

## THE PARADOXICAL DUALITY OF MODERN LAW

**H**abermas has always defined the role of the philosopher as the guardian of reason. He considers the problem of rationality as *the* central question in every philosophical discussion. While he is sometimes critical of modernity and its rationalist ideals, he remains a vigorous defender of the ideas of rationality and modernity. He maintains that modernity is an unfinished project. And while he disapproves of the modernist appropriation of rationality in a restrictedly positivist and instrumentalist manner, he deplores in the same stroke those who have little regard for the capacity of human reason to establish valid standards and to tackle the challenging dilemmas of life. He insists that there are rational grounds for social hope.<sup>1</sup>

In his series of lectures on modernity, Habermas rails against the distortion of reason and the ambiguity of the rationalization processes that he claims modernity has perpetrated. He condemns specifically the reduction of reason to “the subjective faculty of understanding and purposive activity.”<sup>2</sup> He claims that modernity has conjured up “the image of an *exclusive* reason”<sup>3</sup> because it fails to distinguish between subject-centered reason and reason itself—committing in the process what Jay Bernstein brands as a metonymic fallacy—that is, “taking subject-centred reason as the whole of reason.”<sup>4</sup> Although acknowledging that this model of the subject has the advantage “of relating practical reason to the ‘private’ happiness and ‘moral’ autonomy of the individual,” Habermas avers that at the same time

subject-centered reason detaches “practical reason from its anchors in cultural forms of life and sociopolitical orders.”<sup>5</sup>

On the one hand, it must be granted that modernity made possible the rationalization of society.<sup>6</sup> On the other hand, it must be asserted that such rationalization of society was premised on a limited understanding of practical reason, “as if only empirical or scientific validity claims about factual states of affairs can be rationally contested and redeemed.”<sup>7</sup> As a result, we have the increasing domination of modern societies by systems of strategic calculation aimed solely at control over nature and people and the manufacture of material products. This is most evident in the economic order and bureaucratic state administration.

Habermas argues that this state of affairs is unsatisfactory since “neither a productive market economy nor an effective public administration [is] sufficient to hold together a complex modern society.”<sup>8</sup> In the political arena this has also fostered a gross misconception, as it abets an understanding of politics in which rationality is equated with the efficacy of means. Reason comes to be understood as the efficient pursuit of individual and collective ends, with nary a regard for the ends themselves.

As a corrective to this misconception, Habermas proposes the substitution of self-centered reason with a decentered one, justifying this move by citing its advantage: “A concept of reason transposed into the linguistic medium and unburdened of the exclusive relationship to moral issues plays a different role in theory construction; it can serve the descriptive purposes of a rational reconstruction of competences and structures of consciousness operative in history.”<sup>9</sup>

### COMMUNICATIVE ACTION AND SOCIAL COORDINATION

Habermas anchors his critical theory of societal rationalization in the premise that claims pertaining to the normative regulation of human interaction are subject to critique. He also refrains from equating modern practical reason with instrumental or strategic rationality.<sup>10</sup> He points out that

not all social actions can be reduced to instrumental or strategic orientation to *success*—“defined as the appearance in the world of a desired state, which can, in a given situation, be causally produced through goal-oriented action or omission”<sup>11</sup>—otherwise, all the various actors involved in social action are to be suspected as looking on one another as mere conditions or means to their respective ends. Habermas finds this absurd because it would mean that objects and people are to be treated on the same level, and that human interaction is to be characterized by manipulation or by systems of enticement and intimidation.

Such an underhanded mode of interaction Habermas finds inapt to account for how the social fabric is able to hold society together steadfastly. Instrumental or strategic action reduces “rationality and subjective meaning . . . as something which arises from the consciousness of each individual, rather than from the communicative relation which is always present and which is always recreated between several individuals.”<sup>12</sup> Communicative relation among individuals is something too obvious to dismiss or disregard. As Howard Williams points out:

Community is implicit in linguistic communication. For an utterance to be received and properly comprehended there has to be a reciprocal acceptance of a grammatical structure for the language concerned. This grammar is not fixed, it changes as the society changes but it is only transformed consensually. You cannot employ a language that is solely personal. To belong to this community you need as an individual to demonstrate “communicative competence.” Where such communicative competence exists “an ideal speech situation” has been attained in which the participants’ utterances are both intelligently expressed by the speaker and easily comprehended by the intended audience.<sup>13</sup>

