

Procedural Or Contextual Justification Of Moral Norms

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One of the primary problems of meta-ethics is the justification or validation of ethical or value judgments. A variety of theories have been advanced in order to ground or justify ethical or value judgments. In essence, all ethical theories are an effort to ground or justify ethical or value judgments. In this paper, I will develop an argument that shows that the contemporary "dialogical turn" in ethics, as represented by the European debate between the dialogue ethics of hermeneutical philosophy and discourse ethics as developed by critical theorists, and the Anglo-American form of a similar debate between liberal theorists and communitarians, is a debate about the justification of ethical norms and value judgments.¹ Both sides of this debate agree that the justification of ethical or value judgments is grounded by the normative (that is, obligatory) form of discourse itself.

While both sides of this dialogical turn in ethics agree that the obligations of discourse ground moral and value judgments, they differ significantly as to how dialogue grounds such obligation. Discourse ethics and liberal theory from its side argue that the justification of normative judgments lies in the basic structure of moral argument such that the validity of ethical or value judgements is justified or validated by the procedures of moral discourse. Hermeneutical philosophy and communitarianism from its side argue that justification lies in the context of moral dialogue about substantive ethical norms or values. For convenience, we shall call these two positions proceduralism and contextualism.² My argument is that if discourse is the justifying or validating ground of ethical judgments, then the controversy between the two sides of this debate is fundamentally displaced.

It must be recognized that this is not the usual approach for understanding what is going forward in these important debates.³ Normally the issues are categorized through the frameworks of universalism vs. contextualism, or as exemplars of the controversy between context-independent or context-dependent rationality. But analysis of the debate shows that the primary issue is the meta-ethical concern of justifying ethical or value judgments either through their form or their substantive content. This question of justification in both cases moves the question of justification from logic as the ground of justification to the structure of moral argument or dialogue as yielding moral agreement or consensus. That is, each argues that where there is consensus about a moral or value judgment, it is reasonable to accept it as normatively obligatory. If this analysis is correct, then we have

two questions before us. First, do the norms of discourse justify ethical or value judgments? Second, is consensus or agreement the objective of moral arguments? ?

In this paper, I will reserve consideration of the adequacy of consensus as justifying normative judgments for another paper in order to concentrate on the first. To set up an answer to this question, I will first outline the essential aspects of the two positions with regard to justification. Then I will move through a short discussion about validity and argumentation. Then I can adequately support my conclusion that the debate is fundamentally displaced.

This debate in dialogical ethics starts with the fact that all efforts to secure a universal grounding or justification of moral norms must come to terms with the contextuality of knowledge and normativity. The debate has moved forward in dialogical ethics as a response and solution to the initial problem. The two positions that have developed can be described as a debate between universalism and various forms of contextualism in which the rules of language as dialogue or discourse become the major focus of attention. Both sides of the debate have an insight. This insight can be described as the recognition that the truth of propositions or the rightness of norms can be assessed only against the background of a shared conceptual scheme; and, moreover, that there exists an irreducible plurality of conceptual schemes within which such justification can take place.⁴ Superficially this debate appears a rehash of the still active fact-value debate, but it is in fact a debate with deeper roots, issues, and concerns than the relationship of facts and values, because it concerns the essential nexus between normativity, meaning, and justification within social discourse, especially in conflicted situations where common horizons cannot be taken for granted.

Alasdair MacIntyre sets up one side of the debate by arguing that all reasoning takes place within the context of some traditional mode of thought that transcends through criticism and invention the limitations of what had hitherto been reasoned in that tradition.⁵ This is to say that the ground of reasonable justification of ethical and value judgements lies in a "prior," (as preceding all present conversation about norms or values) consensus of a tradition of moral discourse. The normative ground of moral judgments is the dialogue within a tradition of reasoning.

Jürgen Habermas sets up the counter-position by arguing that traditions are systematically distorted and a philosophical programme of discourse analysis must start with removing these elements of systematic distortion of self-understanding that are communicated through language, the objective being a recovery of individual and social identity. Through self-reflective consciousness one realizes "communicative competence." By such competence one is enabled, beyond all distinctions, to communicate, to talk reciprocally, and to attain consensus by insight. Thus, it can be said that the justification of normative judgments lies in the norma-

tive (pragmatic transcendental) requirements of communication and discourse itself.

