Human Rights and Views of the Catholic Church under Habermas Discourse Theory: Discovering Common Ground in Differences

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Abstract

This article aims to explain the views of the Catholic Church on human rights and put them into dialogue with the concept of human rights based on discourse theory as put forward by Jürgen Habermas. In the view of the Catholic Church, the ethical basis for the concept of human rights is the biblical view of human beings as being made in the image of God, which later became the forerunner to the birth of the concept of human dignity and the ethical basis for human rights. This article shows that the discourse theory rejects this theological model of justification for human rights. The criticism of the discourse theory as it relates to an absolute paradigm is that the absolute paradigm requires metaphysical premises. However, in a modern society characterized by a pluralism of worldviews and philosophical and religious beliefs, such metaphysical claims are no longer acceptable. Through the lens of discourse theory, the foundation of the notion of human rights cannot be based on the pre-political basis of religious values. This discourse theory grounding model is based on the conditions of contemporary post-metaphysical society, characterized by a plurality of comprehensive doctrines. However, Habermas emphasizes the role of religion in the public sphere in promoting human rights. He advocates for the reinvention of public reason by encouraging religious people to translate sacred terms into secular language when entering formal political spaces. According to Habermas' theories, democratic decision-making must allow citizens the right to use religious terms in public debate. Furthermore, this article shows that discourse theory creates a roadmap for human rights by allowing religion, law, and politics to coexist. Only if we adhere to the principles of discourse theory can we guarantee the fair and just participation of both secular and religious members in a democratic constitutional state.

Keywords: *Human Rights, Catholic Church, Religion, Habermas's Discourse Theory*

I. INTRODUCTION

Human rights are globally defined as "universal, egalitarian, individual, and categorical".[1] Universal means that human rights must apply to all human beings regardless of their biostatistics or sociocultural backgrounds. Standards for egalitarianism require that human rights apply equally to all people regardless of religion, culture, nationality, race, or ethnicity. The validity of human rights holds moral, legal, and political dimensions. From a moral perspective, human rights are either absolute or categorical. In practice, however, disputes regarding the idea of human rights are always contentious. Some people feel that human rights guarantee the shared hope of a global community; others argue that the notion of human rights is only a by-product of Western liberal society.[2] As a result, a dualism of opinion underpins human rights: that between cultural relativism and absolutism.

From the point of view of cultural relativism, the position of human rights applies only to certain cultural systems and is specific to local cultural values. On a philosophical level, the negation of the universality of human rights is the paradigm of cultural relativism. However, the paradigm of relativism proves decidedly weak as a model for guaranteeing human rights. The relativist paradigm links human rights only to specific cultural practices, histoical experiences, and models of political institutions.

Claims about the categorical validity of human rights cannot and should not be based on specific and conditional values. Universal, egalitarian, and categorical validity can only function on shared principles of universality, egalitarianism, and categorical distinctions. Such validity is rational.[3] The relativist paradigm has been significantly criticized due to its insensitivity towards historical facts, particularly humanity's history of oppression and suffering in the 20th century.[4] The Declaration of Human Rights may be viewed as the conclusion of the Enlightenment Age's intellectual achievements in making human dignity the foundation for universal ethical legitimacy when living together under the democratic rule of law.[5]

Shared trauma in response to totalitarianism in the 20th century, as well as the crises of liberal democracy, contributes to the growing revival of the absolute paradigm in defence of the original concept of human rights. Absolute or universal definitions of human rights see the principle of "human value" as an absolute value at the core of

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1   Georg Lohmann, "Menschenrechte zwischen Moral und Recht" in Stefan Gosepath, ed, Philosophie der Menschenrechte (Frankfurt am Main: Suhrkamp, 1998) at 62–95.
2   Laura Valentini, "Human rights and discourse theory: some critical remarks" (2014) 17:6 Critical Review of International Social and Political Philosophy 674–680.
3   Lohmann, supra note 1.
4   Hans Küng, "Weltpolitik und Weltethos. Zur Problemstellung" in Dieter Senghaas & Hans Küng, eds, Friedenspolitik: Ethische Grundlagen internationaler Beziehungen (Muenchen-Zuerich: Piper Verlag, 2003) at 16–17.
5   Johannes Müller, Entwicklungspolitik als globale Herausforderung: methodische und ethische Grundlegung (Kohlhammer, 1997).