Habermas embarks on a project to rehabilitate the idea of rationality—a rethinking of the problem of rationality and the process of rationalization. His project involves

incorporating the category of communicative action into the conception of purposive-rational action. Communicative action stands apart from both instrumental and strategic action by reason of its orientation towards understanding.<sup>14</sup> Actors who are oriented towards understanding subordinate their individual goals to their desire to reach a common understanding with other social actors. They act differently from actors oriented towards success, who prioritize their individual goals and act only on the basis of calculations of how optimally they can attain their respective goals. Habermas elaborates on the distinctive character of the orientation to understanding:

Reaching understanding is considered to be a process of reaching agreement among speaking and acting subjects. . . . Processes of reaching understanding aim at an agreement that meets the conditions of rationally motivated assent to the content of an utterance. A communicatively achieved agreement has a rational basis. . . . Agreement can indeed be objectively obtained by force; but what comes to pass manifestly through outside influence or the use of violence cannot count subjectively as agreement. Agreement rests on *convictions*. . . . Both ego, who raises a validity claim with his utterance, and alter, who recognizes or rejects it, base their decisions on potential grounds or reasons.<sup>15</sup>

Communicative action illustrates how a sense of rationality is intrinsically embedded in ongoing linguistic interaction. The speech acts of the communicatively competent *ego* and *alter* conform to a set of norms that lay down the criteria of communicative action. When a speaker attempts at reaching understanding, which is what engaging in communicative action is all about, the speech act stakes out three validity claims.<sup>16</sup> These are: *truth*—that the propositional content or existential presupposition of the speech act is true; *normative legitimacy* or rightness—that the statement is correct within the given context; and *truthfulness* or authenticity—that the pronouncement is

expressed sincerely. Together these constitute the *conditio sine qua non* of every communicative action.<sup>17</sup> The capacity for communicatively rational action simultaneously requires competence in the employment and defense of validity claims.

Habermas posits an intimate relation between knowledge and rationality. For him, the rationality of an utterance is a function of the reliability of the knowledge it contains; hence, the validity claims set forth in communicative action are always criticizable. They are liable to error, open to objective judgment, and dependent on a discursive ground to validate them.<sup>18</sup> Utterances are not, therefore, immediately rational. Habermas explains why this is so:

In contexts of communicative action, we call someone rational not only if he is able to put forward an assertion and, when criticized, to provide grounds for it by pointing to appropriate evidence, but also if he is following an established norm and is able when criticized, to justify his action by explicating the given situation in the light of legitimate expectations. We even call someone rational if he makes known a desire or an intention, expresses a feeling or a mood, shares a secret, confesses a deed, etc., and is then able to reassure critics in regard to the revealed experience by drawing practical consequences from it and behaving consistently thereafter.<sup>19</sup>

When a speaker is able to persuade his or her hearers that the claims he or she makes are rational and deserve to be recognized, there arises a rationally motivated consensus that can serve to coordinate future action. By means of a rational utterance, a hearer can be motivated to agree with the content proposed by a speaker. Through his theory of communicative action, Habermas highlights the intrinsically dialogical feature of communication. There is no communication without interactive participants; at the very least, a speaker and a hearer are engaged in the communicative process—a speaker and a hearer who are both oriented to mutual or reciprocal understanding, and are capable of

taking an affirmative or negative position when a validity claim is challenged.<sup>20</sup>

The mutual understanding that speaker and hearer attempt to establish is conditioned by social reality. Mutual understanding cannot be attained in a situation where both speaker and hearer regard each other as strategic adversaries bent on pushing a private agenda to achieve personal objectives. Habermas stresses that precisely “the goal of coming to an understanding is to bring about an agreement that terminates in the intersubjective mutuality of reciprocal understanding, shared knowledge, mutual trust, and accord with one another.”<sup>21</sup> This means that both speaker and hearer must consider each other as partners equally intent on the accomplishment of a common goal.

Communicative action seeks the cooperation of dialogical participants through a consensus regarding the rational validity of the norms whereby they understand the situation. The consensus is important because it serves to regulate the otherwise conflicting individual interests and to coordinate social action. It also makes possible the rationalization of social action according to the agreed norms in such wise that when the action fails to conform to these norms, an outright criticism can be mounted against it. These twin possibilities underscore the advantage of communicative action.

