



## Negotiating Ethics as a Two Level Debate

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**ABSTRACT:** As a form of moral debate, discourse ethic, according to Habermas, is based on regulated discussion. Participating moral agents share a common understanding in the ideal speech situation. Following procedures they try to reach consensus on questions of justice and rights. Critics of discourse ethic point to the bias of Western assumptions regarding agents and methods, the danger of elitism, and the optimism and the pacifism that run through the theory. After modification, Habermas distinguishes two types of discourse: the discourse of justification and the discourse of application. The second is inferior to the first. In the second, there is room for negotiating. There is another way of looking at negotiation, one that takes negotiating seriously as an important category of human behavior. This category shows an interesting overlap with moral behavior. Distinguishing four concepts of negotiating and using reciprocity and trust as the moral minimum, Negotiating Ethics is presented as a two level moral debate, close to Habermas but morally different in essential aspects.

### I. Discourse Ethics: Habermas

Habermas establishes his moral theory by externalizing the Kantian *dialogue interieur*. The externalization takes place in three steps. The first step is to transfer the mental deliberation of the Kantian individual into an interactive public deliberation of all those concerned with the moral topic in question. The second step is to conflate rationality with reason. Rationality no longer is a deduction from Reason, but instead it is an underpinning of reasonableness. In discourse ethic rationality means giving good reasons for choices of reasonableness. The third step is to view justice, not according to the categorical imperative, but by concentrating on the following of procedures. Claims concerning the content of moral deliberation must be avoided. What results is an elaborated, interactive Kantianism, concentrating on procedures but still claiming universalism.

Continuing the line of critical theory, Habermas avoids the classical standards of Nature, God and Reason and instead presents the ideal speech situation: an attempt to interpret rational consensus procedurally, with no regard for the content. The ideal speech situation serves to summarize the rules to be followed in moral argumentation: symmetry and reciprocity. Symmetry refers to speech acts: each participant must have an equal chance to initiate and to continue communication, and to make assertions, give explanations, and challenge justifications. Reciprocity refers to action contexts: participants must have an equal chance to express their wishes, feelings and intentions, and speakers must act as if each of them has the

same capacity to order, to promise and to be accountable. In the ideal speech situation the participants operate without power differences; the only power allowed is the power of argumentation. The ideal speech situation, Habermas later admits (1985, 229), is a somewhat too concrete expression for the presuppositions moral agents always (must) make when they want to participate seriously in a discussion. Serious participation means assuming that the final aim of communication is the reaching of shared understanding: *Verständigung*. The agent who denies this is contradicting himself. Habermas calls this a performative contradiction.

The ideal speech situation is the basic orientation for discourse ethic. Such a discourse is a gathering of people with the intention of reaching rationally motivated consensus on moral norms that will be universally valid. In the process agents learn from each other to see what their common interests are, while all interests are judged impartially; only those norms can claim validity that are able to meet the agreement of all concerned (1983, 103). Discourse ethic demands the willingness and ability of individuals, and their cultures in general, to adopt a universal moral view. The central moral problems in the discourse are therefore likely to be questions of justice in the form of a norm or a principle tested on universability. When the discourse leads to consensus about a universal norm, the consensus guarantees the justification of that norm.

In his discourse ethic Habermas forges ahead with the Kantian distinction between autonomy and agency. Autonomy is the condition of the will that makes agency possible. Together with Reason it forms the metaphysical foundation of Kantian ethics and for Habermas autonomy and Reason are the basis of justice to be discussed as a question of *Moralität*. Agency is the means to express autonomy and as such it is bound to culture and history. Practical agents have needs, beliefs and relationships related to and restricted by local manners and customs. Considering actions within the framework of manners and customs for Habermas is *Sittlichkeit*.

