorporated into political system by means of labour parties and trade unions. Thus in welfare states, the relationship between capital and labour acquires new legal dimensions. Contrary to Marxian explanations, in the changed social condition, labour struggles are accounted as workers' fight for legal rights, which can be resolved through legal means. Along with this, welfare states are seemed to be capable of meeting the demands raised by labour parties and trade unions by means of 'compensations' and 'compromises'.

NSMs are post 1960 phenomena comprising of women's movement, movements of radical ecologists, peace activists, gays and lesbians, local autonomy groups and various other counter cultural movements.[21] Instead of raising the demand of redistribution, NSMs focus on 'the grammar of forms of life'. The 'self-legitimizing radicalism' of these movements rejects the idea of 'social totality', explicated by modern revolutionary theories. Habermas examines NSMs in the light of the thesis of 'internal colonization' of the lifeworld by system. The system penetrates into the lifeworld mainly in the form of bureaucratic and legal regulations as well as in the form of political and privatized economic interventions.

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[20] Habermas takes the concept of 'juridification' from Kirchheimer, to him; there were four ways of juridification, characterizing the bourgeoisie state, the constitutional state and the welfare state respectively. See David M Rasmussen, *Reading Habermas*, Basil Blackwell, Cambridge, 1990, p.82

[21] Stephen K. White, *Recent Works of Jurgen Habermas*, Polity Press, Cambridge,1988, p.123

This process imposes 'functional rationality' on lifeworld interactions. As a result, new arenas of conflicts are created centered on culture, identity and lifestyle.[22]

Accordingly, in modern societies, the prevailing law is insufficient to justify different modes of social interactions controlled by the 'system' or the steering media of money and power or market economy and administrative bureaucracy. The corollary effect of this development is the decline of the lifeworld and its specific values. Habermas maintains that law is the only possible and legitimate means for society-wide normative integration; a hinge between the system and the lifeworld. Normative claims can only be expressed through the language of law, and, therefore it performs the role of a 'transformer' that protects communication network of the lifeworld and guarantees social integration.

Habermas deflects from his early theoretical alternative in *Legitimation Crisis*, which advocated, as Stephen K White points out, the reemergence of a critical public sphere and the possibility for success of critical politics.[23] Contrary to that, now critique is defined within a procedurally regulated pragmatic discursive context. Here, he rather focuses on normative self-understanding of internally differentiated societies through discourses in the political public sphere. Habermasian theory conceives the question of law mainly in two ways: firstly, it focuses on the aspect of 'juridification' in the process of internal colonization of the lifeworld. Secondly, it deals with the question of law on the basis of discourse ethics. Accordingly, Habermas reformulates the relationship between law and morality.

Unlike his earlier position, Habermas now accepts the inevitability of an administrative state with its bureaucracy, large corporate organizations and dominant mass media. He explores possibilities for restoring private autonomy without preventing factual equality provided by welfare state. Adopting a reflexive approach, Habermas endeavors to bind the foremost questions of the nineteenth century formal law and twentieth century material law.[24] He wants to enliven the 'freedom preserving' character of the bourgeois formal law

[22] Gemma Edwards, 'Habermas and Social Movements: What's New?, in, *After Habermas: New Perspectives on the Public Sphere*, (ed), Nick Crossley and John Michel Roberts, Blackwell Publishing/ The Sociological Review, Oxford, 2004, p.116
[23] Stephen K White, op. cit. pp. 125-126
[24] Nineteenth century formal law employed and preserved the separation of powers in order to fix limits to state interference in society. Twentieth century material law realized specific policy programmes through

and the 'equality-ensuring' quality of material law. Hence, Habermas attempts to propound a new paradigm of law by which he binds certain relevant aspects exclusively affiliated to the liberal and the welfarist legal paradigms.

III. A CRITIQUE OF THE LIBERAL AND THE WELFARE STATE PARADIGMS OF LAW

In order to propound a new paradigm of law, Habermas examines two existing ones: the liberal and the welfare state paradigms. To protect private interests in the domain of a self-regulating market economy, the liberal paradigm emphasizes the primacy of individual's private autonomy. The private law therefore safeguards its legal subjects primarily as participants in the market. Legitimacy of law from a liberal point of view is guaranteed on the basis of 'principle of equality before law'. From a different perspective, within the liberal model, market has a spontaneous development that limits the scope of individuals from reshaping the working of the system.[25] He criticizes the liberal paradigm by explicating its failure to overcome the threats posed by 'factual equality'. The problem pertinent to liberal formal law, from social welfare point of view, is the internal contradiction that exists in between legal and factual equality. While implementing basic individual rights, liberal law applies same rights differentially to different subjects. The sharp line existing between the private and the public, in the liberal bourgeois sphere, makes a clear demarcation between the realm of rights and that of democratic participation.

Contrary to the liberal model, social welfarism puts forward the idea of legal equality, which offers opportunities to make use of legal powers to attain material equality. With the development of welfare state, society looses this 'quasi- natural' character and the spontaneous development of market society. The economic domain therefore comes under the direct domination of state through the process of planning and bureaucratic interventions. In contrast to the liberal model, social welfare view regulates private autonomy and extols political autonomy. Instead of providing individual liberty, welfare state prioritizes distribution of justice in social life by providing grants and aids. Under the steering mechanisms of the state, the autonomous individuals become 'mere subjects'. As Habermas explains, "...from this point of view, the state and private actors are involved in

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state's extension of its administrative arms into society. See John P. McCormick, "Three ways of Thinking "Critically" about Law", *American Political science Review*, Vol. 93, no.2, Jan. 1999, p.419
[25] Jurgen Habermas, "Paradigms of law", *Cardozo Law Review*, Vol.17, 1996, p.775

a zero-sum game- what the one gains in competence the other loses."[26] Individual's equal liberty and justice, proclaimed by liberalism, become a category of discretion of state's superior political will.

In the liberal public sphere, rather within the civil society, the economic society is institutionalized in the form of private law. It provides social justice to legal subjects who could exercise their free will or private autonomy within a spontaneously working market system. The private law was legitimate because of its legitimate origin from the bourgeois public sphere. Freedom of acquiring private property and the capacity to participate in the economic activities in towns bring about equal justice. With the change taking place in the society, the whole notion of legality is defined differently under the same system of basic rights. As a result, in a welfarist model, new basic rights introduced for the equal distribution of socially produced wealth, lead to the decline of the liberal notion of equality and liberty in the domain of civil society. Habermas argues, as a result, the 'citizen' becomes 'client' under the welfare state. Instead of exercising their free will and taking risk, private individuals become dependent on government grants and aids.[27] The shift from 'legal citizen' to 'client' is to be seen as a shift in the liberal thought itself.

IV. CONSIDERING FACTS AND NORMS: EXAMINING MAJOR CONTRIBUTIONS TO LEGAL THEORY

There are two streams of theoretical explorations that problematize the question of 'facts and norms' in law. One way of looking at this issue is informed by empirical and factual side, and the other is guided by normative positions. Regarding the empirical-factual side, Weber's theory of capitalist development provides significant insights. Weber saw modernization as a continuation of world-historical development. Weber analyses, with the emergence of capitalism, the distinct cultural value spheres were separated from the developing sub-systems by the operation of purposive rational action. Weber characterizes its upshots, as Habermas puts: "...the first component is represented in the thesis of a loss of meaning, the second in the thesis of a loss of freedom."[28] As a result, the cultural sphere transforms into an arena of differentiated values which are abstract in nature. It destroys the meaning-giving unity of religious world views. Therefore, society becomes a centre of

[26] Ibid, p.775
[27] Jurgen Habermas, "Further Reflections on the Public Sphere", p.434
[28] Jurgen Habermas, *TCA Vol.1*, op.cit, p.244

conflicting cultural values and world views, and reason begins to split itself into plurality of value spheres and destroys its own universality.[29] Conceptualizing this development as an essential challenge to individuals, Weber endeavours to theorize the development as an institutionalization of purposive rational action, in which economy and state institutionalized in a cognitive-instrumental rational basis.

Weber analyzes modern law that developed parallel with state and administration.[30] In the course of its development, modern law separates from all kinds of moral inclinations. Weber termed this development as 'negative' as it is proceeding towards the 'iron cage.'[31] Habermas notes that Weber's legal positivism negates the concept of 'rational justification' that arose with modern natural law. The main problem pertaining to law, in this situation, is to answer the question as to how can legality claim legitimacy? He criticizes the procedural legitimacy, explained by Weber and later elaborated by Schmitt and Luhmann, by arguing that "...the belief in legality can produce legitimacy only if we already presuppose the legitimacy of the legal order that lays down what is legal. There is no way out of this circle."[32] This procedural legitimacy therefore upholds the command of the authority that enacts rules.[33]

Habermasian project is to reconstruct the mutual relationship of 'facticity' and 'validity', embedded in modern law, which has always been treated separately. The tradition of treating legitimacy on the basis of factual and empirical notions comes from Weberian theory and later it is pursued by Carl Schmitt and Niklas Luhmann. The normatively biased notion of subjective recognition of law's legitimacy is theoretically propounded by Kelsen and John Rawls.

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[29] Weber sees the sin of the age in the return of a new polytheism, in which the struggle among the gods takes on the de-personified, objectified form of an antagonism among irreducible orders of value and life. The rationalized world has become meaningless. Ibid. pp.246-247

[30] The essential features of rationality, for Weber, are based on its systemic character. He treats modern law as a professionalized one and, therefore, bound to formal procedures framed by specialized jurists. see *TCA Vol.1* , p. 256

[31] Klaus Eder, "Critique of Habermas's Contribution to the Sociology of Law", *Law & Society Review*, Vol. 22. no. 5, 1988, p.934

[32] Jurgen Habermas, *TCA Vol.1*, op.cit p.265

[33] Habermas explicates that, in '*Economy and Society*' Weber says, "...legality can be regarded as legitimate in virtue of (i) voluntary agreement among interested parties, (ii) imposition by an authority which is held to be legitimate and therefore meets with compliance." Habermas criticizes these points "...that in neither case is it legally as such produces legitimation, but either (i) rational agreement that already underlies the legal order, or (ii) the *otherwise* legitimized authority of those who impose the legal order. The transition between the 'agreed upon' and 'imposed' order are fluid." The reduction of legitimacy to legality confines it into a procedural problem." Ibid, p.265

By examining the development of liberalism, Carl Schmitt argues that liberals, for protecting their private interest, always try to eliminate arbitrary directions from judiciary. But, with the emergence of welfare state, administrative interventions increased, and through social policies society comes under the control of bureaucratic administrators and judicial officers. Hence, liberal formal law acquires new material status. Schmitt argues that the social welfare state is a weakened state and therefore it cannot carry its own burden through extensive interventions. Schmitt's 'decisionist' alternative to liberalism explicates that, as Macormick says, only a person, not a rule within a larger system, can determine how to enforce or realize the law. Therefore, '...Schmitt sacrificed the law to the state.'[34]

Critical Legal Studies (here after CLS) argues that legal liberalism renders formal rule of law that offers a conservative procedure only. For Tushnet and Duncan Kennedy, this formal law in fact protects the existing social hierarchy, and, therefore, preserves social inequality intact. They go on to argue that liberal law is an ideological instrument in the hands of judicial and state administers. Both Schmitt and CLS criticize the aspect of legal formalism with two different intensions. The issue, here, is centered on the 'indeterminacy of the rule of law'. To expose it, CLS argues that, the decisions made by judges are blindly pursuing the conservative formal law; without any consistency regarding its application.[35] Having conceived of different theoretical intensions Schmitt emphasizes on personal quality of judges in decision making.

In contrast to Schmitt, Kelsen proposes a normative approach, according to which, the "... individual entitlements are not just autonomised by the will of someone with the power to command, but possess normative validity: legal norms establish prescriptions and permissions having the character of an 'ought'."[36] But, Habermas illustrates that the process of law making is through a set of previously established procedures and therefore it lacks necessary interactions with subjectively normative imperatives. Hence, this model also has a 'decisionist' character.