Habermas clarifies that the function of communicative reason is not to generate prescriptions:

Communicative reason . . . has a normative content only insofar as the communicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. . . . Communicative reason thus makes an orientation to validity claims possible, but it does not itself supply any substantive orientation for managing partial tasks—it is neither informative nor immediately practical.<sup>22</sup>

The function of communicative reason may be viewed, on the one hand, as a limitation, in the sense that communicatively acting individuals are not provided with a

normative ought towards action. Habermas admits that, unlike the classical form of practical reason, one does not encounter in communicative reason the forceful imperative for action traceable either “deontologically to the normative validity of a moral law, axiologically to a constellation of preferred values, or empirically to the effectiveness of a technical rule.”<sup>23</sup> The insights for action that follow from the exercise of communicative rationality are “reached in a hypothetical attitude and carry only the weak force of rational motivation.”<sup>24</sup> They do not necessarily or immediately culminate in action.

On the other hand, situating practical reason within the concept of communicative rationality imbues that same reason with a novel status. Habermas thinks it becomes heuristic and assists the reconstruction of the network of discourses that not only helps to shape opinions and to facilitate the attainment of consensus, but also serves as a critical standard to evaluate actual practices in the social arena.<sup>25</sup> Communicative rationality thus contains twofold aspects; it marshals “an ensemble of conditions that both enable and limit.”<sup>26</sup> And this is because it no longer simply pertains to the relation of a cognizing and monologically acting subject to an object, but involves rather the relation of communicating and dialogically acting individuals oriented towards the *telos* of mutual understanding.

The manner in which conclusions or resolutions are arrived at is of fundamental importance in rational discourse. Habermas develops a procedural view of rationality from which he derives two implications. The first is that communicative rationality, being not didactic, yields knowledge that is theoretically fallible and leads to conclusions that continually remain questionable and criticizable and hence open to further revision at all times. The reason is that the context of communicative reason is always limited. The second implication is that, by way of this procedure, competent speakers are able to engage in successful interaction. While the context within which dialogical actors engage in communicative action is limited, the claims to validity that they raise presuppose an idealizing moment that brings the actors beyond the immediate

context where they raise their claims.<sup>27</sup> A reference is made to something transcendent or independent of us in our relation to reality: "With each truth claim, speakers and hearers transcend the provincial standards of a particular collectivity, of a particular process of communication localized here and now."<sup>28</sup>

The tension between the "strongly idealizing, context-transcending claims of reason and the always limited context in which human reason must ply its trade" constantly accompanies the process of communicative action. Habermas writes:

[V]alidity claims are Janus-faced: as claims, they overshoot every context; at the same time, they must be both raised and accepted here and now if they are to support an agreement effective for coordination—for this there is no acontextual standpoint. The universalistic meaning of the claimed validity exceeds all contexts, but only the local, binding act of acceptance enables validity claims to bear the burden of social integration for a context-bound everyday practice.<sup>29</sup>

The tension, in other words, cannot be overcome. Habermas calls it the tension between *facticity* and *validity*.

The correlation between communicative action and linguistic validity claims denotes the singular capacity of communication to serve as a medium to bind actors in dialogical interaction and to coordinate their action. The binding character of communicative action is embodied in the obligation of the speaker to produce rationally convincing justifications of his or her claims for the sake of his or her hearers, who are bidden to evaluate the claims presented. The raising of a validity claim affirms, moreover, the mutual commitment of participants in discourse to criteria of validity that make communication possible. This leads to the establishment of social relationships among them insofar as their mutual commitment enables each communicating actor to see his or her own perspective side by side with that of another in relation to the objective world that they intersubjectively share.<sup>30</sup>



The validity standards to which social actors commit form the basis of the social bond. The degree of rationalization that informs social institutions and processes is, according to Habermas, directly proportional to the development of communicative practices in that society. Where these practices are hampered by purposive rationality—for instance, in the economic sector and other types of formal organizations—“the consequence is that relations which should be based on personal commitment, common understanding and involvement, are instead regulated on an impersonal basis, with alienation, disintegration of social responsibility and decline of legitimacy as results.”<sup>31</sup>

The ascendancy of communicative action, especially in political institutions and processes, is an extremely important proposition to make because it opens wide the range of rationality and freedom, which is relevant to a theory of deliberative democracy and discursive politics. It should also be stressed that the absence of rationality and freedom compounds the problem of legitimation in the modern society.