objective standards for human rights. Absolute conceptions of human rights reflect the same values upheld by religion, natural law, and Kantian laws of rationality.[6]

This study focuses on the challenge of establishing human rights in an absolute paradigm using a religious foundation. Religion can provide a solid and reliable basis for the establishment of human rights. Human rights are a moral imperative of democracy. According to the religion-based absolute paradigm, human rights are manifestations of human dignity, and the idea of human dignity is based on the creation of humanity as God's image (*imago Dei*). As a result, religion may be viewed as a source of pre-political imperatives for comprehending human rights. In this line of thought, religion serves as a theological source for the justification of human rights, as well as a foundation for social solidarity in a democratic rule of law and an authority of fidelity towards constitutions based on sound ethics. The goal of this research is to propose discourse theory as a solution for the fundamental understanding and application of human rights. This article uses the normative-deliberative concept of discourse theory as developed by Jürgen Habermas. According to Habermas, Discourse theory is a theory in which the central criterion for formulating epistemological truth and correctness of ethical statements (prescriptive sentences) is achieved through the process of discourse. In this discourse, there is a process of exchanging arguments rationally, equally, freely and without coercion.[7]

Habermas understands discourse theory as a discourse ethics. Discourse ethics refers to those ethical theories whose central criterion is that the correctness of ethical statements (prescriptive sentences) is gained with the help of Discourse theory grounds itself in the universality of human rights while acknowledging that universality is a goal: a battle to construct a common platform in the face of disparities, disputes, divides, and struggles.[8] In terms of human rights, the discourse theory approach can work beyond the paradigmatic limitations of both cultural relativism and absolutism. Advocates for discourse theory contend that tensions that arise based on human rights may be resolved through adequate communication and shared motives.

Discourse theory based on human rights is the most appropriate model in the context of modernity, which is overwhelmed by the process of globalization and by variety, differences, and cultural disputes. Discourse theory creates a link between universal validity and human rights, too often restricted by political-cultural foundations. The discourse theory paradigm demonstrates the requirement for objectivity and universality of human rights by validating the relationship between

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6   Christiane Alpers, "A Catholic Boost for Democracy : Politicizing Performed Solidarities" (2019) 80:4 Theological studies 864–878 at 864–878.

7   Jürgen Habermas, *Erläuterungen zur Diskursethik*, 7th edition ed (Frankfurt am Main: Suhrkamp Verlag, 1991).

8   Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge: Polity Press, 2011) at 70.

human rights and Jürgen Habermas' idea of popular sovereignty.[9] The most prominent criticism of discourse theory is that it requires metaphysical premises. However, in a modern society characterized by a pluralism of worldviews and philosophical and religious beliefs, such metaphysical claims are no longer acceptable and lose their basis for universal meaning. This criticism sets up absolute rational validity based on natural law principles and buries the universalism of rationality itself.

This work is divided into various sections. After this introduction, I will discuss the dialectics of religion and the democratic legal state (second section). The third section provides a historical review of the relationships between religion, specifically Christianity, and the universal notion of human rights. The fourth section addresses critiques of discourse theory as it relates to religion-based human rights foundations.

