Discourse Ethics and Third-Party Mediation

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Discourse Ethics and Third-Party Mediation: Habermasian Guidelines for Current Mediation Practices as a Method of Conflict Resolution

Ban Ki Moon, United Nations Secretary-General, stated in a 2009 report to the Security Council that mediation has proven to be "the most promising" (Moon 2009: 3) tool in order to maintain international peace and security. Quantitative research on mediation confirms this assessment: in 46 percent of all disputes after the Cold War a third party was involved (Beardsley et al 2006: 59) whereby the likelihood to come to an agreement was five times higher with mediators' involvement than in those without mediators (ibid: 77). Following Bercovitch, Anagnoson and Wille (1991: 8), mediation is defined in this essay as

"a process of conflict management where disputants seek the assistance of, or accept an offer of help from, an individual, group, state, or organization to settle their conflict or resolve their differences without resorting to physical force or invoking the authority of the law."

In academic literature, one finds extensive empirical and normative research on mediation in conflict management. There is a common perception that the aim of mediation should be to overcome violent disputes in order to establish (negative) peace or enable compliance with international law (e.g. UN 2012: 20). Those goals are seen as desirable; therefore, the motivation for research is a normative one. However, the question of which norms should serve as a guideline for mediators is missing in almost all of these approaches (Sguaitamatti/Hellmüller 2012: 88). This essay aims to fill this gap by relating Jürgen Habermas' discourse ethics to current mediation practices in order to evaluate how the theory can give useful instructions for peacekeepers. Using a moral theory for this undertaking is essential since a mediation procedure based on morality is a precondition for a just and morally acceptable outcome. Moral criticism is crucial in order to change human behavior and correct judgments. Consequently, a Habermasian critique should above all contribute to more just – and as a result more successful – mediation practices. For it is known from socio-psychological research that disputes are particularly emotional and fierce when the parties blame each other for being unfair, unjust or exploitative (Dieter et al. 2000: 7). This essay follows the attitude that normative approaches should not stay in an abstract, theoretical realm but should be made useful for everyday practice. Mediation practices which can be morally justified on the basis of an elaborated theory are more legitimate and run a smaller risk of being accused of neo-imperialist attempts to impose Western ideas on non-Western states. Since, in Habermas' theory, norms are created in a practical discourse between the conflict parties, this approach is deemed to be especially useful to apply it on mediation theory.

Therefore, this essay first introduces Habermas' discourse ethics by localizing it in moral philosophy in order to identify its basic principles. Furthermore, the accusation of expressing a Western 'moral point of view' is dismantled. This is important because mediation should be based on universal principles which can be accepted in every cultural context. Afterwards, Habermas' thoughts are transformed into instructions for current mediation practices. The conclusion will sum up the findings and evaluate the value of Habermas' theory for mediation practice.

An Introduction to Jürgen Habermas' Discourse Ethics

Jürgen Habermas' discourse ethics represents a moral constructivist theory which relies on an epistemic notion of

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truth. His theory does not offer a set of concrete moral laws but rather a procedure in order to be able to justify norms: the practical discourse. This procedure does not create new norms but examines the validity of proposed, hypothetical norms. The initial situation of a troubled normative consent determines the subjects and problems which are open for negotiation (Habermas 1983: 113). Importantly, ethics in Habermas' sense is distinct from morality. The former includes all issues related to the question of what is a 'good' life for the individual whereas moral norms are universal and deontological. With a formal moral theory such as discourse ethics, many different sorts of 'good lives' can be created. This makes pluralism possible.

Localizing Habermas in Moral Philosophy: Following a Kantian Tradition

Habermas' discourse ethics builds up on Kantian moral theory. Habermas aims to reformulate Immanuel Kant's ideas of morality with regards to the justification of norms by means of communication theory (Habermas 1991: 9). Similarly to Kant's theory, Habermas' moral philosophy has a deontological, formalistic, universalistic and cognitivist character.

Both theories are *deontological* in the sense that they establish criteria for how to decide morally on the basis of a reasonably motivated understanding. Actions are seen as intrinsically good or bad (according to the moral law), regardless of their consequences. Like Kant, Habermas separates the deontological aspect of morality from an 'ethical' life since the latter is concerned with a certain *telos* of 'the good' (ibid: 11).