With regard to the power of communication to coordinate social action, Habermas thinks that such power depends on how the tension between facticity and validity is resolved. In an earlier setting, this tension did not exist because there was “a fusion of facticity and validity” like in the “archaic institutions that present themselves with an apparently unassailable claim to authority,” or in those kinship societies where “institutions protected by taboos form a site where cognitive and normative expectations merge and harden into an unbroken complex of convictions linked with motives and value orientations.”<sup>32</sup>

The same no longer holds in the modern period, where secularism and disenchantment reign and resources like traditions and strong institutions, with which the tension was bridged in prior times, have lost much of their puiſſance.<sup>33</sup> The implication is that in the present state of affairs, managing the tension between facticity and validity is no longer possible in venues that in the past proved adequate. There is a need to explore new avenues and to forge

new tools to carry out the tasks of social reproduction and integration.<sup>34</sup> Habermas points to communicative action in this regard:

With the concept of communicative action, which brings in mutual understanding as a mechanism of action orientation, the counterfactual presuppositions of actors who orient their action to validity claims also acquire immediate relevance for the construction and preservation of social orders; for these orders *exist* through the recognition of normative validity claims. This means that the tension between facticity and validity built into language and its use turns up again in the dynamics of the integration of communicatively socialized individuals.<sup>35</sup>

Habermas explains how language functioning communicatively becomes the primary source of social integration:

In such action, actors in the roles of speaker and hearer attempt to negotiate interpretations of the situation at hand and to harmonize their respective plans with one another through the unrestrained pursuit of illocutionary goals. . . . This use of language functions in such a way that the participants either agree on the validity claimed for their speech acts or identify the points of disagreement, which they conjointly take into consideration in the course of further interaction. Every speech act involves the raising of criticizable validity claims aimed at intersubjective recognition. A speech-act offer has a coordinating effect because the speaker by raising a validity claim, concomitantly takes on a sufficiently credible guarantee to vindicate the claim with the right kind of reasons, should this be necessary.<sup>36</sup>

The task of social integration is not yet completely achieved at the intersubjective level. While communicative reason and action provide a sufficient venue in which

the tension between facticity and validity may be satisfactorily negotiated, the inescapable fact remains that every agreement welded communicatively is subject to challenge and therefore remains at best a fragile basis for social integration.<sup>37</sup> The communicative deficit is complicated by another dilemma, namely the emergence in modernity of "a predominantly secular society in which normative orders must be maintained without social guarantees."<sup>38</sup> Modern society has become differentiated and pluralized such that social issues and assumptions need to be arbitrated communicatively. In the past, said issues and assumptions were reckoned immune from challenge; in the present, they are no longer granted easily and unquestioningly. The monolithic lifeworld background in which they were once safely nestled, and the formidable authority and institutions that vouchsafed them, have disintegrated considerably. It seems no area of modern life is spared any more from relentless critical scrutiny nor exempt from the intensified demand for its own rationalization.

The modern scene has also been the *situs* for the surfacing of multiple groups, subcultures, and subsystems; local rationalities or worldviews; and varying traditions and values. The citizens of modern society are thus confronted with a plethora of spheres of validity, which they have to delineate clearly from one another and with which they have to wrestle separately. Added to this is the intrusion of strategic action, which tries to wrest from communicative action the initiative for social integration.<sup>39</sup> The strategic phenomenon refers particularly to the rise in modern society of a capitalist economy, which serves to synchronize relations within its own subsystemic network. Habermas notes that traditional societies were structurally monolithic; the capacity for action was concentrated in the state organization. This is not the case for modern societies where the state no longer represents the capacity for action of society as a collectivity; instead, "the state apparatus becomes dependent upon the media-steered subsystem of this economy; this forces it to reorganize and leads, among other things, to an assimilation of power to the structure of a steering medium: power becomes assimilated to money."<sup>40</sup>

The convergence of political and economic power has resulted in an anomaly with respect to the motivation for action. George Trey explains:

On the one hand, due to rationalization, secularization, and differentiation within the lifeworld, modernity meets the condition necessary for consensus formation to coordinate social action. On the other hand, due to the huge need for coordination in a social order that has grown increasingly complex, non-linguistic "steering media" (power and money) play a more dramatic role. As efficiency is of paramount importance to the capitalist economy, it is the latter mode of action coordination that comes to dominate, relegating the lifeworld to subsystem status.<sup>41</sup>