II. THE DIALECTICS OF RELIGION AND THE DEMOCRATIC LAW STATE

Nowadays, public debates over the role of religion in a democratic rule of law are resurfacing.[10] Habermas describes this development as post-secularism. Post-secularism describes the phenomenon of religion returning to the public space after privatization under a secular ideology.[11] Post-secular culture indicates a shift in awareness in a secular society, a society in which religion's influence has faded. The shift in consciousness takes place at the social and normative levels. Post-secular society is a sociological corrective to the idea of secularization, which forecasts the eradication of religion as the outcome of the process of social modernization. Nonetheless, the facts reveal that religion still exists in public places, and this phenomenon, according to Habermas, will continue in the future.[12] From a sociological standpoint, the idea of post-secular society seeks to demonstrate that, epistemically, modern society is still open to the presence of religious communities.[13] This means that religious behaviour and belief continue to be cognitively accessible. In this perspective, John Rawls argues that religion may be rational even in the face of modernity.[14] Some philosophers claim that there is a discrepancy between Habermas' post-secular society theory and his outspoken

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9   Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1992).

10 Philippe-Antoine Hoyeck, "Religion and Democracy: Jürgen Habermas and Charles Taylor on the Public Use of Reason" (2021) 26:2 The European Legacy 111–130.

11 Otto Gusti Ndegong Madung, "Post-Secularism as a Basis of Dialogue between Philosophy and Religion" (2021) 31:2 Jurnal Filsafat UGM 271–289.

12 Jürgen Habermas, "Religion in the Public Sphere: Presuppositions for the 'Public Use of Reason' by Religious and Secular Citizens" in *Between Naturalism and Religion: Philosophical Essays* (Malden, MA: Polity Press, 2008) 139 at 138.

13 *Ibid* at 39.

14 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 13.

advocacy for excluding religious arguments from determining institutional politics.[15] Yet, Habermas' notion of post-secular society is not intended to call the legitimacy of a secular state into doubt. In the first place, post-secular society intends to call into question the concept of social secularization, which leads to the loss of religion's social and political importance. For Habermas, a legitimate religious theory is evident in the readiness to acknowledge the validity of secular politics.

The idea of a post-secular society has normative implications for the need to reconsider the connection between religion and politics. Religious traditions, according to Habermas, include several essential moral elements that are crucial for the creation of insight and solidarity.[16] Religion has "a special power to articulate moral intuitions, especially for vulnerable forms of communal life".[17] This function of religion is regarded as crucial because Habermas is concerned about the modernization process, which has deviated and caused a lot of difficulties that go beyond the regulative ability of a secular morality based on individual rights.[18] The problems mentioned include those generated by new technical advances, the advent of global market capitalism, and the dilemma of democratic institutions' failure to counteract these destructive tendencies.[19]

In every discussion about the public role of religion in a democratic rule of law, the notion of human rights provides a fundamental frame of reference. On the one hand, calls for a public role and social engagement of faiths are made in the name of the human right to freedom of religion. On the other side, this demand elicited a response in the shape of a propensity to confine religion to the private domain, as done in the secularist paradigm.[20] In this mode of thinking, the privatization of religion is viewed as an acceptable paradigm of thought to respond to the plurality in contemporary society's vision of life, as well as the attacks on the values of a democratic legal state through waves of terrorism.[21] However, this demand for a strict separation between religion and politics received a response in the form of a demand for freedom to practice religion,

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15 Maeve Cooke, "Violating Neutrality? Religious Validity Claims and Democratic Legitimacy" in Craig Calhoun, Eduardo Mendieta & Jonathan VanAntwerpen, eds, *Habermas and Religion* (Malden, MA: Polity Press, 2013) 115 at 227; see also José Casanova, "Exploring the Postsecular: Three Meanings of 'the Secular' and their Possible Transcendence" in Craig Calhoun, Eduardo Mendieta & Jonathan VanAntwerpen, eds, *Habermas and Religion* (Malden, MA: Polity Press, 2013) 27 at 47–48.

16 Thomas M Schmidt, "Die Konstelllation von Glauben und Wissen: zur Genealogie des nachmetaphysischen Denkens bei Jürgen Habermas" (2020) 49:2 Internationale katholische Zeitschrift Communio 192–205 at 178.