## II. Discourse Ethics: Criticism

The ethic of discourse offers important gains because contrary to Kant Habermas uses a dialogical and historical perspective on moral questions. However, discourse ethics has been criticized from different sides, not in the least by sympathizers. The critics are unanimous on two points. First, the ethic of discourse is presented as a purely procedural moral theory, but it is not free from all content. Everyone who agrees with its norms is already motivated by something: will, choice or tradition. Within an existing society a moral sensitivity or moral preference has come into being that enables moral discussion to be successful. This is the willingness to reach consensus and the capacity to do so. As such agency precedes autonomy. Habermas' procedural ethic is actually based on typically Western assumptions about moral agents. The reasonableness and equality of individuals are postulated as self-evident highest Good. Not all African and Asian cultures share this assumption (Solomon and Higgins, 1993). The second point concentrates on the conditions Habermas uses for the participants in the discussion. Not only must these 'subjects' be capable of using language and acting reasonably, they must also have a level of reflection that enables them to think about questions of justice, to argue about these questions and to reach consensus about them with others. This level of reflection can only be reached by a small, well-educated and trained group of agents: an intellectual elite. The matter of course that in discourse ethic everybody speaks for himself is undermined by the conditions imposed.

Two other topics of criticism are not shared by everybody but have considerable impact on the empirical status of the *Diskursethik*. Probably Axel Honneth is right when he identifies Habermas' moral intuitions as the intuitions and ideals of the left, postwar generation in Germany (1985, 78). Habermas also is a child of his time, both as a person and a philosopher. This may explain the basic ideas of conciliation and optimism in Habermas' theory, but these

ideas remain the weak spots in a universal theory of moral debate. In such a debate we are concerned with the actual moral notions in everyday life worldwide, not with idiosyncratic notions or wishful thinking. The impotence of Western discourses of reasonableness, for instance in the United Nations, against the ongoing conflicts of our time in Eastern Europe, the Middle East, Africa and South-America is a showcase of all too naive ideas of conciliation and optimism.

The second topic also concerns the lack of sobriety. In his first study in discourse ethic Habermas states: the testing of moral norms requires the impartial judgment of the interests of all concerned (1983, 87). This implies discourse ethic has impartiality already built into its basic structure. The performative contradiction links impartiality to the presuppositions that make communication possible. In a philosophical debate Albrecht Wellmer remarked: "it still is not clear what these presuppositions are" (1986, 103). This is not surprising because the suppositions are not the result of interdisciplinary research in human communication, but are part and parcel of the ontological assumption of communicative action: "Shared understanding exists in human language as a *telos*" (1981, II: 387). Habermas is at pains to make this assumption plausible, but it never becomes clear why the structure of language should refer to consensus without powerdifferences. With the same intensity the belief can be defended that language is a verbal weapon for strategic action, and shared understanding is an exception to that rule. Habermas' *telos* of human language is an optimistic assumption based on speculation, not on empirical premises. Richard Gebauer is right when he claims that critical theory cannot constrain itself to the mere explication of communicative presuppositions, but has the task "to prove the impossibility to go beyond the model of communicative action with empirical arguments" (1993, 85). In his attempt to develop a pragmatic moral theory Habermas has not gone far enough. First, there is procedural conceitedness and bias in the form of Western assumptions of agents and methods, and the silent presumption of an intellectual elite. Second, there is lack of sobriety expressed in rational post-war optimism and in the pacifism of the basic ontological claim. Both characteristics distort the hermeneutic and explanatory power of what could be and should be a fully-fledged theory of moral debate.