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[34] John P. McCormick, op.cit. p.417

[35] Judgment of law is affected, on the one hand, by political and economic influence, and on the other, by self interests and personal prejudices of judges. See McCormick, Pp.417-421, and Jurgen Habermas, *TCA. Vol.1*, pp. 265-266

[36] Jurgen Habermas, *Between Facts and Norms: A Contribution to Discourse Theory of Law and Democracy*, MIT Press, Cambridge, 1998, p.86 (here after *BFN*)

By founding a normative theory of justice, Rawls offers a procedural understanding of political justice aiming at self-stabilization promoted by 'just' institutions; these institutions, he assumes, were already in existence in liberal democratic societies. Under these conditions, a sense of justice grounds the desire to act justly. Habermas argues that Rawlsian theory is incapable of solving the tensions between claims to legitimacy of law and social facticity, because his theory ignores the factual side. And in deep theoretical sense, Rawlsian theory seems to be a monological one; therefore it negates necessary democratic participation.[37]

Habermas acknowledges Dworkin's theory as a 'deontological approach' to law, under which contractual adjudication must establish 'what is right' and therefore ensures its legitimacy in plural societies. The establishment of 'deontological principles' upholds the 'right' of each persons with equal respect and dignity, and it also offers integrity through considering relevant judicial interpretations in the past.[38] In opposition to legal positivism, in the light of recognized principles, Dworkin upholds the importance of rights that receive legitimacy in accordance with their content, not with formal procedures. Dworkin's legal theory is seen as a historically developed form of practical reason. To achieve collective goals, morality addresses this reason as an articulated form of the principle of equal concern and respect for each person. By expounding a legal theory, Dworkin reserves the decision making power, regarding moral principles, to "...a judge whose intellectual capacities would compare to the physical strength of Hercules."[39]

Habermas claims that the real tensions prevailing in modern liberal democracies arise from the impossibility of solving lifeworld problems through the means of money and power.[40] In order to solve the tension between facticity and validity prevailing in legal theory, Habermas attempts to erase the gap between these above discussed traditions by formulating 'discourse theory of law'. Hence, he detaches from Weber and tries to relate morality to law. He denies Weberian formalistic description of law and redefines the notion of legal legitimacy. In contrast to a 'negative' approach to the development of modern law, He offers a pessimistic approach; the unfolding of modernity with normative forms of

[37] Ibid, pp.56-62
[38] Michel Rosenfeld, "Law as Discourse: Bridging the Gap Between Democracy and Rights", *Harvard law Review*, Vol. 108, 1995, p. 1187
[39] Jurgen Habermas, *BFN*, op, cit, p.212
[40] William Outhwait, *Habermas: A Critical Introduction*, Polity Press, Cambridge, 1994, p.117

understanding. By sharing the argument of Dworkin, he claims that the 'indeterminacy thesis' on liberal democratic law is invalid. For, it can only be seen as the limitation of judges, while interpreting law. He goes on to argue that CLS confuses legal rules with legal procedures.[41] Differing from the moral theory of Rawls, Habermas endeavors to formulate a theory of democracy based on law, which is 'dialogical' and therefore rooted in discursive practices. He rejects the notion of 'judge' in Dworkin's theory in sofar as it attributes superhuman character to judge. Moreover, to him, it is monological in character too. In the normative approach of Kelsen, Habermas observes the absence of due engagement with factual elements and he wants to treat both factual and normative aspects together. Therefore, through discourse ethics, he tries to reconcile the tension between legal and factual equality.[42] The fundamental rule of discourse ethics as he elaborates is: "**D**: just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse."[43]

Discourse ethics, developed by Habermas, is considered as an attempt to change the monological ethics of Kant into a dialogical one. He treats the 'unbridgeable gap' between the 'intelligible' and the 'empirical' in Kant as a tension prevails in 'everyday communication' in the form of 'factual force of counterfactual presuppositions'. Discourse ethics offers an intersubjective deliberative practice in the domain of a public sphere. Therefore, Habermas overcomes the limitation of Kantian monological approach, and attests what Husserl points out: individual treats his maxims of action 'in the loneliness of his soul.'[44] Discourse ethics also tries to reconstruct the Kantian notion of 'autonomy', which is described as subjective as well as monological, into an intersubjective form. Hence, actualization of freedom in the matter of self assertion extends to the freedom of all in the same respect.

Within the conflicting domain of plural societies, the notion of equality is questioned by the dialectic between legal and actual freedom of the addressees of law. Legal equality, on the one hand, is provided by the existing liberal formal law that propounds equal freedom within the legal framework. Actual equality, on the other, is determined by the social

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[41] Jurgen Habermas, *BFN*, op, cit, p.217
[42] Legal equality means similar treatment of similar cases, factual equality vests on consideration of only relevant identities and relevant differences in law making. See Rosenfild, op. cit, p.1171
[43] Jurgen Habermas, *BFN*, op, cit, p.107
[44] Jurgen Habermas, *Moral Consciousness and Communicative Action*, Polity Press, Cambridge, 1990, p.203

effects of legal regulations, the actually existing social inequality. The existing social system is incapable of or inadequate to address this social contradiction. Habermas' discourse theory of law emphasizes the procedural aspect of legitimate lawmaking through the exercise of communicative power of neglected voices in conflict ridden societies, wherein dominant structures enjoy the benefit of illegitimate use of power. The participation of all the affected persons in the process of discursive law making process is aimed at the extension of their fundamental rights.[45] Habermas explains: "...rights can empower both men and women to shape their own lives automatically only to the extent that these rights also facilitate equal participation in the process of civic self determination, because only the effected person themselves can clarify the 'relevant aspects'-the standard and criteria-that define equally and inequally for a given matter" "...accordingly private autonomy cannot be secured without simultaneously promoting public autonomy."[46]

V. CONSIDERING PLURALISM: A RECONSTRUCTIVE APPROACH TO MODERN LAW

Plural societies show two possible tendencies. Firstly: there are contradictory values and conflicting interests prevail in a historically evolved social condition; therefore the prominent value or interest has always the chance to dominate other values - the first order value preference. Secondly: the condition rests on mutual existence of conflicting values based on mutual receptiveness of values and tendency of mutual inclusion- second order value preference.[47] Taking these possible conditions preferentially, Habermasian theory is compatible with the second order value pluralism. An ideal discursive practice is possible only when the first condition of value performance respects the second order value performance. His theory relays on two basic stand points: one is pluralism's need for integration, and the other is, at a particular vantage point, the discourse method's demand for more inclusion. Discourse model is competent to bring about a reflexive equilibrium only if the first assumption is proved right.

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[45] Habermas gives the example of liberal feminism, he says, depends upon the welfarist-liberal notion that actually prevents the chance of self-determination. For example the protective norms pertaining to pregnancy and maternity, or to custody rights and divorce case, such norms and rights cluster around the clear biological differences connected with reproduction. In welfare state context the legal provision of pregnancy and maternity have only increased the risk of women losing their jobs. And on the other, the liberal politics has included women in the society but has denied the chance of emancipation. See Habermas, "Paradigms of Law", op. cit. pp. 780-784

[46] Jurgen Habermas, *BFN*, op.cit, pp, 284-287

[47] Michel Rosenfeld, op.cit, pp. 1180-1181

Theory of discourse is based on 'post-traditional' human identity, apart from religious and metaphysical interpretations. Culture and people are now defined on the basis of history and its interpretation. Defining identity, within the structures of a pluralistic society, invites serious ethical and moral questions. For, collective consciousness has to be developed from a fragile, dynamic and fragmented public consciousness. In such a social condition, self-understanding and self-assertion become preconditions of politics of identities. At this point, normative values gain importance in attaining collective consciousness. While endeavoring to mediate the historically derived status of individualism in personal life and pluralism in collective form of life, the aspect of universalism assumes an imperative role in Habermas. This potential condition, studded with plurality of values, combines both private and civic life of individuals and necessitates the need for justification. Therefore, in such a society, it is essential to protect private and public autonomy of individuals. Discourse theory emphasizes self-legislating character of rational individuals; accordingly, 'the addressees of law are simultaneously the authors of law'. The discursive process of opinion and will-formation is thus legally institutionalized; wherein popular sovereignty plays a binding role. Before going on to the details of the discourse theory of law, it is important to elucidate certain core characteristics of modern positive law which Habermas wants to reconstruct.

Modern legal orders are distinguished, on the one hand, by the facticity of their enactment and their enforcement by the state (by virtue of their positive and coercive character) and on the other by their claim to validity. This tension resides in several levels, but on each level we find a social reality on the one side and a claim for reason which is sometimes belied by the reality of the other (between law and social reality). Habermas begins with the assumption that in modern, pluralistic societies, social norms can derive their validity only from reason and will of those whose decisions and interactions are supposed to be bound by them. In such a situation, it is the duty of law to satisfy the conditions of social integration without means of coercion. But modern law lacks this ideal condition and functions on the basis of a legitimacy that is derived from justification and application of positive law. Habermas expounds;

> "…modern law is formed by a system of norms that are coercive, positive and so it is claimed, freedom guaranteeing. The formal properties of coercion and positivity are associated with the claim to legitimacy: the fact that norms backed by the threat of state sanction stem from the challengeable decision of a political law giver is

linked with the expectation that these norms guarantee the autonomy of all legal persons equally. This expectation of legitimacy is intertwined with the facticity of making and enforcing law. This connection in turn mirrored in the ambivalent mode of legal validity."[48]

In this sense, modern law is positivized into a functional technical system that seems to have suspended moral deliberation. But, Habermas argues that modern law, inspite of being rationalized into a completely functional entity, remains in need of moral justification in terms of a practical discourse on the basis of rightness of norms. In order to have a proper understanding of legal order, citizens should participate in the process of discursive law making.[49]

VI. RECONSDERING THE NOTIONS OF AUTONOMY, MORALITY AND LAW

According to Habermas, a legal order can be legitimate only if it does not contradict basic moral principles. In a society, morality and law refer to same problems by means of legitimately ordered impersonal relationships and action through justified norms and rules. In post-traditional societies, morality represents the form of cultural knowledge and law has, in addition to this, a duel role to play. On the one hand, it acts as a 'symbolic system' and on the other it functions as an 'action system' and, therefore law has, at the institutional level, a binding character.[50] It is through the principle of universalism that moral norms are justified. In discourse theory, moral principles function as a rule of argumentation.[51] For Habermas, these moral principles have the capacity to cross the boundaries between the private and public spheres. In a plural society, morality can be effective only if it transforms into the form of a legal code.

Moral norms regulate historically derived interpersonal relationships in the life context of a concrete community. But in contrast, legal norms regulate the interpersonal life and conflict of an abstract community, which is produced and bound by the legal order itself. The main difference between morality and law lies at the levels of knowledge and action. Morality

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[48] Jurgen Habermas, *BFN*, op.cit, p.447

[49] Habermas explains "the procedure of democratic legislation must confront participants with the normative expectation of an orientation to the common good, because this procedure can draw its legitimating force only from a process in which citizens reach an understanding about the rules for their living together. In modern societies as well the law can fulfill the function of stabilizing behavioral expectations only if it preserves an internal connection with the socially integrating force of communicative action". Ibid pp. 83-84

[50] Ibid p.79

[51] But in particular cases it is replaced by the principle of appropriateness.

lies at cultural level and is capable of producing ethical knowledge which conveys the meaning content of cultural symbols. But, it has only a virtual relation to action. However, law can overcome the deficiency of being in existence primarily as a system of knowledge and stretch to a level of action, as it consists of both motivations and value orientations within it. The integration of morality and law, propounded by Habermas, can be seen as the merging of universal and particular will within a legal context, which represents what is 'just' and what is 'true' respectively.[52] Therefore, legal discourse turns into pragmatic and ethical-political use of practical reason.

In contemporary liberal democracies, where historically developed legislature exists, it is the duty of the legislature to produce positive law. The concept of positive law implies the law which is made and enacted by the consent of the legal subjects to produce law and to authorize a legal authority to use coercion on their behalf. But on the contrary, according to discourse principles, a person has the right to renounce his community membership, and also has the right to be protected from the universal deprivation of membership. This expression emphasizes the right of persons to assert their status of self-legislation. What is fundamental here is the protection of basic private rights of individuals that facilitates a propitious condition to enjoy maximum individual autonomy.

The salient notion of individual autonomy can be actualized only if people use their right to self-legislation. It is in this particular juncture, people freely use their autonomy and act as the authors of their rights, and submit themselves as its addressees. It is only through the means of law people actualize the right of self-legislation and exercise their autonomy. The idea of legitimacy, in Habermas, transforms into a new theoretical domain and subsumes new procedural meaning. Legitimacy, as elaborated in his early works, is based on the process of discursive will-formation. Later he redefines it on the basis of procedurally defined democratic lawmaking. The notion of private autonomy merges with civic autonomy, and the source of legitimacy here lies in the notion of popular sovereignty.[53]

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[52] Justice is considered as an interpersonal norm, and therefore possesses an absolute validity claim. The application of universal norms excludes teleological role of morality and provides relative preferability for special values or interests. Moral norms are directed to every person, legal norms address only the members of the legal community, see Habermas, *BFN*, pp.153-154

[53] The concept of autonomy in Kant is his response to the Hobbesian notion of 'the system of rights' based on participant's enlightened self interest devoid of moral reasons. But, according to Habermas, Kant failed to bring the principles of morality, law and democracy together. *BFN*, p.90

VII. THE FORMATION OF BASIC RIGHTS: AN ATTEMPT OF BINDING LAW AND POLITICS

Law, in Habermas, is the elaboration of the Kantian notion of self-legislation, which makes the exercise of individual autonomy possible. The idea of self-legislation is based on moral autonomy, directed to meaningful exercise of individual will. The idea subsumes a new meaning of political autonomy at the level of collective will formation as well. Within a legally defined political system, this process is to be seen as a legally defined political community's act of interpreting and elaborating the system of basic rights.