17 Habermas, *supra* note 12 at 131.

18 Jürgen Habermas, "The Boundary between Faith and Knowledge " 211. On the Reception and Contemporary Importance of Kant's Philosophy of Religion." in *Between Naturalism and Religion: Philosophical Essays* (Malden, MA: Polity Press, 2008).

19 Jürgen Habermas, *Glauben und Wissen. Peace Prize of the German Book Trade 2001* (Frankfurt am Main: Suhrkamp Verlag, 2001).

20 Schmidt, *supra* note 16.

21 Habermas, *supra* note 19 at 11.

which is a constitutional and human right. This constitutional right is interpreted as the right to public articulation and manifestation of religious beliefs and rites.

The freedom to exercise religion without interference from the state is a fundamental component of constitutional rights. Throughout history, religious freedom has affected the nature of negative rights as well as the concept of classical human rights. This explains why conversations about the role of religion in a plural public space usually appear to centre on the right to religious freedom. Of course, the answers to these questions differ. On an ideal level, responses can be divided into three categories: The secularism[22] model in France, the doctrine of "res mixta" represented by German state church law, allowing cooperation between the state and the Church in certain areas[23], and the US model, which implements a strict institutional separation between Church and state. At the same time, there is a strong rhetorical relationship between religion and politics at the civil society level. These models have historically varied, but all of them consider the human right to religious freedom as the only normative starting point.[24]

Additionally, comprehending human rights gives an intellectual foundation for establishing links between religion and politics. Arguments for religion's public and social role are frequently linked to disputes concerning the existence of a pre-political religious basis for interpreting human rights. At this point, only from a theological perspective can the meaning and nature of the ultimate understanding of human rights be viewed. As a result, from this vantage point, a democratic rule of law that adheres to normative principles of comprehending human rights is inextricably linked to religion as a pre-political source and beginning point for legal ideas.

This perspective's argument connects human rights and human dignity. The historical experience of totalitarianism, as well as the present phenomena of liberal democracy's moral dilemma, necessitate that the idea of human rights is founded on the principle of human dignity. Yet, the idea of human dignity has a religious underpinning, both historically and structurally. As a result, religion is seen as an obvious pre-political root of the concept of human rights. As a normative basis, human rights precede democracy and are an expression of the principle of human dignity;

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22 This model discourages religious involvement in public affairs and forbids state to be involved in religious life. See: Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience* (Harvard University Press, 2011).

23 Thomas M Schmidt, "Vernunftrecht und gőttliche Gebote. Religion als vorpolitische Quelle der Menschenrechte" in Stefan Kadelbach & Parinas Parhisi, eds, *Die Freiheit der Religion im europäischen Verfassungsrecht* (Baden-Baden, 2007) 15.

24 Eka Ar Hendry, "Religious Democratization in Indonesia: Strengthening the Procedural and Substantial Religious Democracy" (2013) 2:1 **AL-ALBAB**-Borneo Journal of Religious Studies (**BJRS**) 33–49.

human dignity has a religious basis in the concept of man being made in the image of God.[25]

In the preceding reasoning paradigm, religion serves as a pre-political necessity for human rights. Religion is a theoretical foundation for human rights, a base for social solidarity in a democratic rule of law, and gives personal incentive for citizens to follow the constitution and the law.[26] Consequently, religion contributes to the formation of a value foundation for an efficient democratic government that respects human rights. To stress and ground human rights, normative allusions to religious concepts, such as those fought for in European constitutions to include the name of God, must be explicitly articulated in legal literature.

The interpretation model above, which details the close relationship between democracy, human rights, and human dignity, has several references to constitutional law. For instance, Article 1 of the German Constitution considers human dignity as both a fundamental quality shared by all people and a moral responsibility shared by the state. A society that is equal and free can only exist if human dignity is completely protected. In concrete terms, human dignity is based on the state's assurance of the preservation of constitutional rights, regardless of a person's socioeconomic status or achievements. From this perspective, the idea of human dignity emerges as a fundamental ethical value whose everlasting validity transcends every historical circumstance of society.