### **III. Discourse Ethics: Modification**

Over the years a more differentiated approach of discourse ethic has developed. Klaus Günther argued that the recognition of a norm as valid means that every participant in the discourse holds that norm in all relevant situations as appropriate or *Angemessen* (1988, 50-52). A norm is appropriate when the consequences of that norm in a specific situation are acceptable to the agents and all characteristics of a specific situation have been taken into consideration. This brings Habermas in his second study on discourse ethic (1991, 137) to recapture a distinction he made earlier only tentatively (1983, 83). In Habermas' view an effective theory of morality should guarantee both the inviolability and the social relationships of individuals. Inviolability refers to the right: to questions of justice that have universal validity. Social relationships refer to the good, to questions of personal ideals, cultural differences and solidarity. The differences between these sorts of questions are now made explicit by distinguishing two types of discourse. The first type, in which the universability of norms of justice is decided upon, is now called the discourse of justification. The second type, in which is discussed what to do in specific situations and why, is called the discourse of application (1991, 138). According to Habermas a clear hierarchy exists between the two types of discourse. First and most important is the discourse of justification, which clusters topics like autonomy in moral decision, foundation of justice and conciliation of perspectives. Second and inferior to the first one is the discourse of application, which clusters moral agency, everyday practices and differentiations. The ranking of these discourses is already adequately expressed in the use of the term application. For Habermas ethics are insights, generated by high-quality moral agents with cooperative intentions. Once

these insights are recognized and agreed on, they can be 'applied' to the outside world, with all its contingencies and shades of gray. This binary opposition between the higher discourse of justification and the lower discourse of application creates a serious one-sidedness in Habermas' moral reflection. For Hans Krämer this is a systematic misunderstanding of moral discourse (1992, 37); Jeffrey Reiman agrees: "The requirements of morality are those of living together, not of speaking about living together" (1990, 181).

Walking the same path of critical theory Seyla Benhabib (1990, 330) criticizes Habermas' discourse ethic for its Kantian rigidity. She prefers a "weak deontology". For her the basic assumptions of universal respect and egalitarian reciprocity need not always be valid. Occasionally one should be able to deflect and exclude a party from the discussion for a period. This can be the case when the pressure exerted by one party makes it impossible for another party to function normally. Nonetheless, good reasons must be given to exclude a party temporarily. Reaching consensus is not an end in itself, but a mean to sustain relationships and practices in which consensus as a way of life can exist. That is why we must also consider self-regarding virtues, moral emotions and questions of character. However, time is limited: discourse ethic is not particularly suitable for institutions and corporations, because of the restrictions of time and scarcity of resources of these collective agents. Benhabib's points to the need for making well-argued exceptions, stresses the importance of questions of the Good next to questions of the Right, and restricts the applicability of discourse ethic.

Simone Chambers is trying to extend Habermas' argument by outlining some of the pragmatic implications for a "real practical discourse" (1993, 231). She concludes that discourses must be understood as open-ended and fallible: conclusions and agreements reached are always open to revision. Discourse in the real world will never match the ideal speech situation, so the only thing we must be alert to is the degree of approximation. One conversation will seldom be enough; moral consensus must be seen as the cumulative product of many crisscrossing conversations over time. To close such strings of conversations we need chairpersons or mediators. Janna Thompson (1994) presents her analysis as a defence of communicative ethics, but in fact she is suggesting the development of what I call *negotiation ethics*. The "existence of universally acceptable judgments and principles, will have to depend upon negotiation and compromise among people who have different ethical intuitions and different ideas of what is desirable" (254). Discourse must be seen as a process of negotiation, focussing not only "upon the points of view which people start with, but also upon how people respond to the responses and suggestions of others."

#### **IV. Concepts of Negotiating**

It is no coincidence Habermas has changed his ideas on negotiating. In his first moral study (1983, 80-86) he conceived of negotiating as a zero-sum game: there are no common or shared interests and all that can be reached is a settlement of conflicting interests. Negotiating for Habermas is of no importance. In his second study (1991) he developed a renewed interest in situations of suitability and finally, after ten years, influenced by Jon Elster (1989), his concept of negotiation changed into a non-zero-sum game (204-207). In the discourse of application there is room for negotiating when it is unclear which value or interest is most important, or when several interests are at stake at the same time. The only negotiations tolerable, according to Habermas, are the ones in which discourse ethic is presupposed: only then a fair compromise will be reached.