For Habermas, the idea of self-authorship cannot be restricted to the aspect of autonomous identity formation only. It also comes to the fore on accounts of legitimacy and political will-formation, particularly in the traditions of legal and political thinking inspired by Kant and Rousseau. The idea of self-legislation is centered on his notion of public autonomy, which is fundamental to his normative modal of deliberative politics. In Habermas, public and private autonomy are internally related to each other. The autonomy of private life of an individual depends on the strengthening of his/her position in the political public sphere. Habermas elucidates: "...this mutual dependency, or circular relationship, is manifested in the genesis of valid law. This is because legitimate law emerges from, and reproduces itself only in, the form of a constitutionally regulated circulation of power, which should be nourished by the communications of an unsubverted public sphere that in turn is rooted in the associational network of a liberal civil society and gains support from the core private spheres of the lifeworld."[54]

To protect the private and public life Habermas introduces five categories of rights;[55]

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.

These rights require following as necessary corollaries:

2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in voluntary association of consociates under law.

3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.

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[54] Jurgen Habermas, "Paradigms of law", op. cit p.777
[55] Ibid, pp.122-123

4. Basic rights to equal opportunities to participate in a process of opinion will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.

5. Basic rights to the provision of living conditions that are socially, technologically and ecologically safeguarded, in so far as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in 1 through 4.

The first three rights entail subjective liberties to secure private autonomy of citizens. They comprise of freedom of speech, freedom of conscience, right to association, right to legal protection, due process etc. Fourth right defines legal subject as the author of law. The last and the fifth right extends opportunities to exercise the first four categories.

Habermas, here, intends to bind the procedure of law with politics; therefore, law is not seen as a means for protecting individual rights, but as the expression of the common praxis of political community. Communicative power that comes about, whenever people act in concert, must be mobilized and effectively secured within the legal medium itself. Such a collectivity can constitute itself as a legal community only if it possesses central authority acting on behalf of the members. In a legal community, where individuals enjoy equal rights, independent and impartial judiciary and state assume the role of these authorities. The state is not a mere public institution grounded on bureaucratic power. On the contrary, it is based on public that grounds equal claims to participation in democratic legislative process which legitimates only the bond with legitimately enacted law.

The political power is presupposed by law and itself is established in the form of law. This law is produced by the citizens themselves by engaging in political discourse which is protected by rights. The normative content pervasive in the discourse is neutral with respect to morality and law, and that has to be redeemed by discursive practices on the basis of the above mentioned discourse ethics. Habermas describes that the democratic principles are only those statutes which may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation. The discourse theoretic concept of political autonomy argues for the mobilization of communicative freedom. This approach offers a counter power to administrative power of modern state: the communicative power. According to this model, both law and communicative power have their co-original source in the opinion

upon which much publicity where in agreement. The domain of discourse offers a space wherein communicative power acquires its political significance.

VIII. OFFERING FOUNDATIONS OF PRAGMATIC, ETHICAL-POLITICAL AND MORAL DISCOURSES

Political theory, in Habermas, treats major co-ordination problems through political means of conflict resolutions. Conflicts, in a plural society, arise out of individual action-orientations, choice and collective realization of goals. According to Habermas, "...in the first case, participants face the question; 'According to which rules should we live together? In the second case, the question is: 'which goals do we want to achieve and in which ways?"[56] Co-ordination, with regard to the first question, takes place through value consensus, and in the second case, through balance of interests. Habermas proposes two modes of conflict resolutions: consensus and arbitration. In a conflict situation, he also proposes the presence of a mediator who does not stand above the parties in the process of negotiation.

In modern societies, law acquires legitimacy in so far as it functions as a resource of justice. As a result, against politically enacted law and institutionally employed power, Habermas introduces an alternative notion of power; namely communicative power. The idea of political autonomy is redefined, in a discourse theoretical perspective, on the basis communicative power. Aiming at transforming the persisting power code, constituted by positive law and political authority, he offers a discursively formed common will, based on intersubjectively shared beliefs and values. For Habermas, it functions as a motivational system, as explained earlier, which always tends to action. The exercise of political autonomy implies the use of discursively produced will to interfere in the power mechanisms of administrative system. This process is explained as the transfer of communicative power into administrative power.

In Habermas the concept of the political includes administrative power with political system. In the discourse model, law is the medium through which communicative power is translated into administrative power. For conceiving the character of empowerment, it excludes the illegitimate intervention of social power in the form of privileged interests.

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[56] Ibid, p.139

According to discourse theory, moral norms can appear with a purely cognitive validity claim, because the principle of universalization provides a rule of argumentation that makes it possible to decide moral-practical questions rationally. Apart from moral justification, legal norms can be justified also by means of pragmatic and ethical-political reasons.

Pragmatic discourse is possible when the goals are already given and an actor is in search of an appropriate means to realize it. If the goals themselves seem problematic, then, the actor has to rationally evaluate his/her goals in the light of accepted value performances. And actor is free to choose alternative means or goals. The goals are evaluated on the basis of concerned values as well as on the basis of the means in accordance with purposive rational action; both provide a balanced view regarding concerned values and accepted ends. In pragmatic discourse, actors assume values from empirical knowledge. And discursively justified ends are open to assessment and alternative choices based on previously applied maxims or rules. If the orienting values themselves are problematic, the actor has to go beyond the horizon of purposive rationality.[57]

Ethical discourse aims at binding the intersubjectively shared values and collective life of a community. It clarifies the shared life of a community through a process of discourse which extends the existential question of 'I' to a collective consciousness of 'we'. Ethical discourse, according to Habermas, is rooted in the "...political self-understanding of a historical community."[58] Law, therefore, in discourse theory, acquires a hermeneutic dimension as well. While searching for an 'authentic identity,' in an intersubjectively related lifeworld, the question of 'ought' surpasses the level of subjective ends and subsumes to the 'good for all.'[59] Beyond the level of these two discourses, an adequate justification of politics and law must consider a further step; that of justice, which leads to the domain of moral discourse.

Questions pertaining to morality are treated as normative ones and therefore participants in the discourse explore "...how we can regulate our common life in the *equal* interest *of*

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[57] Ibid, pp. 159-160

[58] Ibid, p.160

[59] Habermas explains, "...in pragmatic discourse, we test the expediency of strategies under the presupposition that we know what we want. In ethical-political discourse, we reassure ourselves of a configuration of values under the presupposition that we do not yet know what we really want". Ibid, p.161

all."[60] Here, the concept of 'ought' is thus related to the concept of justice. Moral discourse is a higher level of discourse, wherein people are aware of their subjective positions as an imperative part of a social collective. In other words, it can be seen as moral self-regulation of a collective community. According to Habermas, moral discourse is decontextualised as well as strictly universal. Therefore, it is applicable to all standard situations. Further, it opens up the possibility of expansion of a restricted community to unlimited communicative community.

The discourse eventually produces three kinds of 'will'. Pragmatic discourse, by means of coordination and different preferences, produce an 'aggregate will'. Hermeneutic discourse, through shared values of social collective, renders an 'authentic will'. And finally, moral discourse, of justification and application, provides an 'autonomous will', rooted in the shared insights.[61]

In a complex society, if neither of these conditions will open, there remains the alternative of bargaining; negotiation between success oriented parties who are willing to cooperate. Its aim is to balance the conflicting interests through 'compromise' under three conditions:1) that the compromise should be more advantageous to all, 2) exclude those who are not ready to cooperate, 3) exclude exploited parties who contribute more to the cooperative effort than they gain from it. Here, the theory tries to regulate bargaining in the form of fairness, aims at equal distribution among parties. Bargaining is permissible and necessary only when particular interests are involved.

A fair election is necessary to select the delegates or representatives for the political balancing of interests. The model of election must ensure that all the relevant perspectives and voices are involved. Instead of the principle of government by law, this general political communication brings about a new constitutional meaning of a normative concept of public sphere. These aspects are, according to Habermas, contribution to a notion of constitutional democratic state.

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[60] Ibid, p.161
[61] Ibid, p.180

IX. FRAMING THE FOUNDATION OF A THEORY OF CONSTITUTIONAL DEMOCRACY

Rational political will formation appears in the process model as a network of discourses and negotiations. The political legislature may use its law-making powers only to justify legal programmes. Judiciary has the power to review the norms that were already renewed by the legislature, aiming to preserve the legal certainty. Habermas elucidates: "...judicial decision making is bound to law and legal status, the rationality of adjudication depends on the legitimacy of existing law, the legitimacy hinges in turn on the rationality of legislative process that, under the conditions of the constitutional separation of powers, is not the disposal of agencies responsible for the administration of justice."[62] Thus, the functions of the legislature, judiciary and administration are clearly differentiated. The administration is not permitted to deal with normative reasons either in a constructive or reconstructive manner. It is the duty of the legislature and judiciary to share the work of justifying and applying norms.

Habermasian theory of discourse, primarily attempts to reinterpret four major principles which, for Habermas, constitute the foundation of constitutional democracy. This includes interpretation of the principles of a) popular sovereignty[63] b) independent judiciary and legal protection for individual c) subjection of administrative system to law and judicial review d) the principle of separation of state and society. In order to elaborate these principles, Habermas considers three major sources prevailing in contemporary societies, namely: administrative, social and communicative power. The legitimate ordering of these powers provides a constitutional democracy.

The idea of popular sovereignty is exercised through free and uninterrupted use of communicative power, through the process of discourse that turns into political power. Habermas considers communicative power as the basic premises for democratic participation. It is the transfer of legislative power to communicative power, via citizen's act of will-formation, which makes popular sovereignty possible.[64] This transfer of power

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[62] Ibid, p.238

[63] Habermas explains "...The principle of popular sovereignty, according to which all the governmental authority derives from the people, the individual's right to an equal opportunity participate in democratic will-formation is combined with a legally institutionalized practice of civic determination". See Ibid, p.169

[64] Habermas continues: "only the principle of the guaranteed autonomy of public spheres and competition between different political parties together with the parliamentary principle, exhaust the content of the principle of popular sovereignty". Ibid p.171

between citizens and legislature, through ethically bound discourse procedures, ensures a face to face interaction between deliberation and decision making. The inclusion of political parties, associations and citizens in the process of deliberation enriches the principle of 'political pluralism' both inside and outside representative bodies.

Independence of judiciary entails the principle of impartiality between system of rights and administration. These institutions are differentiated on the basis of justification and application of norms, consisting of different logics of argumentation. Therefore, within a legal system, these programmes should be bound by the existing law. Judiciary, in this sense, guarantees both 'the certainty of law and the rational acceptability of court decisions'. The separation of powers aims at restricting the use of administrative power to democratically enacted laws. For Habermas, administrative power should be legally prevented from intervening in the process of legislation and adjudication, and its function is restricted to the implementation of legal programmes. Therefore, citizens in a constitutional democracy are ensured the status of constitutional protection against the arbitrary interventions of administrative power.

Habermas explicates his theoretical project: "...the intention is to tame the capitalist economic system, that is, to 'restructure' it socially and ecologically in such a way that the development of administrative power can be simultaneously brought under control"..."from the standpoint of legitimacy, it means linking the administration to communicative power immunizing it better against legitimate power."[65]

The principle of separation of state and society is an attempt to preserve social autonomy of citizens, in terms of equal opportunity to exercise their basic rights as participants in political as well as communicative processes. Therefore, certain requirements such as a civil society, network of associations and a political culture detached from class structure are necessary to maintain this separation. Social power fosters civic autonomy and facilitates effective conditions for social interaction between differentiated individuals to assert their interests. Similar to the condition of civil society, Habermas expounds the idea of social power, in the form of different interests emerged out of interactions between societal organization, institutions, movements etc. that fosters autonomous exercise of equal

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[65] Jurgen Habermas, *Paradigms of Law*, op. cit. p778

liberties and communicative freedom in the civil society. Functionally, social power has a dual role; it can both facilitate and restrict the generation of communicative power. 'Social power is facilitative in so far as it provides the preconditions of private autonomy, and it becomes restrictive if it allows some actors to transform their social power into political power either through influencing administration and manipulating public opinion.'[66] But as Flynn also mentions, communicative power functions as a counterforce not only for controlling administrative power but also for controlling social power. This counterforce provides necessary inputs for liberal society's political self-organization.

X. CONCLUDING REMARKS

The idea of self-organization of an autonomous political community reduces the possibility of 'critical politics' explained in the theory of legitimation and motivation crisis. In his later writings, Habermas tries to find out critical politics and legitimacy inside the system of law. Therefore the process of lawmaking becomes the means of society's political and normative reproduction. The binding of politics into law changes the notion of 'critical politics' into a new direction. Here it does not aim at society's total transformation. For, instead of critical politics, the pragmatic, ethical-political and moral discourses are directed towards a politics of consensus which is focused only on the normative restructuring of the society. The ethical-political discourse, because of its intention directed towards understanding the tradition of ethical community and its attempt for redefining the identity in the present socio-cultural context, provides a hermeneutical aspect to legal discourse.

The legitimate law emerged out of discourses, on the basis of clearly defined discourse ethics, thus make social transformation possible within the institutional structure of liberal democracy. This process of lawmaking, according to Habermas, cannot be separated from the idea of democracy, because it is rooted in the normatively governed pragmatics of society's self-realization process. With the theory of law, Habermas accepts the inevitability of historically developed institutional structures prevailing in liberal democratic societies. What is decisive in Habermasian understanding of the relationship between law and democracy is that it replaces the aspect of 'fundamental law' by 'fundamental lawmaking' as the basis of democracy.