The elevation of the steering media of power and money as devices for social coordination has bred a disastrous effect on the integrating capacity of the lifeworld. Complex systemic networks have come to dominate the lifeworld, and they have transformed the lifeworld into a subsystem. Power and money replace linguistic modes of action coordination. This means that the rational motivation for action, one grounded on consensus formation, is shunted aside and supplanted with an empirical one, backed by the force of money and power. In other words, "media such as money and power . . . encode a purposive-rational attitude towards calculable amounts of value and make it possible to exert generalized, strategic influence on the decisions of other participants while *bypassing* processes of consensus-oriented communication"; as a consequence, "the lifeworld contexts in which processes of reaching understanding are always embedded are devalued in favor of media-steered interactions. . . . [T]he lifeworld is no longer needed for the coordination of action."<sup>42</sup>

As Habermas considers the gravity of the problem that modern society imposes, he discovers how magnified the tension between facticity and validity has become. It overtaxes the integrating capacity of communicative action so that it becomes imperative to look elsewhere for what can

assist social reproduction and integration. Habermas locates this in the medium of law, particularly in the modern form of positive or enacted law. For him the law is the suitable mechanism that complements communicative action and by means of which the aggravated tension of facticity and validity can be resolved. The law also enables the extension of communicative rationality into virtually all regions of society.<sup>43</sup> Kenneth Baynes sums up this reasoning of Habermas:

In highly differentiated and pluralist societies the task of social coordination and integration falls to institutionalized procedures of legitimate lawmaking that transform into binding decisions the more diffuse public opinions initially produced via the anonymous communication network of a loosely organized and largely autonomous public sphere.<sup>44</sup>

#### TWOFOLD DIMENSIONS OF LEGAL VALIDITY

The tension between facticity and validity, when analyzed within the context of the law and the lawmaking process, involves a much more complex mode of validity. Habermas clarifies why this is so:

In the dimension of legal validity, facticity and validity are once again intertwined, but this time the two moments are not fused together—as they are in lifeworld certainties or in the overpowering authority of archaic institutions withdrawn from any discussion—in an indissoluble amalgam. In the legal mode of validity, the facticity of the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational because it guarantees liberty.<sup>45</sup>

The internal tension persists in the legal medium and is reflected in its “claim to reach judgments that are both rational and certain (or predictable) as well as in its

claim to issue legitimate orders, that can be coercively enforced."<sup>46</sup> While he acknowledges that the "conditions of coercion" do provide "*occasion* for norm-conformative behavior," Habermas thinks that compliance with the law is not enough, especially when the law is considered as a medium for social integration. To achieve the goal of social integration requires normatively valid rules by which the law can solicit from its subjects their rational motivation to follow in accordance with their free consent. Habermas writes thus: "Although legal claims are coupled with authorized coercion, they must always be such that the subjects can comply on account of their normative validity as well, hence out of 'respect for the law.'"<sup>47</sup>

Legal validity consists of two dimensions: on the one hand, the *facticity* of the legal institution "found in the threat of sanctions that are legally defined and can be enforced through court action"; on the other hand, the *validity* of the legal provisions "measured against the discursive redeemability of their normative validity claim . . . according to whether they have come about through a rational legislative process."<sup>48</sup> These two elements are distinct in the sense that the "legitimacy of a statute" is not coincident with its "de facto implementation." The factual assent to the law by a subject does not necessarily entail his or her recognition of its legitimacy. Some other factors can easily be cited to account for his or her action. It is therefore critical that the subject is fairly assured regarding the justifiability of the law to which he or she is bound. Without this supposition, the law will not be able to generate rational motivation for actual compliance with its demand. In such a situation, it will be necessary to resort to other means of enforcing the law, like intimidation and the threat of sanctions. The latter course is patently unacceptable to Habermas, not only because of its obvious disregard for freedom—which he considers an equally essential component of legal validity—but more so because of its facile insinuation that the binding power of the law is dependent on factors alien to the legal medium itself. This would belie its capacity, putatively inherent in the law, to entice obedience to its command.