Human rights that are open and procedural are the polar opposite of the aforementioned interpretation approach. According to this viewpoint, the normative content of human rights thinking does not come from religious or pre-political ethical origins but is formed autonomously through a political process of individual and communal self-determination. There is also a reference to constitutional law in this interpretation. As a result, the idea of dignity under the Constitution is open and not clearly defined. Through an eternally valid normative ethical framework, such a definition merely restricts and limits the evolution and new interpretations of the concept of human rights. In addition, questions about the concrete composition of human dignity often create a plurality of answers, depending on the ideological point of view. This becomes visible in the debate about the beginning and ending of human life. Starting from the polarization of interpretations of human dignity in the resolution of concrete cases, the question that arises is whether the concept of human dignity is still in line with the neutrality principle of the rule of law in today's factual conditions of religious pluralism and outlooks on life.

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25 Jürgen Habermas, *Auch eine Geschichte der Philosophie: Band 1: Die okzidentale Konstellation von Glauben und Wissen* (Frankfurt am Main: Suhrkamp Verlag, 2019); Jürgen Habermas, *Auch eine Geschichte der Philosophie: Band 2: Vernünftige Freiheit. Spuren des Diskurses über Glauben und Wissen* (Frankfurt am Main: Suhrkamp Verlag, 2019).

26 Habermas, *supra* note 25 at 807.

III. HISTORICAL REVIEW OF THE RELATIONSHIP BETWEEN THEOLOGICAL VIEWS OF THE CATHOLIC CHURCH AND HUMAN RIGHTS

A variety of perspectives diverging from the pre-political ethical essence of human rights allude to the term's historical pedigree. Human dignity is, in fact, much older than the concept of human rights. The Stoics, an ancient Greek philosophical tradition, saw dignity as something that underpins inequalities in one's social position.[27] Dignity is a general remark that is not simply tied to distinctions in social position within a specific community. Dignity articulates the distinction between people and other living things and serves as the foundation for humans' unique position in the universe. This refers to the privileged status that all people enjoy as members of the human community. As a result, the idea of dignity serves to both separate and unify.

The tension between difference and equality implicit in the idea of dignity was subsequently adopted by early Christianity, which was strongly influenced by Stoic thinking from an ethical standpoint. The portrayal of man as being made the image of God in Genesis 1:26-28 is the major biblical scripture combining the philosophical notion of dignity with religious traditions.[28] The notion of man as God's creation and image serves as a foundation for the religious perspective on dignity. Discussion about human being as the image of God have a positive nuance since it highlights the unique place of humanity in the universe. The expression of creation, on the other hand, leans more negatively because the term of creation refers to a variety of inherent laws and limitations that constrain our ability to manipulate the natural and social environment.

Ambivalence has always existed in the creation paradigm. On the one hand, the statement "man as creation" stresses the reliance of human capacities and rights on divine power. Man, on the other hand, is seen as a unique creature endowed with exceptional dignity, and he is designated as a partner who participates in the will of Divine creation, with the position of an independent king over earthly constellations that operate according to its laws. Early Christian conceptions of the notion of human dignity stressed all humans' particular equality in the universe for their membership in the human community. Early Christianity saw the emergence of a more egalitarian notion of dignity. Paul relativized and challenged the inequalities in Christ between "Jews and Greeks, slaves and masters, male and female" at this time (Gal 3:28).[29]

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27 Honnefelder, "Person und Menschenwűrde" in Honnefelder/Krieger, ed, *Philosophische Propädeutik 2 Ethik* (1996) 215.

28 *Die Kirche und die Menschenrechte. Ein Arbeitspapier der Päpstlichen Kommission Justitia et Pax.* (München: Berlin Arbeitsgemeinschaft Sozialpolitischer Arbeitskreise, 1976) at 22.

29 *Ibid* at 23.