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[66] Jeffrey Flynn, 'Communicative Power in Habermas's Theory of Democracy, *European Journal of Political Theory*, Sage Publications, London, p.433-454, here, p.450

CHAPTER III
THE CONCEPT OF DEMOCRACY IN THE LATER WORKS OF HABERMAS: A CRITICAL ANALYSIS

BINDING LIBERALISM AND REPUBLICANISM: AN ATTEMPT OF FORMING A NEW DEMOCRATIC MODEL

THE REDISCOVERY OF CIVIL SOCIETY AND PUBLIC SPHERE: EXAMINING HABERMASIAN TWO-TRACK MODEL

PLURALISM AND DISCOURSE: EXPLAINING THE DELIBERATIVE TURN IN DEMOCRATIC THEORY

DELIBERATIVE POLITICS: A NEW PROCESS OF DEMOCRATIC DELIBERATION

CONCLUDING REMARKS

CHAPTER THREE

THE CONCEPT OF DEMOCRACY IN THE LATER WORKS OF HABERMAS: A CRITICAL ANALYSIS

Democracy, in our times, is considered as the most legitimate form of governance that modernity has ever produced. In twentieth century, especially after the collapse of socialist systems, liberal democracy celebrated its triumph. The concept in itself is a combination of two distinct ideals which in the actual practice, has always exhibited the latent contradiction it carries. Democracy demands people's participation in decision-making; either directly or indirectly. Modern democracy in the west has two different traditions of this sort: the liberal and republican. The first model is based on the ideals such as the rule of law, human rights and individual liberty. The latter one upholds the idea of equality and popular sovereignty.

Democracy, as a functional system, can sustain solely in so far as it proves its legitimacy. In democracy citizens are the source of legitimacy. A democratic state is therefore liable to the citizens it governs. Hence the emergence of welfare state in the west has to be seen in the light of the failures of liberal democracy in fulfilling society's need for equality. Welfare state always exhibits an interventionist tendency. The penetration of administrative power into the yet untouched private spheres of life invites protests from society. Habermas understands the 'New Social Movements' (here after NSMs) as reactions of this kind.[1]

With the change in the organizational structures of civil society, the public realm became complex. The unequal distribution of social power among the differentiated public spheres now demands greater democratization of the society. In such a society the aspect of social integration acquires vital importance. Thinkers of democracy, in the modern era, therefore, start exploring an inclusive model of democracy, mainly within the possibilities available in the existing system. Inclusion in democracy means the inclusion of citizens in the formation of collective will.

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[1] Jurgen Habermas, *Autonomy and Solidarity* (Interviews with Jurgen Habermas), (ed), Peter Dews, Verso, London, 1992, p.73

The idea of deliberative democracy is the product of an attempt of this sort, which argues for the participation of all the affected in the process of democratic will-formation. Habermas, by pursuing this line of thinking emphasizes a procedural model of democracy. This model primarily is a blend of the liberal and republican ideals and hence builds up a two-track model which aims to bind the two functionally specialized domains: the informal and formal public spheres.

I. BINDING LIBERALISM AND REPUBLICANISM: AN ATTEMPT OF FORMING A NEW DEMOCRATIC MODEL

Liberalism defines the status of citizens on the basis of constitutionally guaranteed rights they possess. The rights guaranteed by the bourgeois private law render freedom for participating in the market economy. These are negative rights which protect free private individuals from government interference and coercion of any sort from outside.[2]The freedom for exercising individual private autonomy in pursuit of the realization of the goals in the domain of a civil society, where interactions are governed by laws of market, is guaranteed by the rights provided by constitution. These rights are centered on private individuals and therefore legal order in liberalism is conceived in terms of individual rights.[3] Therefore 'free individuals' in society, according to liberalism, is autonomous and individual's interaction with state and fellow citizens predefined by certain basic values is applicable to all. The primacy of private interest, in a negative theoretical sense, endows individuals, as a participant, to get access in attaining goals from competition prevailing in civil society. In order to protect these liberties provided by liberalism, individuals especially the bourgeoisie on the one hand, want to protect themselves from state interventions and, on the other they need to influence and regulate the administrative power.

Politics in liberal society, according to Habermas is "...essentially a struggle for positions that grant access to administrative power."[4] Political autonomy thus

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[2] "The negative theories want to define freedom in terms of individual independence from others...Isaiah Berlin points out that negative theories are concerned with the area in which the subject should be left without interference..." see Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2*, Cambridge University Press, Cambridge, 1985, p. 213

[3] Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, MIT Press, Cambridge, 1999, p. 242

[4] Politics therefore is considered as a competing collectivity's strategically formulated opinion and will formation in the public sphere as well as in parliament. Ibid, p. 243

preserves liberal equality and individual's private autonomy in society. As Habermas puts it, these traits in liberalism ensure the interrelation of two imperative normative institutions "...on the one hand, the idea of equal individual liberties for all satisfies the moral standard of egalitarian universalism, which demands equal respect for and consideration of everyone. It meets the ethical standard of individualism, according to which each person must have the right to conduct her life according to her own preferences and convictions."[5] Taking these features into account Habermas elucidates the failure of classical liberalism for not having become a status realm of ethical liberalism. As a result, possessive individualism gained supremacy over the ethical notion of equal liberties and it was subsequently conceived in terms of its instrumental values. Consequently, according to Habermas, society lost the possibility of being united in the form an ethical-political community and thus limited itself into legal relationships.[6]

In culturally differentiated societies, liberal equality always gets entangled with questions of social facticity. The presence of the system of equality and social inequality, at the same time, in plural liberal societies, denotes, as Habermas points out, 'equal rights do not have equal value.'[7] The contradiction entails the need of legitimacy for existing system of law and form of democracy. It unleashes the realm of thought for alternative ways and approaches to democracy based on normative and egalitarian inclinations. In order to prevent the 'tyranny of the majority' the liberals emphasized the need of establishing human rights which enables individual liberty over general will. Accordingly, the 'given nature' of human rights got priority in liberalism which always controls the intervention of state as well.

In Kant, individual autonomy and human rights are explained in terms of its normative validity. The system of natural rights in Kant is an inalienable category, in which individual autonomy and human rights are defined as the fundamentals of human moral life. Political autonomy and will-formation are explained only on the basis of an internal connection between popular sovereignty and human rights. Thus in Kant, the

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[5] Jurgen Habermas, "Equal Treatment of Cultures and the Limits of Postmodern Liberalism", *Journal of Political Philosophy*, Vol. 13, Nov. 1, 2005, p.1

[6] Habermas observes that the turn into instrumentality missed an important normative institution which was possible under the conditions of modern society; forms of solidarity that could have extended its influence beyond relatives, friends and neighbors within private sphere of life. Ibid, p.2

[7] Ibid, p. 13

notion of egalitarianism undermined the major aspects of popular sovereignty. In contrast to this approach, Rousseau offers a republican reading of political autonomy and will-formation. He formulates the idea of civic autonomy through which he explicated the internal relationship between popular sovereignty and human rights. In republicanism, within the domain of a political community, politics acquires communicative character through which individuals produce a general will in the form of law. While forming the general will of a political community individuals become citizens having deliberative power and realizes themselves as equal consociates under law. Here the idea of self-legislation attains a new dimension. The change from the Kantian notion of individual autonomy to a republican political autonomy (in the form of popular sovereignty), provides an ethical rather than a moral dimension to the concept of self-legislation. In this regard, Habermas elucidates: "...Rousseau imagines the constitution of popular sovereignty through the social contract as a kind of existential act of sociation through which isolated and success oriented individuals *transform* themselves into citizens oriented to common good of an ethical community. As members of a collective body, they fuse together into the macrosubject of a legislative practice that has broken with the particular interests of private persons subjected to law."[8]

Contrary to liberal negative liberties, republicanism provides positive liberties to citizens. Therefore, rather than giving priority to the protection of individual rights state concentrates on greater levels of inclusion in the process of opinion and will-formation.[9] As a result, Habermas points out, in republican model, public sphere and civil society acquire a strategic importance: the protection of communicative power of citizen on the one hand, and on the other, the integration of citizens into a political community.

Taking accounts of these two models Habermas opines that the core features of popular sovereignty and the Kantian idea of human rights could carefully be secured

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[8] Jurgen Habermas, *Between Facts and Norms: A Contribution to Discourse Theory of Law and Democracy*, MIT Press, Cambridge, 1998, p. 102 (here after *BFN*)

[9] Right to political participation and communication are considered as positive liberties. These are political rights which guarantee participation in the process of community's common will-formation. See Habermas, *The Inclusion of the Other*, p. 241

through the exercise of a proper procedure.[10] He further argues, in Rousseau's model, under the republican virtues, in the process of the formation of general will the particular interests of private individuals are always undermined.[11] The general will addresses the macrosubject or the 'subject-in-the-community', in other words the society as a whole. Therefore the liberal critique emphasis that, since modern societies are not homogenous in character, the formation the Rousseauvian model of general will is unattainable.

Habermas upholds deliberative aspect of self-legislation and popular sovereignty in the process of will formation. As a model of democracy he accepts republicanism's inclusive tendency and its contribution of positive liberties in forming a larger communicative community. The ethical interpretation carries both its merits and demerits at once. That means, in detail, the ethical definition of a political community renders a valuable integrative aspect that furthers the scope of egalitarianism. But at the same time, even by taking account of this aspect, it is possible to see that ethical egalitarianism, as Habermas says "...accepts a limitation on egalitarian universalism,[12] and therefore restricts itself to the specificities of a particular political community.

By taking pluralism seriously, Habermas emphasizes the importance of individual autonomy and the need for protecting private interests in a society where diverse interest positions exist. He observes that liberalism always imbibes an internal conflict between bourgeoisies' need for limiting popular sovereignty and the free use of practical reason guaranteed by constitution. This is basically a tension between the private and political autonomy. On this account, both liberalism and republicanism fail to fulfill the need of accommodating these two within a possible democratic model.

Habermas proposes a new model of democracy based on certain 'procedural conditions of communication' devoted to an all encompassing deliberative politics through which, he assumes, rational results could be produced. This new approach is an attempt to formulate a normative theory of democracy by combining aspects from liberal and

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[10] Jurgen Habermas, *BFN*, op.cit, p.101
[11] "Rousseau imagined the popular sovereign as something like an external act of sociation through which isolated individuals were transformed into citizens oriented towards the common good." Ibid, p. 473
[12] Jurgen Habermas, 'Equal treatment of cultures', 2005, op. cit, p.2

republican model in a novel fashion. The proceduralist model accepts democratic institutions existing in liberal societies: free and fair election, equal right to vote, parliamentary bodies etc. It also incorporates the ethical notion of republicanism that offers a greater participation in the process of opinion and will-formation. The whole system is characterized by its openness to procedurally defined rational deliberations which take place in the informal domain of public spheres as well as in the democratic institutional structures.[13]

Habermas at this point negates the Rousseauvian notion of popular sovereignty. For liberals also argue that in 'polycentric' complex societies, power is dispersed rather than concentrated on a political axis, and the majority will is thus also incapable of ensuring that participation of all in the democratic process of will formation. As Bohman points out, sovereignty of this sort is threatened by two disparate forms of complexity prevailing in both internal and external domains. Internally, the complexity makes the discursive process of political decision-making difficult. Externally, the disparate and complex forms of socio-cultural settings and its conceptions of good impede the possibility of effective democratic deliberation to subdue the tension between conflicting validity claims.[14] One of the fundamental aims of Habermasian discourse model of democracy is, conspicuously, to overcome the conundrums prevailing in complex societies.

II. THE REDISCOVERY OF CIVIL SOCIETY AND PUBLIC SPHERE: EXAMINING HABERMASIAN TWO-TRACK MODEL

Since plural societies have shown complex propensities and differential tendencies, the task of a democratic theory, for Habermas, is to provide possible solutions for social integration. The question of participation as well as the task of guaranteeing inclusion of all in the persisting democratic model acquires vital importance. In (post)modern societies the organizational structures and integrative values of civil society has

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[13] Habermas elucidates "...notwithstanding this discursive rationalization, only the political system itself can "act." It is a subsystem specialized for collectively binding decisions, whereas the communicative structures of the public sphere comprise a far-flung network of sensors that respond to the pressure of society-wide problems and stimulate influential opinions. The public opinion which is worked up via democratic procedures into communicative power cannot itself "rule" but can only channel the use of administrative power in specific directions." see Jurgen Habermas, *BFN*, op.cit, p.300, and *The Inclusion of the Other*, p. 250

[14] James Bohman, "Complexity, Pluralism and the Constitutional State: On Habermas's Faklizitat und Getlung", *Law and Society Review*, Vol.28, No. 4, 1994, pp. 905-906

already been changed. By acknowledging the contributions of Smith and Dryzek, Habermas elucidates; "...the core of civil society comprises a network of association that institutionalize problem-solving discourses on questions of general interest within the framework of organized public spheres. These 'discursive signs' have an egalitarian, open form of organization that mirrors essential features of the kind of communication around which they criticize and to which they lend continuity and permanence."[15]

As I have mentioned in the previous chapter, civil society has subjected to a radical change. It is no longer the same, the one that explained by Hegel as a 'system of needs' and later conceptualized by Marx as a 'bourgeoisie society' with specific class characteristics.[16] As a result, along with its economic disposition, the ethical-political character of the domain also gained new meanings. By considering the uniqueness in solving problems of contemporary civil societies, the civil society associations are defined in terms of its self-limiting character.[17] However, through political discourses take place in the domain of political public sphere, civil society succeeds in influencing public policies.