Discourse Ethics as Procedural Justification

Discourse or communicative ethics is an attempt to define formally those rules and communicative presuppositions that make it possible for participants in a practical discourse to arrive at a valid, rational consensus on social norms. Discourse ethics is not simply a matter of individual conscience, subjective conscience, or social consensus, but rather a concern connected with normative exigencies of language and communication. Normative principles are not simply the contingent outcomes of communicative exchanges, but are understood as premises or preconditions for intelligible language and communication as such.

In general terms, discourse ethics is a cognitive theory of ethics that relies on insights gathered through participation in communicative or discursive exchanges rather than factual or intuited data. Such exchanges permit one to grasp the normative structure of language in terms of an "ideal speech community" or ideal community of communication. By exploring this structure, communicative ethics is concerned not so much with the formulation of concrete norms or values as with the grounding of normativity itself. The consensus-communicative discourse ethics views the Kantian principle of universalization as the formal internalization of the principle of universalized reciprocity which requires that concrete norms be justified where possible by an agreement upon the interests of all those concerned. This "trans-subjective universalization" provides rational choice (or strategic action) calculations and ultimate normative justification a forum of judgment according to a principle or "regulative idea" for assessing concrete situations.⁶

According to Habermas, both theoretical and practical discourses are argumentative enterprises in which claims of truth and rightness are tested and contested through the invocation of validating reasons.⁷ A practical discourse aims at a rationally motivated consensus on norms. Thus, the aim of discourse ethics is to identify and make explicit the criteria that guide practical discourses and serve as the standard for distinguishing between justified and unjustified norms.⁸

This function, Habermas argues, is not an abstraction limited to personal morality. It serves the social or public purpose of prescribing impartiality and general reciprocity. "Impartial judgment reflects a principle which requires that, in assessing interests, every participant must assume the perspective of all others."⁹ This means that a norm "can claim validity if and only if all those potentially affected by the norm can consent to this validity as participants of a practical discourse."¹⁰ Thus, Habermas argues that the purpose of ethical theory is to provide a universal procedure with which to determine whether ethical norms and consensus are rational, moral, and possibly universal.¹¹

In attempting to specify the criteria that guide practical discourses, discourse ethics consists of two core affirmations. The first specifies the necessary conditions for coming to a legitimate rational agreement; the second articulates the possible contents on a formal level of such an agreement. These two dimensions are separable. The first has a higher priority than the second.¹² A norm of action is to be considered legitimate only if all those possibly affected would, as participants in a practical discourse, arrive at an agreement that such a norm should come into or remain in force.

What is to be considered as a rationally motivated agreement, however, has demanding preconditions. First, so all affected have an effective equality of opportunity to assume dialogue roles, there must be a mutual and reciprocal recognition, without constraint, by all autonomous rational subjects whose claims will be acknowledged if supported by valid arguments.¹³ But in order that the dialogue be capable of producing valid results, it must be a fully public communicative process unconstrained by political or economic force. It must also be public in terms of access. Anyone capable of speech and action who potentially will be affected by the norms under dispute must be able to participate in the discussion on equal terms. In short, these procedural principles that underlie the possibility of arriving at a rational consensus on the validity of norms demand symmetry, reciprocity, and reflexivity.¹⁴

The idea of rational consensus, however, involves more than the actual participation of every affected person in the relevant discussion. The *de facto* recognition of a norm by a community only indicates that the norm might be valid. Its actual validity can only be established through the use of a "bridge principle" to establish the connection between processes of collective will formation and the criteria for judging particular norms. "To enable consensus the bridge principle [between concrete norms and meta-ethical principles] must make sure that only such norms are accepted as valid which express the general will."¹⁵

This brings us to the second aspect of discourse ethics: the formal contents of agreements. Habermas maintains that norms of action on which we agree must articulate generalizable interests. "Every valid norm must satisfy the condition that the consequences and side effects which result for their general observance could be accepted by all those concerned."¹⁶ Such a situation is possible only where there are institutionalized measures in place to assure the idealized conditions presupposed by participants so as to approximate the conditions and minimize the empirical limitations of avoidable internal and external interference.¹⁷ This is a reversal of the standard justificatory argument that holds that in accepting a particular norm one must accept the more general norm under which it is subsumed. Habermas must reverse this standard form, since he starts with the general norms of discourse to move to the particular.