But, throughout history, theological positions that overemphasize the problem of sin have dominated the biblical concept of the common dignity of all persons. Furthermore, conceptions of mankind as a whole are diminishing, with an emphasis on religious distinctions and internal religious disputes between the devout and the heretical. Consequently, the Church hierarchy was created by following the pattern of feudal society. This progression finally resulted in the dominance of a feudal conception of the idea of dignity, an understanding that highlights the features of human uniqueness. On this premise, there has been an endeavour in the contemporary century to reclaim the egalitarian meaning of the idea of human dignity in the drive to reject religiously legitimized theological interpretations and political action. This is evident in the anticlericalism of the French Revolution, which laid the groundwork for the concept of human rights by pointing to the fundamental secular values of freedom, equality, and solidarity.[30]

Throughout the 19th century, the Church's reaction to this revolutionary anticlericalism movement resulted in antagonism and rejection of human rights by the Church hierarchy. The attitude of the Church was only beginning to be friendly towards the notion of human rights when Pope Leo XIII announced a social encyclical entitled Rerum Novarum in 1891.[31] This encyclical addresses a variety of social concerns, including the development of widespread poverty and the rights of workers in industrial society. The encyclical also defends property rights as natural rights. The religiously grounded notion of human dignity is the normative basis for human rights.[32] At the same time, government involvement is necessary to provide equitable salaries, the ability to organize unions, and solidarity with the most disadvantaged and marginalized groups. This encyclical's state philosophy is more geared towards the ethical basis of human dignity rather than a radical democratic and positivistic interpretation of human rights. Primary normative principles include separation of powers and social welfare, the rule of law, and the welfare state, yet not democracy in the sense of popular sovereignty.[33]

The Church's hierarchical discourse on democracy and its normative principles became the basic colour of the Christmas message during the wartime of Pope Pius XII on December 24, 1944. His speech, entitled "Democracy and Global Peace," clearly stated his point.[34] It is highlighted here that the democratic view is merely one of the types of state philosophies that comply with the natural law conditions of legitimate

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30 *Ibid* at 24.
31 Pope Leo XIII, "'Rerum novarum (1891).' Über die Arbeiterfrage. Quoted from: TEXTE ZUR KATHOLISCHEN SOZIALLEHRE. The social circulars of the popes and other ecclesiastical documents. Edited by the Bundesverband der Katholischen Arbeitnehmer-Bewegung-Deutschland-KAB" (2006) 7 41–78.
32 *Ibid.*
33 *Ibid.*
34 Josef Punt, *Die Idee der Menschenrechte: ihre geschichtliche Entwicklung und ihre Rezeption durch die moderne katholische Sozialverkündigung* (F. Schöningh, 1987).

authority. Consequently, democracy is no longer condemned in principle but is viewed as a form of political authority founded on natural law and by the reality of the revelation of the scriptures. Nonetheless, there are still concerns about an open democratic system. This argument is conveyed through the idea that democracy, which is not founded on pre-political ethical norms, is at risk of becoming a shapeless mass. The democracy of Pius XII's time (1939-1958) looked to be a morally right and high-quality hostile vision of democracy. The criterion of authentic democracy includes the divinely willed set of values that form the basis of the special dignity of human beings. Human dignity is shown through the status that accompanies God's image, state dignity is disclosed through God's willed ethical community, and political power dignity is revealed through participation in God's authority (Pius XII). According to Pope Pius XII, real democracy emerges when it is compatible with human dignity, natural law principles, and God's will.[35]

With the incorporation of human rights into international law, the Catholic Church's perspective began to shift. The Encyclical Pacem in Terris (1963) of Pope John XXIII was the first official Church statement to address the subject of human rights.[36] This point of view was eventually recognized by the Second Vatican Council (1962-1965), particularly in the declaration of religious freedom (Dignitatis Humanae, 1965). In addition, Pope John Paul II's Encyclical Redemptor Hominis (1979) was built on an argument detailing an understanding of human rights. On marking the 100th anniversary of the Encyclical Rerum Novarum, he also highlighted in the Encyclical Centesimus Annus (1 May 1991) that real democracy is only possible in a state governed by the rule of law. When democracy is associated with the notion of law, it undergoes a process of modernization based on the ethical grounding of natural law. According to Pope John Paul II, the criterion of "genuine democracy" is the protection of human rights.[37]