Habermas enters the field of negotiating with suspicion and aversion. For most philosophers negotiation still has a negative connotation. That is a mistake. We are frequently involved in processes of negotiation, even when we're making moral decisions. To reach a clearer picture I will present a conceptual tool to map out the field of negotiating. This tool I have called the "Barry/Schelling scheme"; which can be specified into "Four concepts of negotiating".

For picturing human interaction Thomas Schelling (1960: 69) introduced the idea of a continuum from pure conflict to pure collaboration. Most action can be placed somewhere in between. In these actions it is important to let the other know what your plans, expectations and interests are. The exemplary situation of promoting these mixed interests is negotiating. Brian Barry presented a concept of negotiating (1965/1990) that covers both bargaining and discussion on merits. Bargaining is the proces of bid and counterbid aiming at an optimum, while agents stick to their interests. Discussion is the proces of critical interaction on sharing, policy, and rules. This might cause agents to change their minds about what they want and therefore redefine their interests. The combination of both insights I have called the Barry/Schelling scheme of negotiating. Dividing that scheme in four equal parts supplies us with four concepts of negotiating (Van Es, 1996).

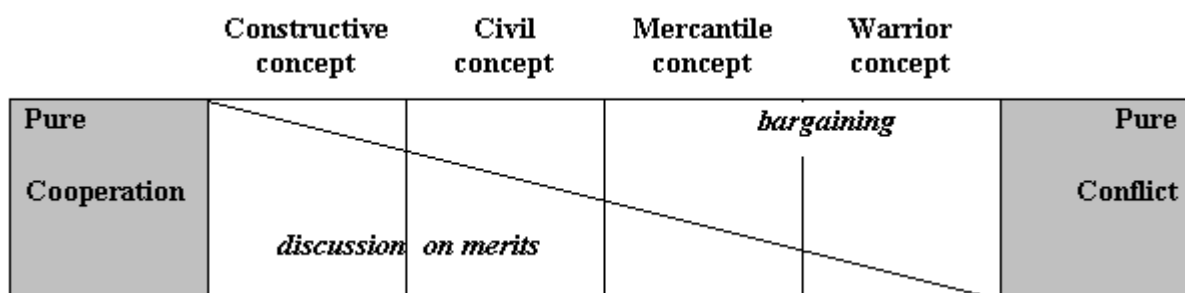


Figure 1 Four concepts of negotiating in the Barry/Schelling scheme

In the *warrior* concept only self-interests are promoted according to opportunism. The basic rule to succeed is exercising power other than violence: psychological and financial power. The 'other' is an enemy, and the right way to treat him is hard, confronting negotiating, without any scrupules. In the *mercantile* concept self-interests as well as interests of others are promoted according to prudence. The other is an aid to promote long-term self-interest; the right way to treat the other is hard but reasonable negotiating. In the *civil* concept role interests and collective interests are promoted out of reciprocity. The basic rule to succeed is cooperation. The other is an equal free civilian, and the right way to treat him or her is soft, argumentative negotiating.

There is one concept of negotiating left: it is situated on a more abstract level. In the *constructive* concept all interests of the agents involved are taken into account according to reciprocity. The basic rule to succeed is the willingness to explain interpetations and interests in order to reach an agreement on the most fitting scheme of interpretation. Others are co-constituents of truth and justice, together they decide what facts and values should be linked. At the same time individuals have to decide what the implications of these links mean for the life they want to live (Van Es, 1997).

## V. Two Level Debate in Negotiating Ethics

We learned from the criticism on discourse ethic not to try to develop a pure procedural ethic, and not to assume typical western moral agents or intellectuals. The more recent idea of two types of discourse is attractive, but the strict hierarchy between them is not necessary. We must be aware of the fact that pacifism is an incomplete answer to conflicts of interests, and we therefore explore the idea of negotiating, of ongoing debates that are temporarily closed by the negotiators or by mediators.