But it can be argued that Habermas is exploiting an ambiguity in the notion of "validity" here. There are, it must be admitted, two distinct meanings of the word validity. Validity₁ refers to norms as they are procedurally justified. Validity₂ refers to norms as they have secured a socially effective binding force. Validity₁ refers to concordance with the subject matter itself or, logically, that norms are justified in a deductive sense. Validity₂ is social. Validity₁ is taken care of by procedures. Validity₂ is taken care of by employment (usage), enactment, and application. That is, the validity of a norm defined by procedural justification is not identical with the social validity of that norm, and, as a rule, the former is also suitable without further reference or concern for bringing about the validity of the latter. We will return to this critical fault in the third section, but first we have to develop the communitarian position.

A Communitarian Counter-position: Justification as Contextual Rationality

Alasdair MacIntyre starts with the negative argument that the language of moral discourse has become disordered. Enlightenment liberalism, he argues, has been compelled to deny almost all of its fundamental ethical and political positions, because its consequence was an inconclusive contention among moral opinions that are merely asserted rather than justified.¹⁸ Rational inquiry is embodied in dialogue.¹⁹ Building from this position, MacIntyre claims that Western thought displays a multiplicity of traditions of inquiry. Each of these traditions includes distinctive conceptions of practical rationality and justice. Given the thesis that rational inquiry is always "embodied in a tradition," it follows that one cannot reason about ethical or value judgements except within one of these traditions. Accordingly, the "rationality of traditions"²⁰ is a dialectical process in which later formulations resolve inadequacies and incoherences in earlier formulations while also withstanding objections and thereby become "the best answers proposed so far."²¹

This argument for tradition-dependent rationality is also an argument against the Enlightenment notion of tradition-independent inquiry advocated by Habermas.²² Tradition-independent inquiry rests on the affirmation that rationality presupposes at least some universal standards by appeal to which the rivalry among moral claims may, at least in principle, be adjudicated. This is a position that MacIntyre rejects categorically.

For MacIntyre, moral reflection is a type of on-going conversation. This conversation, MacIntyre argues, is structured by the embeddedness of meaning in history and tradition, because "we cannot characterize behaviour independently of intention, and we cannot characterize intentions independently of the settings that make those intentions intelligible to the agents themselves and to others."²³ This "meaning of meaning" is what MacIntyre calls insertion into narrative. A narrative

(personal and public) is the concrete context which renders specific acts intelligible. Understanding requires understanding the context, because action itself has a basically historical character.²⁴

The structure of conversation, a specific act, is the human transaction in general. That is, conversational action is not a special sort or aspect of human action, even though the forms of language-using and of human life are such that the deeds of others speak for themselves as much as do their words.²⁵

Thus, language, word-using as an act, enters into the range of actions that can properly and reasonably be attributed to human beings. This is the core of social validity as the normative interpretations of actions *qua* action. Actions are subject to interpretation. Interpretation is a corrective dialogical process of questions and answers; "Did you mean that?" "No, I meant this," until agreement or consensus is reached about meaning. This meaning is normative for the interpretation of the action. Therefore, the achievement of understanding is reasonably and socially validated which, in the case of moral judgments, also means justified.

What is true of the individual as a moral agent is also true of the context in which one is embedded – the tradition. A living tradition is not one in which there is an absence of conflict, indeed, a living tradition embodies conflict because there is within the tradition a continuous argument of what the good is. Thus, a tradition is an historically extended, socially embodied argument about the goods which constitute the tradition.²⁶ Argumentation and procedural validation is only one movement in a more complex set of human intentions and actions. Validity, for MacIntyre, is the social validity constituted by the on-going historical vitality of traditions that interpose, develop, modify, expand, contract, and certify social meaning. This consensus is not a consensus of procedures, a minimal content of shared values, or social utility, but a consensus of intentionality out of which a common good is created by virtue of individuals aspiring to such a good in which the shared intention of the participants becomes the foundation of a moral dialogue.²⁷