The rediscovery of civil society became an impetus for radical democratic thinking. Civil society facilitates adequate promotion for public spheres in which citizens of different interests and goals can come together to express their experiences, problems and needs; through which they form opinions. This kind of sharing of values and interests fortifies the aspect of intersubjectivity in rational communication among citizens. The political public sphere is open to all 'those who are potentially affected'; as a result, it offers equality of opportunity for all sections of the society and ensures equal participation in the process of democratic deliberation.

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[15] Habermas, *BFN*, op.cit, p.363. reference from T.Smith, *The Role of Ethics in Social Theory*, Albany, 1991, pp. 153-74, and J. S Dryzek, *Discursive Democracy*, Cambridge, 1990, pp. 43ff
[16] Ibid, p.366
[17] The associations in civil society are self-limiting because they are not sharing the state power. The domain is open for deliberations and therefore reproduces from within through free use of rational communication. See John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*, Oxford University Press, 2000, p. 24. It is not to the effect that civil society and state are separate islands; but political system influences civil society discourses through various means. Primarily, it is the constitution that provides basic rights such as freedom of association, speech etc. and it also guarantees the privacy of private life spheres. Along with this, public opinion preserves the link between civil society discourses and political system. The role of political parties and the process of election are also important. See, *BFN*, op.cit, P.368

It s to be noted that, in the changed condition of civil society, the idea of pubic sphere is also acquired new definition. Different from his early notion of critical public sphere situated in the bourgeois society, Habermas redefines the notion as "...a social phenomena just as elementary as action, actor, association, or collectivity, but it eludes the conventional sociological concept of social order...the public sphere can best be described as a networking information and points of view (i.e. opinions expressing affirmative and negative attitudes); the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified public opinions."[18]

The most important and politically significant aspect regarding the idea of public sphere is its 'action oriented' role in civil society. As Iris Young points out, that the public sphere is more important and functionally relevant than civil society because 'the public sphere enables citizens to expose injustice and state and economic power and make the exercise of power more accountable.' And also, this political function is even capable of bringing about changes in the civil society itself.[19] Habermas conceives public sphere to be a 'social space' generated in communicative action.[20] Moreover, public sphere is not a problem-solving realm; on the contrary, it is conceived as a solution-seeking one. It amplifies public communication and produces public opinions for the perusal of the decision making systems. The privilege of decision making is given to political system which is considered as a specialized system in that respect. The role of public sphere, in Habermas, as Gerard Delanthy identifies, has three major functions: 'firstly, to detect and identify problems, secondly, to amplify the pressure of problems and finally to thematize and furnish them with possible solutions.'[21]

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[18] Ibid, p. 360
[19] Iris Marion Young, *Inclusion and Democracy*, Oxford University Press, New York, 2000, p.155
[20] For Habermas, the idea of public sphere 'refers neither to the functions nor to the *contents* of everyday communication'. Habermas, *BFN*, p. 360. But thinkers like Young suggests that public sphere with spatial metaphors are appropriate for three major reasons. i) it helps distinguish public discourse and expression not by content or import but as differentially situated, ii)it also helps describe public discussion as a process which people enter and leave, but it goes on even when some leave, iii)and finally, it enables the theory to say that a society has one continuous public sphere without reducing those who are 'in' it, to common attributes or interests." Young, op.cit, 2000, pp. 170-171
[21] Gerard Delanthy, *Social Theory in a Changed World: Conceptions of Modernity*, Polity Press, Cambridge, 1999, p. 89

The new notion of public sphere thus makes a substantial shift here. Due to the demise of the classical separation between state and civil society, along with the ideal public-private divide as well as with the emergence of the welfare state in the post second world war period, the political system gained vital importance especially in dissolving social inequalities. The 'enlightenment public sphere' of the bourgeoisies was called as 'critical public sphere'. For, its primary aim was to unleash critical reason against the domination of the then existing structures of power including the political system. However, the same transformation of public sphere was coupled with a complimentary relationship with political system. Habermas describes: "...in complex societies, the public sphere consists of an intermediary structure between the political system, on the one hand, and the private sectors of the lifeworld and functional system, on the other."[22] Consequently the idea of 'criticality', which at one point qualified the notion of public sphere, now changed into a new level of 'self-criticality'. The deliberation in the public sphere offers critical evaluation of conflicting arguments in the light of practical, ethical-political and moral points of view. Political system is not threatened by the critical appraisals emanating from civil society because political public sphere offers a space for them to reach a consensual opinion. The deliberative space of public sphere provides accommodation for society's critical imperatives, and through a process of democratic deliberation the conflicting positions is converted into consensual opinion.

Political system, like other subsystems, has its specialized functions.[23] It has to ensure fair institutionalized procedures in order to make democratically formed public opinion in the form of law as well as policy output. Public sphere is formed and governed by a 'lawlike' process. It has its own latent mechanisms to prevent strategic interventions.[24] Habermas explains: "...before it can be captured by actors with strategic intent, the public sphere together with its public must reproduce itself out of itself", therefore, "...the communication structures of the public sphere must rather be kept intact by an energetic civil society. That the political public sphere must in a certain sense

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[22] Jurgen Habermas, *BFN*, op.cit, p.373

[23] The other systems, Habermas refers: one category refers to religion, education and family that are associated with general reproductive functions of the lifeworld via, with cultural reproduction, social integration or socialization. Other categories like science, morality and art take up different validity aspects of everyday communicative action such as truth, rightness or veracity. Ibid, p.360

[24] According to Habermas, 'the public sphere can be 'manipulated' but it cannot be 'manufactured' as one pleases. Public opinion can neither publicly bought nor publicly blackmailed.' Ibid, p.314

reproduce and stabilize itself from its own resources is shown by the odd *self-referential character of the practice of communication in civil society.*"[25]

A functioning public sphere has extensive communicative freedom which, according to Habermas, is possible only in the context of a liberal political culture.[26] And the liberal political culture is inclusive enough to accommodate the 'counterpublics' too. He emphasizes the aspect that civil society has the opportunity to summon up counterknowledges and, along with the unrestricted inclusion and equality provided by liberal public spheres, it always preserves its self-transformatory potential. But in order to extend this potential condition to a radical democratic echelon, Habermas endeavours to solve three basic institutional problems that are appeared to be major challenges in complex societies. These problems are, as Bohman also points out, 'the problem of keeping the political division of labor consistent with democracy, the problem of the plurality of publics and their perspectives, and the problem of keeping formal institutions open to differing substantive opinions and arguments on complex issues.'[27]

While taking the empirical aspects of civil society and public sphere, Habermas conceptualizes the existing structures of power in complex societies. The uneven distribution of social power hinders equal opportunity for participating in the deliberative process. In complex societies, there is a political division of labor exist in between 'weak' and 'strong' publics.[28] Within the Habermasian framework of a 'two-track model' it is qualified as informal public spheres and formal decision-making bodies. The strong publics are enjoying the decision making power. On the basis of functional specializations, the weak publics do not share the decision making power. Instead, it operates within a deliberative domain of the political public sphere. The

[25] Ibid, pp. 364-369
[26] Jurgen Habermas explicates, "...we call a political culture 'liberal' to the extent that it operates through symmetrical relations of reciprocal recognition- including between the members of different identity groups. These relations of recognition, reaching beyond sub-cultural boundaries, can be promoted only indirectly- not directly- by means of politics and law. Cultural rights and a politics of recognition can strengthen the capacity for self assertion by discriminated minorities, as well as their visibility in the public sphere, but the value register of the society as a whole cannot be changed with the threat of sanctions." See Habermas(2005), op. cit, p. 15
[27] James Bohman, op. cit, p. 917
[28] This tem is first used by Nancy Fraser in her essay ' Rethinking the public Sphere: A Contribution to the Critique of Actually Existing Democracy', *Habermas and the Public Sphere*, (ed) Craig Calhoun, MIT Press, 1992

basic function it carries is that of will-formation. Adjunct to that, it acts as a warning system which identifies and amplifies social problems in a convincing and influential manner and finally offers possible solutions and make it sure that the decision making bodies are taking up them for further dealings.

Habermas emphasizes that, in normal situations, the informal circulation of communicative power dominates political system and influences decision making bodies like parliament. The function of the 'civil-social periphery' and the 'political centre' are distinguished on the basis of their 'influence on deliberation' and 'power to decide' respectively. More importantly, in a crisis situation, the civil society, consisted of differentiated political public spheres, has a more active role to play. With the emergence of a 'crisis consciousness' at the periphery the existing power relations in the civil society undergoes shift. In such a condition, Habermas expounds: "...*if* the actors from civil society then join together, formulate the relevant issues, their efforts can be successful, because the endogenous mobilization of the public sphere activates an otherwise latent dependency built into the internal structures of every public spheres."[29]

The word '*if*' shows that in that context other possibilities are also available. He declines other possibilities because of his buoyancy about the 'unique' features of liberal culture and also his reliance on liberal society's capacity for its self-transformation.[30] Therefore, Habermas goes on to argue that, in crisis situations informal communication accomplishes two things, "...on the one hand, it prevents the indoctrinated masses that are seduced by political leaders. On the other, it pulls together the scattered critical potentials of a public that was only abstractly held together the public media and it helps this public have a political influence on institutionalized will-formation. Only in liberal public spheres, of course, do

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[29] Jurgen Habermas, *BFN*, op. cit. p.382, emphasis added.

[30] By taking the issue of agenda setting, Habermas considers three models proposed by Roger Cobb, Jennie-Keith Rose and Mark Haoward Ross that are, the inside access model, mobilization model, and the outside initiative model. In the first model, decisions are taken by officeholders and politicians and it circulate within the system only wherein the public is either excluded from the whole process or otherwise have no influence on it. In the second model, decisions are taken inside the system only; but, in order to get the support of certain groups they need to mobilize the public. According to the third model, the initiatives come from the periphery. It comes out from the mobilized public spheres in the form of public opinion. According to Habermas, in normal conditions, as shown by the history of issues and proposals, the third model comes true. See Jurgen Habermas, *BFN*, op. cit, pp. 379-380

substantial political movements take this direction."[31] Here, what seems important is his attempt of refining 'politics' within the cultural possibilities offered by liberal societies. In other words, politics becomes an innate category of the liberal culture's self-referential activity or otherwise 'democratic self-determination of deliberative citizens.'

The problem of complexity of public spheres denotes that civil society is studded with diverse interests and variety of 'loosely connected and fragmented discourses.' These discourses carry different forms of arguments and interpretations. The relevant aspects carried by these discourses in the public sphere, can be highlighted as inclusive issues pertaining to ethical, moral and pragmatic questions. It makes democratic discourse more complex and therefore the process of arriving at a consensus and making a possible decision pose a challenge to plural societies. From the perspective of democratic theory Habermas speaks of, as Dryzek also mentions, diffusions of 'subjectless communication', that demarcate his theory from the participatory models of democracy which limits to small society's face-to-face level of interaction.[32]

The decentered network of communication, for Habermas, provides an ideal conception of 'publicity' which is open to discursive agreement.[33] Considering this aspect, Habermas focuses his attention to making a plausible link between the communicative processes of civil society with the legislative and policy processes of the state. Accordingly, society's informal discursive realm can influence the decision making bodies. He thus accepts the basic components of the 'system' 'notably: elections, lawmaking by legislatures and lawful administrative implementation of policies.'[34]

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[31] The political movements are treated as those "...which abandon the conventional path of interest politics in order to boost the constitutionally regulated circulation of power in the political system." Habermas also considers civil-disobedience as one of the powerful modes of critical politics. He explains that the "...incorporation of civil-disobedience manifests the self-consciousness of a civil society confident that at least in a crisis it can increase the pressure of a mobilized public on the political system to the point where the latter switches onto the conflict mode and neutralize the unofficial countercirculation of power. See Habermas, *BFN*, op. cit, pp382-384

[32] John S Dryzek, op. cit, pp. 24-25

[33] Young explicates three major aspects of publicity; 'first, it refers to the constitution of site of communicative engagement and contest. Secondly, it refers to a relationship among citizens within this site. Finally, publicity refers to the form that speech and other forms of expression take. See Young, op. cit. p.168

[34] Dryzek also points out that these aspects are central to Habermasian democratic theory. See Dryzek, op. cit, p. 25

The attempt to solve the conflict endemic to plural societies through institutional means existing in liberal societies invites serious questions concerning the inclusion and exercise of power in democracy. This is where Habermas introduces the 'reconstructive approach' that binds the rational communicative power of citizens within the existing structures of decision making through an institutionalized legal procedure. The constitutional state, through its functionally specialized organs, makes the practice of society's self-constitution permanent. The democratic procedure of lawmaking thus acquires a privileged status through the ongoing process of constitution making. This process, according to Habermas, ultimately brings about a sociological transformation of society.