Negotiation in the broad sense, as developed in the previous section, offers us the possibility of a alternative moral debate. To realize that we must do two things: we need to cut off the negotiating that cannot be related to ethics, and, in order to establish a metalevel, we need to

split up the remaining forms of negotiating in two levels: the reflective, abstract level and the practical level.

To identify processes of negotiating that cannot be related to ethics we must use an explicit criterium that touches both on moral theory and on negotiation theory. Empirical research in interaction and ethics points to reciprocity as the strongest candidate for such a criterium (Axelrod, 1984), while respect can be considered an aspect of reciprocity and trust a condition for it (Gibbard, 1990; Van Es, 1996). Reciprocity and trust are the moral minimum for any action theory to be related to ethics. This means that the warrior concept and the larger part of the mercantile concept are adequate concepts to describe actual negotiating practices, but they do not relate to ethics. Above the moral minimum of trust and reciprocity we find the mercantile concept in so far as it is concerned with cooperation, and the civil and constructive concept in which reciprocity is the central guideline.

The idea of a two level moral debate enables us to temporarily split the moral deliberation. On the abstract level we have liberal, universal moral claims. Universals are best deduced from anthropological constants, and are generally expressed in terms of rights and principles. What exactly is deduced and how these rights and principles are formulated is not a one-off event, but a returning topic of negotiation on a distance from everyday decisions. There is no need to immediately jump to regulated discussion aimed at consensus; negotiated agreement is good enough. On the practical level we have the deliberation on local moral claims, generally expressed in terms of interests and connections. The practical level of moral debate is not simply a question of application, but is in need of well-considered judgements of moral notions that belong to the (sector of) society at hand.

In the end the split in moral deliberation is lifted. Universal values and principles must be integrated with local ones. A delicate balance is needed between the wisdom of distance and the ties of involvement and above the moral minimum. Figure 2 places these components together. In negotiating ethics the balance reached always is a moral compromise.