Validity and Consensus

Both proceduralists and contextualists affirm that the norms of a communication ground normative justification; however, there are two different positions with regard to how and what is appropriate justificatory evidence. The proceduralists argue that once fair and impartial procedures are grounded, any subsequent agreement or consensus established or accepted in the dialogical process of the ideal speech community is also justified.²⁸ Justification of ethical or value judgments moves outward, so to speak, from the first principles to ethical and value judgments justified by consensus.²⁹ The contextualists, on the other hand, start with the minimum consensual agreement in a tradition. This minimal normative agreement lies in the communicational ground of dialogue itself, but in so far as language is a

bearer of common meaning, the actual consensus is much broader than the general rules of language to embrace religious, anthropological, social, cognitive, and moral consensus. Thus, it is argued that the validation of norms is a social process of mutual recognition.³⁰ In this sense, the process of justification is reversed from that of the proceduralists.

Thus, we see that each position develops a different notion of the validity of discursive reasons and the justificatory role of consensus provided by discourse. Procedural validity is the reasonableness of procedures as first principles that assure specific rational-choice norms are reasonable. The rough analogy is logical validity of an argument. Contextual validity is the validity of social enactment and interpretation. The rough analogy is the verification (interpretation) of specific premises in an argument. These two rough analogies show us why this debate that casts the justificatory choice as an "either-or" disjunctive is displaced, but to see that we must ask a very elementary question about the procedural and contextual processes of argument.

The aim or intent of an argument is to justify the conclusion by providing reasons for accepting it. That is, an argument is a course of reasoning aimed at demonstrating the truth or falsehood of something. Within the framework of reasoning, there are several basic procedures that must be observed. In order to have a sound argument, all the premises must be true; no premise can presuppose the truth of the conclusion; the conclusion must be at least probable in relation to the premises, and so on. These procedures are the conditions of the possibility of a sound argument. Once these basic procedural norms are acknowledged, an argument is evaluated in terms of its validity *and* truth. Validity refers to the structure of the argument. A valid argument holds irrespective of the truth of its claims. However, an argument may be valid and the claims false and so the argument fails. On the other hand, an argument may have true claims and still fail, because the form of the argument is not valid.

The point of belabouring this elementary point is to show that an argument can meet the procedural requirements of rational thinking and still fail because the contextual (substantive) claims of the argument fail. That is, one can observe good procedure and still produce a failed argument. Such arguments, in spite of their form, do not offer *adequate* reason to support the conclusion. That is, a sound argument is one which meets the normative requirements of two tests.

Validity is the normative obligation of procedures of "form." Truth is relative to the content of premises. One can demonstrate procedural validity with no reference at all to any substantive content of any premise. Every argument of the form *A is B, B is C, therefore, A is C* is valid (procedurally correct) and it is valid irrespective of any content. But the argument *All fish are whales; All whales are bipeds; therefore, All fish are bipeds*, while valid according to the procedures of

validity, is not a "good" (sound, justified) but a failed (unsound, unjustified) argument. The conclusion is false with reference to the substantive content of the premises. That is, fully justifying the argument requires the application of both the procedural (structural) and substantive (contextual) tests. Any argument which does not meet the criteria of *both* tests fails. That is, adequate reason is based on two sets of criteria, the normative structures of the process itself grounded by procedures, and the referential content of claims.

In like manner, the validity claims of ethical proceduralism and ethical contextualism are required in an adequate process of moral reasoning. The procedures of adequate moral reasoning can be abstracted from particular contents. But procedural validity by itself does not in fact justify a moral argument. Particular arguments must in fact be tested against particular content claims. In like manner, the contextualist argument that a tradition as social enactment does in fact justify a course of moral reasoning is only half of the validity question. Traditions do provide sedimentation of consensus about ethical and value judgments, but the evaluation of such consensus requires criteria of judgment with regard to the structural validity of the process of moral reasoning. Neither procedural validity nor contextual validity alone can justify a course of moral argumentation. Procedural validity assures that the process is itself reasonable. Contextual validity is the test of concrete cases.