By taking this aspect into consideration, critiques like Bohman argues that radical democracy now turns into 'reformist democracy', and in Habermas, it confines its search to institutional procedures.[35] He goes on to argue that, in order to fit democracy and complexity together, Habermas now turns into a more' realistic theory of social institutions'. Kenneth Baynes also tries to explicate the theoretical shift of democracy in Habermasian theory, and he also notices that in his later works law becomes a crucial aspect in integrating community.[36] Contrary to the arguments of Bohman, scholars like Shane O' Neill and Stephen Grodnick argues that the shift in Habermasian theory does not compromise radical democracy. Kenneth Baynes also finds some version of radical democracy in Habermas, even though the concepts of public sphere and democracy are no longer the same. By supporting Nick Lee's opinion that, in Habermas, the informal publics play the most important role in influencing the process of legislation, Grodnick also argues that, outside technical issues the informal public sphere widens significant legal and normative control over administrative system.[37]

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[35] Bohman argues that radical democracies left the idea of total transformation and turns into reformist democracies and therefore confines the project to the constitutionals and institutional achievements of the past. See James Bohman, op.cit, p. 926

[36] Kenneth Baynes, 'Democracy and the Rechtsstaat: Habermas's Faktizitat und Geltung', *The Cambridge Companion to Habermas*, (ed), Stephen K White, Cambridge University Press, Cambridge, 1995, pp. 201-231

[37] Nick Lee, Review of "Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy," *Sociological Review 45*, No. 2, 1997, p. 344 , and Stephen Grodnick, 'Rediscovering Radical Democracy in Habermas's *Between Facts and Norms*, *Constellations*, Vol. 12, No.3, 2005, pp. 396-405

The advocates of radical democracy in Habermas stresses on the important role of the informal publics in the formation of administrative decision. They elucidate that even if the role of weak publics have an indirect role in decision making, the policy decisions as well as law are formed in accordance with the will produced by them. But it is also to be noted that, as I observed earlier, Habermas forsook other possibilities because of his strong belief in the inherent potentialities of liberal culture and its capacity for self-transformation. As Seyla Benhabib and Scheuerman argue, Grodnick quotes from their critique: "Habermasian critique of actually existing liberal democratic regimes are inadequate and overly optimistic".[38]

This argument would be more explicit if Habermasian treatment of today's mass media is examined. Habermas finds that, within the broad network of plural societies mass media becomes more complex. The public communication is channeled through mass media and reaches out to different publics that develop informally inside association. Instead of providing an empirically rooted radical critique of the existing media, Habermas offers a normative description of it. For Habermas in a civil society where large number of publics are in action, the role of mass media is to foster the process of public communication. Therefore its freedom should be ensured and the power of media should also be neutralized. Hence Habermas assigns a number of normatively defined functions to mass media in nurturing the democratic discourses of public spheres.

Regarding the issue of economic equality, as Scheuerman finds, Habermas advocates for socio-economic equality but providing no 'systematic' way to counteract it.[39] Habermas strongly holds the aspect that the present form of society can not be analyzed solely in terms of the prevailing economic system alone. For it has already incorporated into political system. While revisiting his own theory of 'legitimation crisis', in the later phase, Habermas observes that a real crisis of legitimation is not evident in the present condition. He notices that the administrative system, to a larger extent, succeeds in implementing economic policies without promoting a

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[38], Stephen Grodnick also mentions about what Benhabib and Scheuerman argue that the events of 1989 appears to have impacted Habermas's radicalism. Stephen Grodnick, op. cit, p. 393
[39] Ibid Pp 392-393

delegitimising effect.[40] Taking these realities into consideration, he demands democratization. The idea of democratization, in terms of decentralization of decision-making, is criticized by the proponents of the existing system; by arguing that it leads to loss of efficiency. But, considering the reasons for the emergence of various protest movements, Habermas states that the decisions made by the administrative system are incapable of fulfilling the collective needs, and goes on to argue that a "...greater popular participation and the decentralization of the process of formation of the collective will are essential because the *market +administration* cannot satisfy a whole series of collective needs."[41]

The condition offered by discourse theory, with the help of the two-track model, clearly demarcates the specialized fields of the process of democratic will formation and decision making. Without rendering an analysis of the forms of crisis endemic to the ongoing development of advanced capitalism, he turns his attention to the 'fact-value' contradiction existing inside as well as outside the existing legal system. He no longer considers crisis as a critical condition that requires social transformation.The development of the concept of law thus takes a shift in the theory of democracy in Habermas. The process of democratization within a constitutional state relies upon the democratic genesis of law.

III. PLURALISM AND DISCOURSE: EXPLAINING THE DELIBERATIVE TURN IN DEMOCRATIC THEORY

One of the major objectives of Habermas's two-track model is, as explained above, to establish a legitimate link between the functioning public spheres and decision-making bodies and thereby influence the policy outcomes through consensually formed normative values in the form of public opinion. In highly differentiated plural societies where competing publics exist, the fundamental interest of radical plural democracy is to explore the social and cultural roots of democracy and politically radicalize the functional system in a legitimate and authentic way. In plural societies, the process of discourse has a complex nature. For these discourses are dispersed across a variety of forms having conflicting and contradictory perspectives. Therefore, rational

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[40] Habermas points out that people still keep faith in election and voting and also the major chunk of votes are going to the traditional parties. Jurgen Habermas, *Autonomy and Solidarity*, pp 63-76
[41] Ibid pp.72-73

deliberations take those public discourses seriously.[42] While complying with these realities the question of treating the problem of dissent acquires vital importance.

In liberal societies, pluralism with vibrant public spheres is recognized as the defining feature of modern democracy. Since it is considered as a 'necessary condition' for democracy, the proponents of radical democracy are not in agreement to accept it as a 'sufficient condition' for a radical democracy. The theory of radical plural democracy propounded by Ernesto Laclau and Chantal Mouffe conceives pluralism as something that has to be 'celebrated and enhanced.'[43] For Mouffe social antagonisms offer a way to a 'democratic logic of equivalence', as a result of which the friend/enemy relationship converts into a new form of 'agonistic pluralism'.

Rather than seek political means to eliminate power, the constitution of forms of power is also important in democracy. Mouffe explains "...to acknowledge the existence of relations of power and the need to transform them, while renouncing the illusion that we could free ourselves completely from power- this is what is specific to the project that we have called 'radical and plural democracy.'[44] Antagonistic pluralism, for Mouffe, is the application of this 'logic of equivalence' to social pluralism. It is the transformation of democratic politics from 'antagonistic' relation between 'enemies' into antagonistic relations between 'adversaries.'[45] The project of radical plural democracy aims at converting radical social movements and local resistances into a broader radical politics opposite to the dominant order or the discursive order of liberal capitalism. Laclau and Mouffe render a post-Marxist theory of democracy for the prevailing postmodern social condition. In order to explain the ongoing discourse in dispersed and power-ridden society, they pursue poststructuralism and support Foucauldian discourse analysis.

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[42] Discourses in a plural society, as depicted by Bohman, 'include face-to-face interactions at home and work: larger meetings in various informal associations and different levels of organization throughout civil society (clubs, professional associations, unions, issue-centered movements, and the like); the dissemination of information and arguments through the public media; and the complex network of governmental institutions, agencies and decision-making bodies.' See Bohman, op.cit, p.914

[43] Chantal Mouffe opines that pluralism should not be seen as a mere 'fact' and dealing it with procedures is nothing but making differences irrelevant as well as relegating it to the public. Chantal Mouffe, *The Democratic Paradox*, Verso, 1999, p.18

[44] She argues that the 'negation of the irreducible character of antagonism for achieving universal rational consensus is a threat to democracy. The neutrality offered by the liberal rational thinking actually hides violence and other forms of extremism' see Mouffe, Ibid, p.22

[45] Ilan Kapoor, 'Deliberative Democracy or Agonistic Pluralism?' The Relevance of the Habermas-Mouffe Debate for Third World Politics', *Alternatives*, 27, 2002, p. 465

Discourse for Foucault, as Louis McNay quotes from *The Archeology of Knowledge*, "...is not just the order of language or representation, it is a structuring principle which governs belief and practices, words and things in such a way as to produce a certain network of material solutions."[46] Foucault's archeological method rejects the notion that the world as the projection of human consciousness and rational subjectivity. By rejecting the sovereign rational subject of history, he delineates that it is not the individual who imports meaning to discourse but on the contrary it is the discourse that constitutes the subject. For archeological method stresses that discourse is governed by its own rules of systematicity rather than by a sovereign subject.[47]

Foucault's discourse is manifested in the form of a power/knowledge regime or a regime of truth.[48] As Nancy S Love points out, for Foucault power relation is 'a mode of action upon others, and 'a society devoid of power relations can only be an abstraction'. Accordingly communication as a way of acting upon others is always implicated in power.[49] Foucault elucidates: "...we have been engaged for centuries in a type of society in which the judicial is increasingly incapable of coding power, of serving as its system of representation. Our historical gradient carries us further and further away from a reign of law that had already begun to recede into the past."[50] Bent Flyvbjerg also argues: in a Foucauldian sense, Habermasian idea of 'constitution-writing' would not be an effective way of exposing civil society. By focusing on praxis and freedom in Foucault, he elucidates, that the ideal practice of freedom is not a utopian absence of power. The practice of freedom is ultimately based on resistance

[46] Louis McNay, *Foucault: A Critical Reader*, Polity Press, Cambridge, 1994, p.69
[47] Jon Simons, *Foucault and the Political*, Routledge, London, 1995, p.26
[48] Nancy S Love points out: Firstly; the rules of exclusion determine what discourse is acceptable. Secondly: the external rules are complemented by internal ones. It includes mechanisms for identifying truth such as cultural narratives or author's desire which also include techniques of procedure for acquiring truth. By explaining the third condition, what is explicated is that the means of discourse is not equally open and penetrable. And finally: conditions of employment and appropriation constrains discourse See Nancy S Love, 'Habermas & Foucault on Discourse and Democracy' *Polity*, Vol.22, No.2, 1989, pp. 269-293, here, pp. 279-280
[49] For Foucault, power has a disciplinary function and it is closely connected to democratic politics. He argues that 'the democratization of sovereignty is itself grounded in discipline....The judicial systems...have enabled sovereignty to be democratized through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratization of sovereignty is itself grounded in mechanisms of disciplinary coercion." Ibid, p.278
[50] Michel Foucault, *History of Sexuality: An Introduction* Vol.1, Vintage, New York, 1990, p.89

and struggle, not consensus.[51] Foucault offers no space for any grant projects of resistance, but as Dryzek rightly pointed out, only for local resistance.[52]

Laclau and Mouffe too stress that the social antagonisms existing in plural societies are ineradicable. Here, what is possible is to convert these antagonisms into a form of political. The radical plural democracy attempts to radicalize the politics of antagonisms; not to eliminate it. From this point of view, consensual model, is however, an attempt to destroy the 'political.' Mouffe's democracy is open ended, and as Kapoor says, "...by definition it is pluralist and decentered."[53]

Pluralism or if put it more correctly 'antagonisms' seems to be more of a 'sufficient condition' for a radical democracy. On the contrary, for Habermas, pluralism is only a 'necessary condition'. The proceduralist approach aims at transforming the society into a radical one. Habermasian theory does not advocate for the protection of antagonism as such. Radicalism, in Habermas, rests in the appeal for ensuring more inclusion in democratic discourses in the political public spheres as well as in the process of the conversion of communicative power into administrative power. While considering exclusion as a problem specific to the discourse of pluralism, Habermas replies to Foucault that discourse in his theory is virtually different from the Foucauldian model precisely because of its potential for self-transformation. Habermas explains: "...rights to unrestricted inclusion and equality which are an integral part of the liberal public sphere's self-transformation...but...Foucault considers the formative rule of a hegemonic discourse as mechanisms of exclusion constituting their respective other. In these cases there is no communication between those within and those without. Those who participate in the discourse do not share a common language with the protesting other."[54]

On the contrary to the Foucauldian model, Habermasian public sphere offers a common ground for particular discourses. This presence of pluralism transforms the discourse as well as the structures of the public sphere from within. The concept of

[51] Bent Flyvbjerg, 'Habermas and Foucault: Thinkers of Civil Society?', *The British Journal of Sociology,* Vol.49, no.2, Jan.1998, pp. 222-223
[52] John S Dryzek, op.cit, p.60
[53] Ilan Kapoor, op.cit, p.467
[54] Jurgen Habermas, 'Further reflections on the Public Sphere', *Habermas and the Public Sphere,* (ed) Craig Calhoun, MIT Press, 1992, p.429

sovereignty, in Habermas, is propped up by the idea of communicative power which seems to be an antidote to Foucauldian disciplinary mechanism. Even though, while framing an utopian democratic ideal, one cannot reject the presence of unequally distributed social power and its tendency to dominate the discourses in the public sphere. But by considering these existing possibilities of power and domination, in a plural society, it is very important to provide and also to maintain a democratic deliberative space in which the competition between unequal powers are turned to be neutralized or counterbalanced through normative regulations. This is the point in which one has to look at the deliberative turn in democratic theory.[55]

The deliberative democratic turn heralds the renewal of democratic theory that facilitates both liberal and democratic principles together. The exponents of democratic theory stress that it is the most suitable model for complex societies. Obviously, the concept has different interpretations. For Dryzek, deliberative democracy promises democratic authenticity. It is grounded in the communicative action in the public sphere which is, for him, 'non coercive' and capable of connecting the particular to the general. The communication in the public sphere demands political equality to ensure that all participants in the deliberative process have an equal chance for affecting the outcome. Dryzek argues that the public opinion emerges from the discourses in the public sphere, can be translated into communicative power through the means of variety of mechanisms available.