Habermas argues that the rational substance of the law incorporates at once its ability to inspire adherence “from the nonenforceable motive of duty”; in other words, “the legal order must always make it *possible* to obey its rules out of respect for the law.”<sup>49</sup> This can be achieved through a lawmaking process<sup>50</sup> that can be guaranteed as legitimate in itself. He explains how this can be so:

The process of legislation . . . represents the place in the legal system where social integration first occurs. For this reason, it must be reasonable to expect those who participate in the legislative process, whether directly or indirectly, to drop the role of private subjects and assume, along with their role of citizen, the perspective of members of a freely associated legal community, in which an agreement on the normative principles for regulating social life either has already been secured through tradition or can be brought about deliberatively in accordance with normatively recognized procedures. . . . To the extent that rights of political participation and rights of communication are constitutive for the production of legitimate statutes, they must not be exercised by persons who act merely as private subjects of civil law. Rather, these rights must be exercised in the attitude of communicatively engaged citizens.<sup>51</sup>

Of course it is imperative that the law be socially effective. It is important that the law is passed and ratified, that it requires the observance of citizens, and that it can enforce the same observance through the imposition of commensurate penalty. Habermas emphasizes, however, the prior attention that must be accorded to lawmaking. He writes:

Coercible laws must prove their legitimacy as laws of freedom in the process—and by the kind of process—of lawmaking. . . . To be sure, legal behavior can be described as compliance with norms that have been backed with the threat of sanction and have acquired the force of law through the decisions

of a political legislature. But the facticity of lawmaking differs from that of the enforcement of the law insofar as the permission for legal coercion must be *traced back* to the *expectation of legitimacy* connected with the decisions of the legislature, which are both contingent and revisable.<sup>52</sup>

The positivity of modern law is therefore inextricably connected to the process through which it is constituted in the first place. Habermas flatly rejects the idea of legitimacy based exclusively on legality. Lawmaking must always follow the principle of communicative rationality; it must invariably observe an intersubjective and noncoercive process of communication among “politically autonomous citizens.” Without this communicative element, modern law cannot serve as a socially integrating force. It is only when those subject to the legal norm are able to identify with said norm as its “rational authors” that it is also effective as a medium of solidarity. Habermas therefore strongly maintains that although “the jointly exercised communicative freedom of citizens can assume a form that is mediated in a variety of ways by legal institutions and procedures . . . it cannot be completely replaced by coercive law,” and this is because “modern law lives off a solidarity concentrated in the value orientations of citizens and ultimately issuing from communicative action and deliberation.”<sup>53</sup>

The medium of law as it functions in modern society does not revoke the principles of communicative action; on the contrary, it seeks to maximize the rationality potential of language and strives to reinforce the capacity for social integration of communicative action. This alliance between modern law and communicative action is not without any difficulty. As a matter of fact, it heightens the tension between facticity and validity, already built into linguistic interaction and renders more rigorously the validity requirements of modern law. Habermas refers to these as the two sides of the law, “its positivity and its claim to rational acceptability.”<sup>54</sup> He points out, moreover, that modern society is no longer integrated solely by values and norms, or by mutual understanding alone, but also by economic



markets and the administrative use of power, which are “systemic mechanisms of societal integration that do not necessarily coordinate actions via the intentions of participants, but objectively, ‘behind the backs’ of participants.”<sup>55</sup> This requires that modern law link up with these various resources in order to fulfill its integrating function; furthermore, as it is intermeshed with various imperatives, law-making must now address itself to diverse areas in need of legislation.

As a consequence, modern law sometimes falls short of its integrating function. Habermas admits the following:

Often enough, law provides illegitimate power with the mere semblance of legitimacy. At first glance, one cannot tell whether legal regulations deserve the assent of associated citizens or whether they result from administrative self-programming and structural social power in such a way that they independently generate the necessary mass loyalty.<sup>56</sup>

Modern law is hard pressed for self-legitimation, as it lacks on the one hand metasocial backing that can shield it from criticism, and is burdened on the other hand by “the *secular* pressure of the functional imperatives of social reproduction.”<sup>57</sup> It is thus compelled to confront “the ‘external’ tension between a political order’s claim to be legitimate and its reliance on the *de facto* recognition of its members.”<sup>58</sup>

### THE NORMATIVE SENSE OF THE MODERN RULE OF LAW

It is clear from the foregoing that, for Habermas, the following considerations are indispensable in formulating a conceptual reconstruction of modern law: one, the law must satisfy “the functional requirements of a complex decentralized society”; and two, it must meet “the precarious conditions of a social integration that takes place through the acceptability of validity claims.”<sup>59</sup> These provisos are to be jointly addressed; otherwise, the law would amount to either an inutile or extraneous adjunct in the modern

society from which it must derive its validity and therein perform its function.