Besides, both theories have a *cognitivist* character. Cognitivist ethics has to be able to justify normative statements. It raises claims of fallibilism. This means that moral statements can be normatively right or wrong. In Kant's theory, the cognitive content of a statement is judged by the *categorical imperative* ("Handle nur nach derjenigen Maxime, nach der du wollen kannst, dass sie ein allgemeingültiges Gesetz werde" (Kant 1984 [1785]: 68)) whereas, for Habermas, it is determined constructively in the discourse.

This leads to the next similarity between Kant and Habermas: both theories are *formalistic* as they use one principle in order to judge the validity of norms. Habermas criticizes the categorical imperative's monological nature and its focus on the subject. He does not think that moral statements can be constituted via subject-centered reason as Kant does (Habermas 1991: 31, see also Habermas 1987a: 337f.). Therefore, he replaces the concept of subjectivity with the concept of intersubjectivity by using the principle of discourse ethics *D*:

"Jede gültige Norm müßte die Zustimmung aller Betroffenen, wenn diese nur an einem praktischen Diskurs teilnehmen würden, finden können." (Habermas 1991: 32). (Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.)

Habermas' principle has an advantage over other formalistic moral principles, such as those of John Rawls or G.H. Mead, because the abstract principle of an 'ideal' discourse is a pre-supposition for *existing* argumentation practices. Instructions for acting morally are not created in a thought experiment but in concrete, practical argumentation.

The practical discourse is governed by the principle of universalization *U*:

"Jede gültige Norm muß der Bedingung genügen, daß die Folgen und Nebenwirkungen, die sich aus ihrer allgemeinen Befolgung für die Befriedigung der Interessen jedes Einzelnen voraussichtlich ergeben, von allen Betroffenen zwanglos akzeptiert werden können." (Habermas 1991: 32). (All affected can accept the consequences and the side effects that [the norm's] general observance can be anticipated to have for the satisfaction of everyone's interests, and the consequences are preferred to those of known alternative possibilities for regulation.)

This moral principle counts always and everywhere and is not bound to a certain epoch or culture. Therefore, it is *universalistic*. Thus, U is the only purely moral principle in Habermas' philosophical theory as it belongs to the logic of the discourse itself. In this sense, D can be seen as a deduction of U (Habermas 1983: 103).

Consequently, valid norms have to be approved by every affected person; every person in the problematic situation

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must reasonably decide to accept the norm. Every participant in the actual argumentation is forced to take the perspective of all other participants. As opposed to Kant, the maxim of acting cannot be justified by the subject alone, but has to be agreed upon in a consensual procedure as a norm (Habermas 1983: 77).

Not a 'Western moral point of view': Habermas and Karl-Otto Apel

This is especially important for mediation theory. Skeptics of Habermas' discourse ethics have often claimed that Habermas expresses solely the 'moral point of view' of Western civilizations. Similarly, interventions of western third-party actors have been accused to be neo-imperialist attempts to impose the Western way of thinking on non-Western contexts (see e.g. Chandler 2006). However, since valid norms are the result of a practical discourse of everyone who would be affected by the outcome – thus situated in the given cultural and historical circumstances – those norms cannot be a product of Western imperialism. U is the only norm which governs every discourse. Nevertheless, consequent fallibilists express the concern that even U is the product of a Western moral point of view (Habermas 1983: 88f.). They argue that a transcendental ultimate justification of moral principles is, in general, impossible due to the *Münchhausen Trilemma*. The Münchhausen Trilemma aims to show that arguments are on principle never conclusively justifiable due to three possible problems: The circular argument (we repeat ourselves at some point), the infinite regress (each proof needs a new proof *ad infinitum*) and the axiomatic argument (the proof rests at a dogma). Karl-Otto Apel refutes the trilemma by revealing its inherent performative contradiction. Claiming that every argument is based on the Münchhausen Trilemma (and stating that the trilemma occurs in any case), the trilemma itself becomes an ultimate justification. This is inherently contradictory because the trilemma rejects the possibility of exactly this ultimate justification (Apel 1976: 55f). Therefore, transcendental-pragmatic preconditions exist for every reasonable discourse (Apel 1976: 72f). Every other norm can only be the content of discourses and has to be agreed upon in a process of deliberation (ibid: 96). Following Apel's transcendental pragmatics, Habermas' 'universal pragmatics', with the principle of universalization at its core, reconstructs the internal rules a speaker has to follow in order to make the discourse reasonable and understandable.