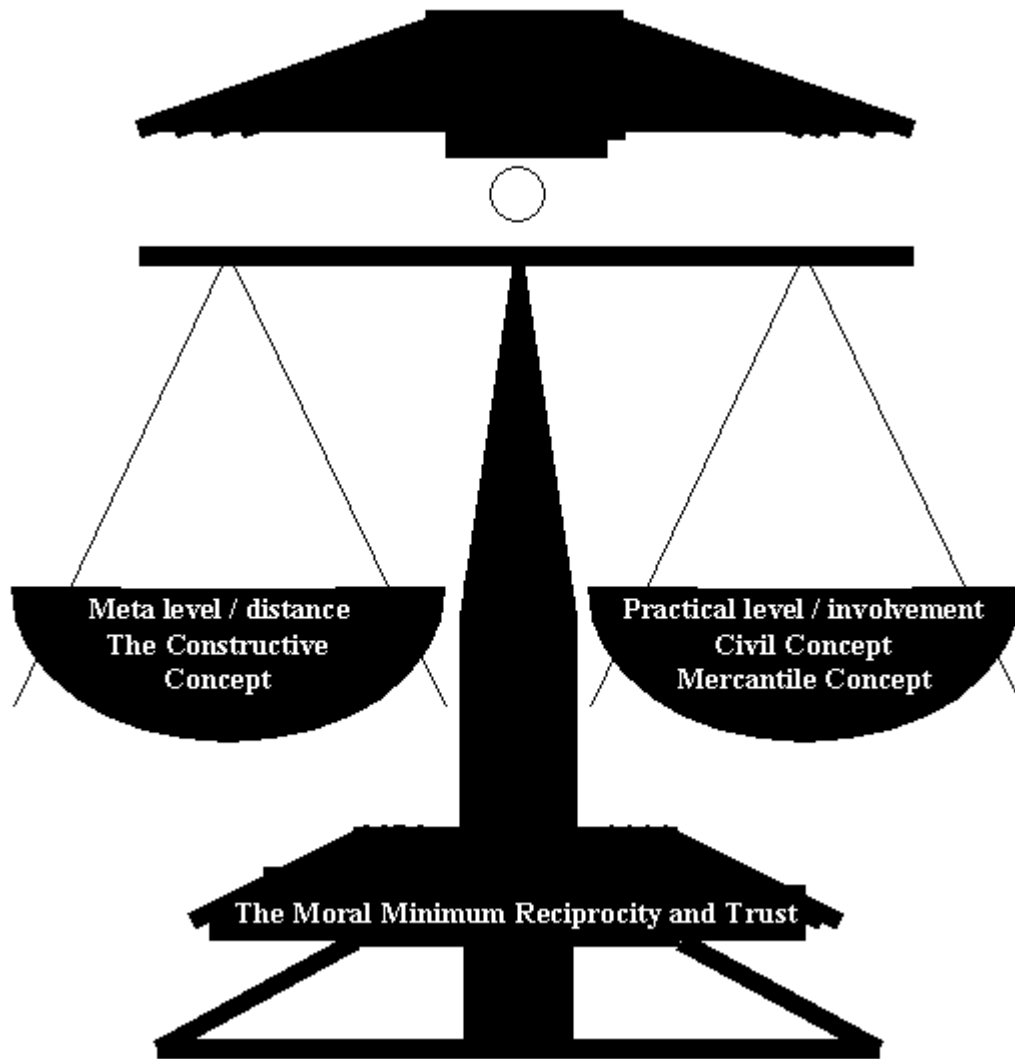


Figure 2. *Negotiating Ethics as a Two Level Moral Debate: a Balance*

## Bibliography

Axelrod, Robert

———1984 *The Evolution of Cooperation*, Basic Books

Barry, Brian

———1990 *Political Argument. A Reissue with a new Introduction*, Harvester Wheatsheaf

Benhabib, Sheila

———1990 'Afterword' *The Communicative Ethics Controversy*, MIT Press

Chambers, Simone

———1993 'Talking about rights: Discourse ethics and the protection of rights' *The Journal of Political Philosophy* 1/3, 229-249.

Elster, Jon

———1989 *The Cement of Society: A Study of Social Order*, Cambridge UP

Gebauer, Richard

———1993 *Letzte Begründung. Eine Kritik der Diskursethik von Jurgen Habermas*, Fink

Gibbard, Allan

———1990 *Wise Choices, Apt Feelings. A Theory of Normative Discourse*, Oxford UP

Günther, Klaus

———1988 *Der Sinn für Angemessenheit*, Suhrkamp

Habermas, Jurgen

———1981 *Theorie des kommunikativen Handelns*, Suhrkamp

———1983 *Moralbewusstsein und kommunikatives Handeln*, Suhrkamp

———1985 *Die neue Unübersichtlichkeit*, Suhrkamp

———1991 *Erläuterungen zur Diskursethik*, Suhrkamp

Honneth, Axel

———1985 'Discussionsbeitrag', *Die Zukunft der Vernunft*, Tübingen

Krämer, Hans

———1992 *Integrative Ethik*, Suhrkamp

Reiman, Jeffrey

———1990 *Justice & Modern Moral Philosophy*, Yale UP

Schelling, Thomas

———1960 *The Strategy of Conflict*, Harvard UP

Solomon & Higgins (Eds.)

———1993 *From Africa to Zen. An invitation to world philosophy*, Roman & Littlefield

Thompson, Janna

———1994 'A Defense of Communicative Ethics' *The Journal of Political Philosophy* 2/3, 240-255

Van Es, Robert

———1996 *Negotiating Ethics. On ethics in negotiation and negotiating in ethics*, Eburon

———1997 'The Constructive Concept of Negotiating. Negotiating morality and truth in the film *Rashomon*', Paper for the Keten project in Tokyo.



Wellmer, Albrecht

———1986 *Ethik und Dialog*, Suhrkamp