At the very center of modern law, moreover, lies a paradox, and this presents a challenge in terms of how the law can succeed in being valid. Habermas writes:

Modern law displaces normative expectations from morally unburdened individuals onto the laws that secure the compatibility of liberties. These laws draw their legitimacy from a legislative procedure based for its part on the principle of popular sovereignty. The paradoxical emergence of legitimacy out of legality must be explained by means of the rights that secure for citizens the exercise of their political autonomy. . . . As "subjective rights," these rights enjoyed by citizens display on the one hand the same structures as all rights that grant spheres of free choice to the individual. . . . On the other hand, the procedure of democratic legislation must confront participants with the normative expectations 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.<sup>60</sup>

The efficacy of law to serve as medium of social integration stems from its possession of coercive power that is allegedly backed up by its validity. The legal validity that is staked is not just factual but also consensual. The validity of the law is claimed to have been conferred by those to whom it applies. Its decrees must therefore be dutifully observed by those subject to it. The law brooks no opposition and any violation is met with sanction; in other words, before the law no individual may behave with impunity. The law defines by external constraints the range of options that the individual may take up. To defy the law is tantamount to defying oneself. Paul Chevigny puts it this way:

The kernel of the concept of law that Habermas draws upon . . . is familiar. He is exploring the implications

of a Kantian ideal of legality, which combines the positive fact of a legal enactment—that it has behind it the power of official coercion—with its validity in the broader sense that we obey it because we recognize the force of its rationale and the legitimacy of its source. . . . [This] ideal of legality, where law is coercive but at the same time recognized as valid, is possible in a modern democratic state only when citizens have the power to participate fully in making the laws that bind them.<sup>61</sup>

This claim of legal validity presents a dilemma especially in the democratic constitutional state where the framing of the laws is for the most part removed from the citizens and entrusted to legislators. The arrangement is not a grant of blanket authority for the legislators to enact any law they please; on the contrary, it imposes upon the legislators the obligation to offer justification for every law they pass. If the law fails in this regard then it cannot deserve the recognition of the citizens because the citizens are the ultimate subjects of the law, and it is for their interests and welfare that the law exists in the first place. In such a situation the law is a vapid command bereft of the power to demand compliance.

The preceding remarks accentuate the complication that a credible theory of law must contend with. Modern law is based on individual rights, which ensure the private autonomy of citizens. The guarantee of freedom is not enough, however. The citizens must be able to participate in the lawmaking process. Without this concession, the law becomes an unwanted imposition that robs the citizens of their autonomy. This is because, as Rasmussen explains, “persons are autonomous . . . only in the measure that they can be understood at the same time as authors of the law to which they are subject as addressees.”<sup>62</sup>

Habermas fully appreciates the perplexity involved in theorizing the nature of modern law. As a matter of fact, he regrets that “thus far no one has succeeded in satisfactorily reconciling private and public autonomy,” citing as evidence “the unclarified relation between individual

rights and public law" as well as "the unresolved competition between human rights and popular sovereignty."<sup>63</sup> To resolve this impasse he proposes the discourse-theoretical postulate according to which private and public autonomy, as well as human rights and popular sovereignty, mutually presuppose each other.<sup>64</sup> This implies that no system of rights can be conceived separate from its enactment by a democratic lawmaker.

### THE RELATION OF LAW TO DEMOCRACY

On account of the above, Habermas reckons as inadequate the earlier theories regarding the nature of subjective rights. One example is private law theory, which he finds problematic because he detects that it is premised on "the idea of morally laden individual rights, which claim normative independence from, and a higher legitimacy than, the political process of legislation."<sup>65</sup> As a contrary argument, he insists that the democratic lawmaking process is the sole provenance of all legitimacy in modern society. Habermas therefore debunks as pure fiction the theory of Thomas Hobbes (1588–1679) regarding the existence of clearly defined rights in a prior state of nature. He holds instead that basic rights are "something individuals mutually confer on one another insofar as they undertake to regulate their common life via positive law and thus to regard one another as free and equal consociates under law."<sup>66</sup> This means that it is improbable for the members of the Hobbesian society, who are deemed ensconced in a rigorously egocentric and asocial worldview, to scale the barrier that stands between their permanent conflict in the state of nature and their cooperation in the state of civil society. Habermas explains:

*On the one hand*, the parties would have to be capable of understanding what a social relationship based on the principle of reciprocity even means. The subjects of private law, who are at first only virtually present in the state of nature, have, prior to all association, not yet learned to "take the perspective of the other" and self-reflexively perceive themselves