Pragmatic Preconditions: Communicative Reason and Discourse Rules

In order to depict an explicit normative content for pragmatic preconditions necessary for a reasonable and understandable discourse, Habermas proposes a set of concrete discourse rules. Their compliance leads to a situation in which every motive except the cooperative search for truth is neutralized. Firstly, every subject able to speak and act is allowed to participate in the discourse. Secondly, every individual is allowed to problematize every statement, introduce a new topic to the discourse and express its own ideas, wishes and beliefs. Thirdly, every subject must have a universal right and equal chances to enter the discourse without any kind of subtle or concealed repression (Habermas 1983: 99). When those preconditions are fulfilled, an ideal speech situation exists. However, not every discourse can meet those requirements. In most of the cases, a rough approximation must suffice. The discourse rules should be seen as a form of presentation of tacitly made and intuitively known pragmatic presuppositions of an excellent speech practice (ibid: 101). Hence, in a *reasonable* discourse, every participant has to *assume* that all the other participants take part, as free and equal individuals, in a cooperative search for truth in which only the unforced force of the better argument wins. As a result, everyone who intuitively accepts those normative rules as preconditions for a discourse implicitly accepts U as a principle governing the argumentation (Habermas 1983: 102f.).

A reasonable discourse is based on communicative reason as opposed to instrumental reason. Only via reason used in communicative interaction can moral norms be justified (Habermas 1987a: 336ff.). This communicative action follows the rules of *verständigungsorientiertem Handeln* (common understanding) (Habermas 1987b: 385) whereby egoistic success calculations should be ignored. During the discourse, individuals try to convince their opponents to change their arguments in order to seek reasoned consensus (Habermas 1992: 370). The discourse is reasonable as long as it can be challenged by three validity claims:

1) *Wahrheit* (truth): Arguments 'imply a claim to truth' and have 'the goal of communicating something about an objectified reality' (Habermas 2001: 63).

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2) *Richtigkeit* (normative rightness): The underlying norms of the discourse have to be morally acceptable.

3) *Wahrhaftigkeit* (sincerity): The speaker is truthful and really means what he says.

Someone who is able and willing to fulfill those validity claims in discourse acts reasonably (Habermas 1987b: 28f).

Instructions for Mediators from a Discourse Ethics' Perspective

In international conflict resolution,

"mediation is the primary strategy for ending civil wars but it has not been conducted and developed in a professional and systematic way. This has greatly reduced the prospect of successful peacemaking in deadly conflicts." (Nathan 2010: 4).

In order to find useful guidelines for mediation practice, this essay applies discourse ethics on mediation theory. Habermas' abstract, ideal discourse is a presupposition for *existing* discourse practice. When the parties enter an argument, they intuitively accept the outlined preconditions for a reasonable discourse with the goal of fixing a damaged consensus. An initially controversial norm will be deproblematized and finally intersubjectively accepted. Therefore, discourse ethics can be applied to every cultural, ethno-social and historical context. This is highly important where the conflict parties involved in the mediation processes come from culturally or ethnically divided backgrounds.

The Role of the Mediator

If every party necessarily implicitly applies discourse rules in order to have a reasonable argumentation, one could argue that there is no need for mediators. However, the ideal speech situation is only achievable in very rare cases. Mediators can take the role of bringing the speech situation closer to the Habermasian ideal. As Habermas pointed out, there is a need for institutional provisions to neutralize empirical restrictions and both external and internal influences, in order to fulfill the idealized argumentation preconditions as nearly as possible (Habermas 1983: 102). The mediator herself, though, should not have any content-related authority to decide or set the agenda. She has to stand outside of the conflict system in a way that embodies a structure which supports the conflict parties to have an autonomous dialogue (Mähler 2000: 10). The aim of mediation should be the consensus of the conflict parties. This should neither be enforced hierarchically by the mediator nor should it be obtained by fraud. The mediator has to create objectivity and a balance of power among the parties; she embodies the process based on the discourse rules, not the result. How this is done in particular will be the subject of the next part of this essay. First, one should clarify certain practical attributes the mediator should possess.