According to Young, 'deliberative democracy is a form of political reason, where democratic process is primarily a discussion of problems, conflicts and claims of need or interest.'[56] By critically evaluating the features of deliberative model she emphasizes the major deficiencies of this model. She points out that the first limitation it carries is that the participants should accept certain premises before entering into the process of deliberation and the issues are framed within a generally accepted conceptual and normative framework. Secondly, the subject of public discussion, accepted by deliberative democracy, is centered on the common good. Thirdly, the

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[55] Dryzek says that 'around 1990 the theory of democracy took a deliberative turn. The new model conceives discourse as a source of order and so the contestation of discourse as central to democracy.' The new turn has its beginning from two different points; liberal constitutionalism and critical theory. See Dryzek, op.cit, pp.v-8

[56] Iris Marion Young, op.cit,p.22

assumption, held by many theorists, that the deliberations occur in a single form where interlocutors face each other directly. Lastly, a particular normative order for deliberation is not yet expounded.[57] According to Young, 'the normal condition of democratic debate is a process of struggle.'[58] In order to overcome the limitations of deliberative model and also to give a wider meaning to the concept of 'political communication', she offers a new concept of communicative democracy.

Deliberative democracy, according to Chantal Mouffe, aims at securing a strong link between democracy and liberalism. The two major approaches in this regard have two different origins; one is from John Rawls and the other is from Habermas.[59] Pursuing the Rawlsian line of thinking, Joshua Cohen puts forward a deliberative democratic model, which is according to him, Habermas quotes "...is rooted in the *intuitive ideal of democratic association*, in which the justification of terms and conditions of association proceeds through public argument and reasoning among equal citizens. Citizens in such an order share a 'commitment' to the resolution of problems of collective choice through public reasoning, and regard their basic institutions as legitimate in so far as they establish the framework for free public deliberation."[60]

The procedure of democratic deliberation, for Cohen, has an inclusive and public character that appears in the form of argumentation. It is free form internal as well as external coercion. By excluding the possibility of 'consensus' in opinion formation, Cohen gives weight to majority decisions, which come out from deliberation and it will remain until the minority become the majority. The matters of deliberation are restricted to the equal interest of all. It is open to the interpretation of needs and wants and even for changing the pre- political attitudes and preferences.[61]

Seyla Benhabib propounds a Habermasian kind of deliberative democratic model based on pluralistic public spheres. The multiplicity of associations, organizations and

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[57] The limitations she explicated are not applicable to all models. While considering the aspect of 'unity' she notices that some theorists conceive unity not as the starting point but as a goal of political dialogue. These models seeking 'common good' devaluing differences and therefore it serves as a means of exclusion. She advocates for a 'decentred' concept of politics and society. Ibid. pp. 37-47
[58] Ibid. p.50
[59] Chantal Mouffe, op. cit, p 84
[60] See Habermas, BFN, p 305, quoted from Joshua Cohen, 'Deliberation and Democratic Legitimacy' in A. Hamlin and B. Petit (Ed), *The Good Polity*, Oxford, London, 1989, p 21. Emphasis mine.
[61] Ibid, p 306

movements, in the civil society, are interlocked through public deliberation in the public sphere. The plurality of public spheres, she explicates "...consists of mutually overlapping networks and associations of opinion-forming as well as decisional bodies. Within these multiple and overlapping networks of publicity, different logics of reason giving, greeting, story telling and embedded speech can flourish."[62]Deliberative democracy ensures rationality and legitimacy of decision making through public deliberations, which design the existing institutions as well. The participants in the public sphere are obliged to consider the view points of others. Benhabib elaborates that "...the requirement of impartiality is particularly binding for legislative and deliberative bodies that decide upon coercive rules of action for all involved."[63]

For Benhabib, deliberative democracy restores 'a sense of democracy' among citizens who consider themselves as free, moral and political being. The general characteristics of the abovementioned models are almost similar. Dryzek lays primary emphasis on deliberations in public spheres and therefore the political process of deliberation comes at the centre of his model. He argues for the conversion of communicative power into administrative power. Unlike Habermas, he does not offer any kind of institutionalization of democratic procedures as well as politics. Young pursues Habermasian project and advocates for a 'decentred' notion of public sphere. By criticizing many of the contemporary deliberative democratic models on the ground that they impose constraints on deliberation, she proposes an enlarged communicative domain with extensive forms of communication. Cohen's model, as Mouffe also understands, is a liberal one. The idea of 'intuitive ideal of democratic association' explicates his theory proposes the 'innate' democratic character imbibed in liberal societies. He provides an inclusive model that privileges majority rule. The discursive realm is always kept open for the minorities to acquire the majority status; through discursive means he intends to keep the discursive realm open and ensure the normal circulation of power as well. In Benhabib also, multiple public spheres are given the task of proceeding with deliberations as well as shaping the institutions.

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[62] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press, 2002, p 139
[63] Ibid, p 62

Habermasian procedural model of deliberative democracy on the one hand, being diametrically opposite to this models, tries to protect the deliberations and opinion-and- will formation in the peripheral political public spheres and on the other, it aims to convert the communicative power generated from those public sphere deliberations into administrative power. Therefore, in order to protect the democratic procedure Habermas argues for institutionalizing these procedures into the legal system. This 'two-track model' also sequels the mutual relationship between law and democracy.

IV. DELIBERATIVE POLITICS: A NEW PROCESS OF DEMOCRATIC DELIBERATION

Deliberative politics is a procedurally regulated form of politics through which a decentered society reproduces itself through a non-coercive 'communicative mode of sociation.' It guarantees the self-organization of a communicative community without compromising its plurality. By considering the factual conditions existing in contemporary liberal plural societies, discourse theory offers a new model of democracy in which politics and law are redefined in a constructive manner. The procedural aspect of deliberative politics entails rules of discourse and forms of argumentation based on practical reason.

Discourse theory integrates elements which are taken from both liberal and republican models and put forward a procedural model tend to pragmatic considerations. It proposes deliberations governed by practical reason which aims to arrive at action oriented mutual understanding on the basis of discursively produced normative validity claims. For Habermas, the process of political opinion- and- will formation and the status of the constitution are equiprimordial. This is the point in which Habermas departs from the above discussed discursive democratic models. He argues for institutionalizing the procedure of deliberation. Habermas elucidates: "...according to discourse theory, the success of deliberative politics depends not on a collective acting citizenry but on the institutionalization of the corresponding procedures and conditions of communications, as well as on the interplay of institutionalized deliberative process with informally developed public opinions. Proceduralized popular sovereignty and a

political system tied into the peripheral networks of the political public sphere go together with the image of decentred society. "[64]

Habermas declines the notion of the 'social whole.' In order to protect the informal network of political public spheres in the periphery and to protect the private and political autonomy, discourse theory proceduralizes the notion of popular sovereignty and establishes its link with the political system. Thus Habermas conjoins the 'channels of procedurally regulated deliberation and decision making.' Popular sovereignty, according to him, is anonymous. The proceduralization of the notion is possible in so far as it acquires the form of communicative power. By negating the philosophy of the subject Habermas offers an intersubjective perspective of popular sovereignty. This concept, from the point of view of discourse theory, has an all encompassing function in the society. He explains: "...the 'self' of the self-organizing legal community disappears in the subjectless forms of communication that regulate the flow of discursive opinion- and will-formation in such a way that their fallible results enjoy the presumption of being reasonable."[65]

Therefore, unless this subjectless form of communication is legally institutionalized and the anonymous popular sovereignty is democratically proceduralized in the process, 'opinion- and will- formation' in the political public spheres would be undermined. The channels of communication in the public spheres are not regulated by procedures as Habermas puts "...it is better suited for the struggle over needs and their interpretation."[66] The informal public opinion generated from the structures of an unsubverted public sphere is the basis of democratically constituted will formation. Insisting on nurturing the undistorted discursive process as well as formalizing the functions of the administrative system, discourse theory ties politics into law. Habermas considers political system as just one action system among others. He explains: "...it provides a safety mechanism for solving problems that threaten social integration, politics must be able to communicate through the medium of law with all the other legitimate spheres of action." [67]

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[64] Jurgen Habermas, *BFN*, p. 298
[65] Ibid, p. 301
[66] Ibid, p. 314
[67] Ibid. p 302

Law ensures the co-originality and reciprocity of private and civic autonomy in democratic process of deliberation. Law and deliberative politics have a complimentary relation to each other. For, on the one hand, legitimate law is produced through deliberative politics. On the other, the process of unsubverted deliberative politics, in public spheres, is protected by the law. In a functionally differentiated society where deliberation aims to obtain social integration, deliberative politics along with the task of conflict regulation, intends to satisfy collective goals. In doing so, politics can effectively work out through the means of law, because it is one of the major sources of social integration.[68] The reformation of the normative self-understanding comes about through discourses based on 'moral regulation of conflicts' and 'ethical safeguarding of identities and forms of life.' Along with society's normative transformation Habermas focuses on society's sociological transformation too.

Deliberative politics is an all encompassing two-track process. At the level of opinion- and will-formation, it proceeds with two dimensions; 'constitutional and informal.'[69] Along with the change in the notion of civil society, the concept of politics also changes and acquires a new meaning. The society became an array of internally differentiated communities. In such a social condition, the available means of non-coercive political communication between the differentiated groups according to Habermas is the means of rational communicative action. From the perspective of discourse theory, deliberative politics is the means of democratic deliberation and the process of will-formation. And this is also considered as the ideal way of settling conflicts without violence. Thus communication becomes the sole political means of social integration.

The idea of the self-organization of the society is one of the central concerns of Habermasian theory of democracy. This aspect, for Habermas, is considered as ideal condition of democratic society, in which society reproduces itself through the means of communication. With the postulation of this ideal notion, Habermas also analyses

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[68] To explicate the role of law and politics in social integration Habermas argues that "...social integration accomplished by democratic means must pass through a discursive filter where other regulators-for example, the co-ordination patterns operating through settled values, norms and routine for reaching understanding- fail, politics and law raise these quasi-natural problem-solving processes above the threshold of consciousness, as it were." Ibid, p. 318

[69] Ibid, p.314

the factual condition existing in complex societies that hinders the communicative social relations in multifarious ways.[70]

But Habermas considers those aspects, in the present context, as 'deviation from the model of ideal communicative society. Even though the ideal condition of communicative social relations are not prevailing, complex societies always have a network of communication with a possibility of integration. The procedural concept of democracy tries to recognize the aspect like politics and law. The approach of this model not represses or to reduce the complexity of the society, but it aims to transfer the communicative power, through procedurally regulated opinion-and will-formation., without suppressing the complexities. These procedures, according to Habermas, are democratic. He delineates: "...the communication circulating in the public sphere...can be converted into political power only if it passes through the sluice of democratic procedure and penetrates the constitutionally organized political system in general.[71]

The idea of 'communicative community' refers to social integration in plural society. The functioning public sphere exists in liberal societies has three specific characteristics. They are, to Habermas: self-interpretative, self-reflexive and self-transformative. And the plural and complex socio-cultural condition renders 'the necessary condition' for the development of democracy. Discourse theory of democracy is an attempt to proceduralize these democratic conditions immanent in liberal political culture. It proposes the proceduralization of deliberative politics and its institutionalization.[72] This aspect, especially his attempt through law and morality

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[70] Habermas explicates the socio-political limitations of communications and decisions, pertaining to the spending of time, expenditure, time pressure, postponement of decisions etc. The unequal distribution of information and knowledge and the 'selective' interaction of the media are also crucial. The asymmetrical structure of the public sphere is also highlighted as one of the major systemic constrains. Besides, inequalities in individual abilities and the adequacy of resources for participating in political communications are posing serious limitations. The absence of relevant knowledge of one's histories and opportunistic attitudes, affects, prejudices etc. distort rational will formation. See, Jurgen Habermas, *BFN*, pp.325-326
[71] Ibid, p.327
[72] "...Habermas's discursive proceduralism – of which his proceduralist paradigm of law is an integral part – is the product of a pluralist vision bent on fairly and equally including and accommodating persons and groups who disagree on substantive issues. While it operates in different space/time frame works ranging from the most universal to the here-and –now of concrete social groups, Habermas's proceduralism invariably replicates through out its field of application the same model predicated on impartiality as between different substantive positions within the relevant framework." Michel

seems to be a challenge to the classical liberal principles viz. negative liberties and subjective rights etc. Habermasian theory rather provides intersubjectively defined rights and freedoms: mainly to participate in the process of democratic will-formation.