A better analogy to use for the notion of discourse/dialogical validity than logical arguments, which are ultimately a sub-class within a larger realm of reasonable discourse, is legal procedure. A justified legal process consists of two inter-related justifications. First, there is the validity of the structure of the process as fair and impartial. These are the formal requirements. Second, there is the interpretative validity of the legal tradition as applied to cases. In this sense, legal values are not fixed absolutes that attach to some hypothetical notion of social contract or social existence, they are rather the concrete result of legal discourse constituted by the concrete process of questioning and offering answers within the procedural framework of the legal process.³¹ The legal consensus is not independent of the substantive values that emerge from and sustain the procedural validation.

A legal procedure can "fail" on the grounds that the structure of discourse was faulty or that the interpretation or application of the legal tradition was faulty. A sound judicial process requires both procedural and contextual validity. As procedural validity governs the consensus of contextual validity, the contextual validity of the conversation is at the same time a permanent conversation about procedures.³² The analogy of the relationship between context and procedure is that of the upper and lower blade of a pair of scissors. The upper blade is the procedural norms of the dialogical/transaction process. The lower blade is the substantive

contextual validity of social enactment. It is the inter-action of the two that yields the intelligibility of what is meant by justificatory validation.

Just as the fruit of legal process as a socio-cooperative scheme of public order is neither judicial procedure or legal interpretation, but the result of interpretation within procedural norms, moral discourse fashions in a similar scissor-like action. Moral conversation is not about context or procedure, it is rather "talk" that is normatively guided by procedure about substantive content. This is to say that the intelligibility of ethical or value discourse is not a choice between procedures or contexts, but a higher viewpoint that joins procedures and contexts as a nexus of cooperative sociability.³³ Neither individual desire nor collective enactment ground ethical or value judgement. Both are required and what is in need of explanation is the interaction of personal desire and collective will.

It is granted that analogies do not solve the problem of the differences between communicative and communitarian concepts of ethical conversation. But they do argue that the debate between discourse ethics and communitarianism is a displaced debate. Actual discourses, in which significant norms or values are at stake, as, for example, in legal discourse, reveal a process in which both sets of criteria are brought to situations where norms are in question. The real question, which discourse theorists and communitarians share in common, is to what extent consensus as ethical or value agreement does in fact ground or justify normative premises. This is another question altogether and one far too broad for the limits of this paper. But an adequate solution to the problem lies in understanding the intelligible link between individual desires which is the foundation of any intentionality in participating in a moral discourse and the social process which orders such desires as coherent, socially recurrent processes that provide the norms of cooperative interaction. This question, of course, abuts on a larger practical question that has not been adequately considered and that is when there is conflict (dissensus, disagreement) with regard to ethical or value judgments what exactly is the object of disagreement? Resolution of this issue has to wait for another paper.

Notes

1. For a discussion of the interrelationship among and between these positions see, James B. Sauer, "Conversations about Conversation in Ethics," in *Political Dialogue*, Poznan Studies in Philosophy and Science, Steven Esquith, ed., forthcoming. Also "Value, Discourse and Consensus," in *Dialogue in Ethics/Dialogue en éthique*, 2 (1) 1994, 21-43.

2. Proceduralists include discourse theorists like J. Habermas and K-O. Apel and liberal theorists like J. Rawls and B. Ackerman. Contextualists include hermeneuticists like H-G. Gadamer and P. Ricoeur and communitarians like A. MacIntyre, C. Sandel, C. Taylor, and M. Waltzer.

3. For a standard presentation of the issues and arguments see, Fred Dallmyr and Syla Benhabib, *The Communicative Ethics Controversy*, (Cambridge: MIT Press, 1991).

4. On conceptual scheme see Donald Davidson, "On Conceptual Schemes," in *Inquires into Truth*, 183-198). MacIntyre picks up the identical notion in *After Virtue: An Essay in Moral Philosophy*, (Notre Dame: University of Notre Dame Press, 1988), 2.

5. MacIntyre, *After Virtue*, 222.

6. Karl Otto Apel, "Is the Ethic of Ideal Communication Community a Utopia?" in Dallmyr and Benhabib, *The Communicative Ethics Controversy*.

7. Jürgen Habermas, "Discourse Ethics: Notes on a Programme of Philosophical Justification," in Dallmyr and Benhabib, *The Communicative Ethics Controversy*, 64-65.