Deducing from Habermas' theory, the mediator should be as objective as possible. This means that, in a best case scenario, she does not have any connection whatsoever with one of the conflict parties. The mediator could, for example, be a UN representative or a representative of a regional organization on which all affected parties have agreed. On the other hand, the mediator should be as professional as possible. She has to understand the cultural background of each conflict party and has to be familiar with the social, political and economic situation of the respective countries. To guarantee a fair discourse one has to understand its content and the opposing positions. For example, since the beginning of mediation efforts in Somalia in 1988, clan structures have changed permanently, new coali-tions have been founded and new actors have gained importance (Interpeace 2009: 9ff.). This "changing nature of the conflict" (Bradbury 2009: 21) has to be recognized by mediators. Though these attributes have recently been acknowledged by the UN – "the mediator should be considered objective, impartial and authoritative and be a person of integrity" (UN 2012: 7) – they have rarely been fulfilled in practice. During the Addis Ababa process on the Somali conflict which was sponsored by the UN, the mediators were accused of incompetence, weak capacities, a lack of neutrality and the inability to see things from a Somali perspective (Menkhaus 2010: 18). Therefore, it is important that there is a consensus between the conflict parties on the choice of the mediator before the actual mediation process even starts. "A mediator who lacks credibility among the parties will not be trusted and taken seriously by them." (Nathan 2010: 2).

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Implementation of Argumentation Presuppositions on Mediation Practices

"Even the most accomplished peacemaker is unlikely to achieve anything if the parties to a national conflict reject negotiations or are unwilling to forge a settlement." (ibid: 4).

Therefore, the discourse participants have to be *willing* to debate on the basis of communicative reason. Without their desire to find a solution for the dispute, a discourse is pointless.

Inclusiveness

One of the most difficult tasks for mediators is to decide who should take part in the peace process. According to Habermas, every subject affected by the outcome of the discourse should be able to participate. Therefore, the discourse has to be inclusive. In order to ensure this, the mediation should take place in a neutral safety zone in the country itself in order to enable all parties to bear the travel costs for the journey. When mediation takes place outside the country it is usually impossible for civil society to participate. Moreover, local actors should be responsible for organizing the mediation conference in a way that fits with local customs. While organizing the conference, the affected parties begin to feel more responsible for its outcome (Hainzel/Feichtinger 2011: 16). A precondition for local actors to organize the conference in their own state is a ceasefire between the conflict parties which must be established beforehand.

However, realistically it won't be possible for all affected citizens to participate in the mediation process. A useful compromise is to invite representatives of each tribe, ethnicity, religion or every other group which demands to take part in the conference. A serious problem in current mediation efforts is that only representatives of the biggest opponents (usually warlords and other armed groups) are invited to the peace conferences (Matthies 2011: 26). The exclusion of civil society makes the outcome of negotiations less legitimate and increases the risk of civil war. Furthermore, customs of traditional conflict resolution should be taken into consideration. In Darfur, for example, the strategy of 'deadline-diplomacy' made communication between the mediators and civil society impossible. Mediation needs time and should be based on a confidence-building approach and not on pressure (Nathan 2010: 3).

Since not all affected individuals will be able to participate in the discourse, its outcome has to be published in a way that it becomes available to every person. Accordingly, there must be a phase in which the persons concerned can raise complaints. Those complaints have to be either dismantled or solved in another discourse. Only when no complaints remain can the consensus be legitimate. Considering the objections of civil society has not yet been done in mediation procedures, although it is crucial to achieving a legitimate outcome.

Equality and Openness

Another challenge for mediators is to establish a discourse free of power imbalances. As pointed out, every affected subject has a universal right to enter the discourse without any kind of subtle or concealed repression. During the discourse, the mediator must make sure that every individual is allowed to problematize every statement, introduce a new topic and express its own ideas, wishes and beliefs. She should do so by reminding the parties that everyone has a right to be heard in the discourse in order to encourage them to express their comments and questions. During the mediation, she should ask regularly whether someone has a question and whether everyone agrees (or disagrees) on certain assertions. Moreover, she has to ask whether someone feels uncomfortable expressing an idea. If this is the case, the reason has to be clarified and the participants have to be reminded that they are in a safety area (see Chilton/Cuzzo 2005: 335).