V. CONCLUDING REMARKS

The core feature of Habermasian democratic theory is its normative inclination. The process of democratic deliberation addresses both moral and ethical questions as the subject of deliberation. Politics then becomes pragmatic and communicative, where values are redeemed through deliberations governed by intersubjectively shared norms and principles. The proceduralization of the process of opinion-and will-formation, take place in the formal public spheres has its aim for protecting the process of democracy in complex societies.

When politics acquires a pragmatic turn, the aspect of 'critical politics', in Habermas, gets connected to a 'politics of self-criticism.' Functionally, politics thus becomes a means of society's self-critical development. Since normative values become the governing principles of society's self-critical development, Habermasian theory offers a democratic form of normative restructuring of the society. Constitutional state provides institutional supports and legal protection for the functional system in order to ensure society's democratic self-organization.

Rosenfeld, "Law as Discourse: Bridging the Gap Between Democracy and Rights", *Harvard law Review*, Vol. 108, 1995, p.1180

CONCLUSION

CONCLUSION

In the twentieth century, especially after the second world war, the notion of democracy turned out to be one of the most significant themes in political theory. The idea of public sphere, expounded by Habermas, has political as well as theoretical significance. The notion of public sphere happened to be a decisive conceptual resource to identify the radical democratic spaces in the domain of liberal civil society. Public sphere is conceived to be a political space free from domination and coercion, in which the private can be converted into political entities. The absence of domination provides a climate for free rational thinking and thereby human emancipation.

The emancipatory values, such as self-reflexivity, individual autonomy, rational and critical deliberation, are the fundamentals of ideal democracy. While explicating the historical role played by the bourgeois public sphere, he argues that it is capable of transforming the society as well. The idea of social transformation, offered by the theory of public sphere, opens up a possibility of radical democratic thinking. Habermas notices the significant role of law in preserving democratic values and to protect individual rights. The private law has its origin from the bourgeois public sphere. Prior to the emergence of constitutional state, private law concentrates basically on protecting exchange relationships and private contracts in accordance with the laws of market. These contract laws guarantees the autonomy of private individuals in market relations. Private law comes into existence as a reflection of the will of bourgeois individuals. But along with the decline of the bourgeois public sphere, private law also deteriorated.

The historical account of bourgeois public sphere and, notably, its disintegration offers a challenge to liberal democracy. The disintegration of bourgeois public sphere, due to internal reasons, mirrors the normative decline of liberal society. The 'disintegration thesis' denotes that during the course of development of liberalism and capitalism, the basic democratic values are undermined. This analysis unveils the internal contradictions and tensions existing between the domain of values and the 'nature-like development of capitalism' in the west.

A genuine public sphere is a domain that guarantees critical reason and critical politics. It is through the critical use of reason, the free and autonomous individuals radically transform the existing system of domination and power. Critical politics is thus capable of bringing about social transformation and reordering social power. But under the duress of capitalist development, with the formation of commercial and business interests and the production of leisure and entertainment (produced by media), society's traditional value spheres were perished. As a result, society became 'refeudalised'. The idea of refeudalisation exposes the degeneration of the critical domain in liberal society and its change into a nonpolitical realm which is now vulnerable to domination. The obliteration of normative and emancipatory values makes liberal society's radical democratic transformation difficult.

Habermas' critique of advanced capitalism succeeds in disclosing the major crises tendencies endemic to the system. The theory of crisis follows the Marxian critical theory tradition on the one hand, and it helps to overcome the one-dimensional and negative theoretical phase of the early Frankfurt School on the other. By elucidating four major crisis tendencies, he explains that late- capitalism is always threatened by any of those crisis tendencies and is liable for transformation.

In state regulated economic systems, crises shift into administrative system and transmute as steering problems. State extends its administrative mechanisms into the private and autonomous structures of the society, which threaten social and system integration. The interventionist state needs legitimation. The notion of legitimation crisis explicates, on the one hand, the lack of democratic participation in the process of democratic will formation, and, on the other, exposes the impossibility of a substantive form of democracy under systemically controlled society.

State uses its institutional structures as the means of domination. The administrative intervention of the state, along with the new values produced by advanced capitalism, distorts the fundamental democratic values preserved in the normative structures of the society. Motivation crisis refers to the decline of these values which are considered to be the basic premises of an ideal democracy. It is also important to note

that, after the decline of the public sphere, administrative decisions fail to represent genuine democratic public opinion.

These theoretical attempts can probably be seen as an explication of the impossibility of a genuine democratic society under the domination of state-regulated capitalist system. But the theory of crisis, expounded by Habermas, does open up the possibility of social transformation. The idea of public sphere, conceived of democratic and emancipatory potential, fuels the quest for a radical democratic alternative. His view regarding the invigoration of participatory opinion and will-formation, for a possible democratic form of decision making, seems to be a contribution to social democratic models as well.

Political theory, for Habermas, is action oriented. With the development of 'theory of communicative action', Habermas's political theory takes a pragmatic turn. This is considered to be his departure from the Critical Theory tradition of the early Frankfurt School. The theory of communicative action aspires to bring mutual understanding between participants in the process of rational communication. He argues that not only empirically valid claims but moral and subjective claims can also be articulated in the process of communicative action.

As a response of the emergence of complex societies in the west, Habermas attempts to reformulate his theory in terms of the changing socio-political conditions. The feminist critiques, especially raised by Nancy Fraser, also contributed to this shift. He now accepts the role of 'counterpublics' in providing necessary condition for democracy in complex societies. As a result, he forsakes the idea of 'social totality' as well as the philosophy of subject and moves on to formulate a theory of intersubjectivity. The theory of communicative action is based on linguistically connected intersubjective relationship between 'speaking and acting subjects'.

Habermas develops 'system' and 'lifeworld' theory in order to explicate the colonizing tendencies prevailing in modern societies. The colonization thesis provides an account of the process of colonization by economic and political system. He develops this theory mainly in the light of the New Social Movements that emerged in the later half of the twentieth century. The lifeworld, in his theory, is described as a

normative realm where genuine communication networks are distorted. Habermas offers a detailed account of the role of law in facilitating the process of colonization. While analyzing the tendencies of domination relevant to the changed conditions of society, Habermas does not offer a critique of present day capitalist development and the dominating tendencies it carries. Instead, he turns his attention to the aspect of law, especially its contribution to the prevailing new forms of dominations. This turn seems to be the most decisive factor in determining the later theoretical contributions of Habermas.

In modern liberal societies, through the process of 'juridification', law becomes the means of systemic coercion. It is through the means of law system colonizes the lifeworld. At the same time, Habermas considers law as the only possible means for society's normative integration. Therefore he endeavors to reconstruct the modern positive law which is coercive in character. Habermas finds that law is capable of providing a legitimate link between the system and the lifeworld. He imagines a legal theory which duly conceives both factual and normative aspects. He puts forward his theory as an alternative to the two already existing paradigms of law; the liberal and welfare paradigms. In order to overcome the deficiencies of these paradigms, he introduces a discourse theory of law which attempts to bind private and political autonomy as well as focuses on eliminating the rift between legal and factual equality.

The discourse theory of law is formulated on the basic principle of discourse ethics which argues for the inclusion of all the affected in the process of discursive law making. The discursively formed will is capable to be transformed into valid laws. Citizens therefore become both 'the addresses and authors of law'. One of the primary concerns of the theory is to meet plural society's need for integration. The discursive realm is open to different forms of expressions and validity claims; therefore it renders a space for pragmatic, ethical-political and moral discourses. The inclusion of morality in legal discourses equips law to act as a symbolic system on the one hand, and, an action system on the other. Accordingly, it binds symbolic and functional realm of the society. Law thus becomes a system of knowledge and a system of action at once.

Habermas identifies three modes of power existing in complex societies, that are; social, administrative and communicative power. Social power refers to unevenly distributed forms and relations of power prevailing in plural societies. Administrative power rests on administrative system which is exercised especially to take and implement decisions on behalf of its addressees. Communicative power emanates from the communicative realm of the society and it functions as a counter power to administrative power.

In a constitutional democracy popular sovereignty is exercised through free and uninterrupted use of communicative power. Through the process of democratic will-formation citizen's legislative power transforms into communicative power. This process makes the interaction between deliberation and decision making feasible. It is also to be noted that, while focusing on the potentiality of communicative power, Habermas disregards alternative forms of power and other possibilities of dominations possible in every day life contexts. Regarding the aspects of power and domination, Habermas mainly focuses his attention to administrative interventions. He finds a functionally possible democracy only under the structural conditions proposed by the constitutional state. Constitutional democracy, with the principle of separation of powers, legally prevents administrative system from intervening in the legislative process where legislature and judiciary share the duty of justifying and applying norms.

It is to be noted that, unlike his early works, Habermas formulates a theory which relies on the historically developed institutional structures of liberal democratic societies. He now demands functional changes only. The theory therefore confines to the defined boundaries of the system. By considering politics as a form of proceduralised law making, Habermasian theory forsakes the idea of 'critical politics' which is oriented towards the total transformation of the society. Instead of critical politics, the pragmatic, ethical-political and moral discourses directed towards a politics of consensus which focuses mainly on normative restructuring of society. The ethical-political discourse, for its intention to understand the tradition of ethical community and its attempt for redefining the identity through will-forming discourses, renders a hermeneutical aspect to legal discourse. The merging of politics into law transmutes the process of law making a defining feature of democracy.

The democratic process of self-legislation demands the presence of both private and public autonomy. In Habermas, individual autonomy and popular sovereignty attains equal importance in the formation democratic will. By developing this form of democracy, Habermas combines two grand traditions of political theories, the first one being Kantian liberalism and the second, Rousseaueian republicanism. In complex societies democracy is obliged to fulfill two major functions; the protection of private autonomy on the one hand, and of social integration on the other. These seemingly contradictory objectives, according to Habermas, can be fulfilled by the sole medium of law.

The rediscovery of civil society and public sphere, contributed by the 'new conflict zones' of New Social Movements, offers a possible condition for democracy. Now civil society is conceptualized as a dispersed, non-economic realm of competing publics. Since the public sphere is conceived to be a 'solution-seeking' realm, it acquires an 'action oriented' role as well. Political public sphere now offers a deliberative space which is capable of accommodating all the affected including the weak publics. Through public opinions emanate from the political public spheres and the civil society succeeds in influencing public policies.

By considering the changed socio-political conditions seriously, Habermas formulates a procedural model of democracy which, according to him, is possible only in the specific context of liberal political culture. Habermas treats liberal political culture as an apposite normative system mainly because of its inclusive and self-transformatory potential. Without providing an empirically rooted adequate critique of the existing media develops the opinion that it is capable of nurturing democracy in complex societies. He thus offers only a normative description of it. He does not propose any sort of measures, either systemic or political, to eradiate the prevailing economic inequality. But, For Habermas, liberal civil society and political public spheres provide the 'necessary condition' for democracy. This is the point in which Habermas contrasts with radical democratic theories, because for them the complex civil society provides 'sufficient condition' for a radical democracy.

Since the civil society possesses unevenly distributed social power, it is essential to ensure that the peripheral public spheres are included in the process of democratic discursive will formation. Aims at providing an inclusive democratic ideal, Habermas propound a two-track model. Political public sphere acts as a plausible link between private realm and decision making bodies. The two-track model offers a separation of the two specialized fields within a constitutional democracy; the discursive and decision making realm. This model endeavors to secure the will formed by the informal publics on the one hand, and to ensure that democratically formed will is converted into policy decisions and laws. This model thus intends to protect the domain of discursive politics on the one hand, and secures the efficiency of decision making on the other.

The theory of discourse model of procedural democracy proffers useful conceptual resources for the existing discursive democratic paradigm. It is obvious that idea of public sphere acquires central position in the theories of Dryzek, Benhabib and Young. But contrary to them, instead of providing a theory of democracy based on radical democratic potential imbibed in the political public spheres, Habermas goes on to argue for the proceduralization of discourse within a legal system through legitimate means of law making.

Deliberative politics offers a procedurally regulated form of politics. It is conceived in the form of a procedure that guarantees the self-organization of a communicative community without compromising its plurality. Functionally, it has two major dimensions; constitutional and informal. It offers legitimate law making on the one hand, and an uninterrupted deliberative politics of informal publics on the other. It is conceived as a deliberative form of popular sovereignty that regulates the process of will-formation.

While analyzing the tensions prevailing in the present day complex societies of the West, contrary to his earlier attempts, Habermas does not offer a theory of crisis. He no longer considers crisis as a critical condition that necessitates social transformation. The liberal political culture, with its capacity for self-transformation, overcomes those critical situations. It seems that, therefore, he forsakes the possibility of a critical theory of politics oriented towards the transformation of society.

Habermas finds that through a pragmatic model of discursive politics, society's moral, ethical and political questions can be solved. Accordingly, in Habermasian theory, the aspect of critical politics seems transformed into a 'politics of self-criticism' aimed at liberal society's normative restructuring. Here, critique is defined within a procedurally regulated pragmatic discursive context. Precisely, Habermas's procedural democracy, contrary to the early one, seems to have turned out to be a form of 'self-critical reformism'. The theory of democracy, in Habermas, thus offers a normative restructuring of liberal democratic society.

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