8. See Thomas McCarthy, *The Critical Theory of Jürgen Habermas*, (Cambridge: MIT Press, 1978), 272-357.

9. Habermas, "Discourse Ethics," 70.

10. Habermas, "Discourse Ethics," 71.

11. Jürgen Habermas, *Communication and the Evolution of Society*, 97.

12. Habermas, in *Critical Debates*, 254.

13. Apel, *The Transformation of Philosophy*, 258-259, 227.

14. Habermas, *Critical Debates*, 254.

15. Habermas, "Discourse Ethics," 68.

16. Habermas, "Discourse Ethics," 70-71.

17. Habermas, "Discourse Ethics," 89.

18. MacIntyre, *After Virtue*, 4.

19. MacIntyre, *Whose Justice? Whose Rationality?* 7

20. MacIntyre, *Whose Justice? Whose Rationality?* 349 ff.

21. MacIntyre, *Whose Justice? Whose Rationality?* 358.

22. MacIntyre, *Whose Justice? Whose Rationality?* 6 ff, 334 ff.

23. MacIntyre, *After Virtue*, 206.

24. MacIntyre, *After Virtue*, 212.

25. MacIntyre, *After Virtue*, 211.
26. MacIntyre, *After Virtue*, 222.
27. Continuing this conversation requires moving to the philosophy of action. While the next section of this paper will open this field, a full exploration of the elements and arguments in the field will carry this essay too far afield. However, an excellent introduction to the field is provided by Carlos Moya, *Philosophy of Action: An Introduction*, (London: Polity Press, 1990). An older, but useful survey of the field is found in Lawrence Davis, *Theory of Action*, (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1979). For applications of two contributors to this field to ethics see Stuart Hampshire, *Thought and Action*, (London: Penguin, 1959, 1990); and Hector-Neri Castenada, "Imperatives, Decisions, and 'Oughts'," in *Morality and the Language of Conduct*, H-N Castenada and G. Nakhnikien, eds., (Detroit: Wayne State University Press, 1963), 219-299.
28. This is why proceduralists such as Habermas and Rawls safely ignore specific normative judgments. Such substantive content is secondary to identifying the general rules of procedure. However, it is incumbent on proceduralists that they show their procedures can deal with substantive content. In some cases, it has not been shown that procedures can handle substantive content. In the literature on conflict mediation that provides a substantial source for actual rather than virtual interest/value conflicted dialogues, the weight of theoretical opinion says that substantive value conflicts cannot be resolved. Bruce Ackerman, a proceduralist of the liberal persuasion, argues that public dialogue must prescind from substantive conflict. See Bruce A. Ackerman, "Why Dialogue?" in *Journal of Philosophy*, 56 (1989), 10; *Social Justice and the Liberal State*, (New Haven: Yale University Press, 1990), 5.
29. The basic principles are (1) a requirement for universal participation; that is, everyone potentially affected by the norm must participate in dialogue about the validity of the norm; and (2) no participant can claim moral authority on any ground except "good reason"; that is, on the grounds of reasons acceptable to and accepted by all participants in a discourse of validation. Procedural rules assure impartiality, fairness, and general reciprocity. While not presented as such, the notion of consensual justification is a reflection of the older natural law tradition of the *consensus gentium* which argues that common agreement is the evidence (justification) for universal obligation. See Richard Hooker, *Treatise on the Laws of Ecclesiastical Polity*.
30. Contextual justification starts with the shared identities and meanings that are "prior" to disagreement about particular ethical or value judgments that enable communication about such disagreement to proceed to greater justificatory specification through the interpretation of acts as grounded by agreement about ethical and value judgments.
31. Bruce Ackerman, *Reconstructing American Law*, (Cambridge: Harvard University Press, 1984), 96-97.
32. See my notion of constitution and contextual normativity applied to the notion of scientific explanation in James B. Sauer, "Between Economics and Ethics: Foundations for an Interdisciplinary Dialogue," *Ethics and Enemies*. Masudul A. Chouhury, ed, Yorkshire: Barmarick Press, 1995, 5-91.
33. See Kenneth R. Melchin, "Moral Knowledge and the Structure of Cooperative Living." *Theological Studies*, 52 (1991), 495-523; and "Revisionists, Deontologists, and the Structure of Moral Understanding." *Theological Studies*, 51 (1990), 389-416.