Establishing a discourse free of power imbalances means as well that there is no exercise of power on part of the mediator. The outcome of the discourse has to be completely open. It should not be the mediators' aim to establish a 'Western' state with a central government in a non-Western context since nomadic societies usually have no tradition of centralized authorities. This has been proven by latest peace-building efforts:

"Arguably the single biggest mistake by external mediators since 1991 has been to conflate the revival of a central

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government with successful reconciliation" (Menkhaus 2010:18).

The Three Validity Claims

Lastly, the outlined validity claims have to be accomplished in order to have a reasonable discourse. It is the mediator's task during the discourse to control whether the speakers assertions are true, normatively right and sincere. She should check the speakers' truthfulness by revealing contradictions and inconsistencies of the argumentation and ask the parties to explain those problems in depth (Chilton/Cuzzo 2005: 335). Moreover, mediators should consistently evaluate whether the actors are willing to be convinced by other's arguments and whether they choose their arguments free of egoistic success calculations. Naturally, this is a difficult undertaking. Still, mediators have to be able to empathize with the conflict parties in order to reveal their authenticity. As expressed by the United Nations, "a good mediator promotes exchange through listening and dialogue, (and) engenders a spirit of collaboration through problem solving" (UN 2012: 4f.). This requires a high level of local knowledge and professionalism which can be strengthened when there is only one mediator (or a group of mediators) for the whole peace process. A problem in the peace negotiations in Somalia was that the mediators changed too often and too many were involved (Matthies 2011: 26). In this way, they had to become acquainted with the situation over and over again. Furthermore, reliable contact persons for the conflict parties were not existent.

The mediator must permanently observe whether the speakers are still willing to be convinced by others' arguments or whether the discourse is deadlocked. If the latter is the case, the mediator should find strategies in order to motivate the participants to rely on communicative reason instead of instrumental reason. She has to call upon the speakers' willingness to find consent in order to solve the conflict by, for example, asking them to explain why a statement is relevant. This avoids "nonproductive discussions to consume time or to wear down the other party" (Chilton/Cuzzo 2005: 329). Lastly, when an assertion by a party is simply not true, the mediator should, with appropriate caution, point to incoherencies and clear them out.

Summarizing, the mediator has the unique opportunity to establish a situation between conflict parties which comes close to the Habermasian ideal discourse. While trying to do this, the mediator will be confronted with several difficulties, such as power imbalances, hostility between the parties, or reluctance to base arguments on communicative instead of instrumental reason. Nevertheless, if the normatively justifiable guidelines underlying the mediation process as a whole are fulfilled, a highly legitimate peace agreement as well as peaceful new order will be the result.

Conclusion

This essay aimed to identify guidelines for current mediation practice based on Habermas' discourse ethics. After introducing Habermas' moral theory and dismantling the accusation of expressing a Western 'moral point of view', the pragmatic preconditions for the discourse were identified in order to transform them into instructions for mediation practice. Habermas' theory has the advantage that, although highly abstract, one can deduce relatively clear instructions for peace builders from it. The mediator should make use of Habermas' recognition that certain communicative preconditions are intuitively fulfilled when people enter a discourse. Deducing from Habermas' theories, mediation should be inclusive and marked by equality and openness. The speakers' assertions must be sincere, truthful and normatively right. The mediator has to ensure these preconditions by being objective and professional.

Some practical guidelines outlined in this essay have already entered into mediation theory, as can be seen in the UN Mediation instructions (2012). However, they have rarely been realized in practice. Some other guidelines deduced from Habermas are completely new in mediation theory, such as the responsibility to make the outcome of the mediation available to civil society and give them time to raise complaints. Surely, this will prolong the mediation process for an unforeseeable duration. However, 'deadline-diplomacy' has mostly failed in peace building efforts. This leads to the conclusion that only a long and inclusive mediation process will be successful in the end.

Using Habermas' theory as a guideline for mediation practice in the field of conflict resolution enriches the work of the

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peace builder, especially because the common criticism of imposing a Western point of view can be dismantled. It is highly important that Third-Party mediation is justifiable on an ethical basis in order to achieve a peace agreement which can be accepted by every concerned subject. When correctly implemented, discourse ethics as the basis for mediation will lead to a legitimate outcome and a peaceful order in which plurality is possible.

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