This shift in the Church's stance toward human rights has various political implications. The defence of human rights as a criterion for genuine democracy can be a tool for effective critique of Eastern Europe's political reality. There was a perception that the Catholic Church was a worldwide human rights fighter under the leadership of the Pope from Poland.[38] In the 1980s, an internal dialectical response formed inside the Church through the liberal movement, emphasizing that the Catholic Church is only credible as a champion of human rights if it is equally prepared to respect and fight for basic rights within the Church itself.[39] Furthermore, the favourable theological judgment of democracy and human rights seems to have several systematic grounds that have emerged to counter the Church's negative conventional attitude toward

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35 Schmidt, *supra* note 23 at 20.

36 Punt, *supra* note 34 at 50.

37 *Ibid* at 54.

38 Patrick James, ed, *Religion, Identity, and Global Governance: Ideas, Evidence, and Practice* (Toronto: University of Toronto Press, 2011).

39 *Ibid.*

modernity. There are several attempts in Catholic theological thoughts to discover a connection between current standardized ethical norms and biblical heritage. The concordance of secular and religious ideas on human dignity leads to a conceptual vortex concerning human freedom. Yet, in general, the natural law conception of human rights continues to be the dominant underlying paradigm in Catholic theology. In this view, human rights are an expression of eternal, pre-political values. Human rights are an absolute criterion for any legitimate form of power. Therefore, human rights precede and become the basis for democracy.[40]

Currently, there is a movement in the Catholic Church to address engagement in the political and social worlds as a result of Pope Francis' emphasis on the fight for democracy. Unlike his predecessors, who frequently stressed the need for increased attention to individual human rights by focusing on the freedom of the human person, Pope Francis prioritizes social components and the challenge of justice for marginalized groups in society.

In his article on human rights discourse in the Popes' teachings since Pius XII, Jodok Troy emphasized that, unlike his predecessors who frequently referred to human rights, "Francis refers to the categories of 'essential human needs,' 'human dignity, 'social and international order,' and 'material inequality/economic opportunities.'"[41] The same author summarizes this as follows: "This emphasis is one of validating human rights, not as Human Rights implanted in Western institutions and agencies, but as human rights embedded in issues of social justice. Looking at the development of the papal human rights discourse, however, anticipates that the next popes will likely continue the path established thus far.[42] As a result, this Latin American pope presents a different viewpoint than those of Western Europe and North America, and this new position will probably become the foundation of the Catholic Church in the future as well. This is related to the increasingly widespread awareness of Catholics that many conflicts in the world today are caused by economic injustice and social inequality. This is reinforced by several documents issued by Pope Francis that emphasize the social aspects of Church life.[43]

IV. DISCOURSE THEORY CRITICISM ON RELIGION-BASED HUMAN RIGHTS GROUNDING

The question of whether religion provides an absolute basis of ethical legitimacy and stabilizes the democratic legal order was once raised by Ernst-Wolfgang Böckenforde. The former Chief Justice of the German Constitutional Court argued that the secular

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40 Hans-Joachim Sander, *Macht in der Ohnmacht: Eine Theologie der Menschenrechte* (Freiburg: Verlag Herder, 1999).

41 Jodok Troy, "The Papal Human Rights Discourse: The Difference Pope Francis Makes" (2019) 41:1 Human Rights Quarterly at 80.

42 *Ibid* at 86.

43 *Ibid.*

liberal state lives on pre-political moral conditions that cannot be guaranteed by itself.[44] This means that the secular state needs moral values that religions provide. But the state cannot force its citizens to belong to a religion. Referring to Hegel, Böckenförde asked, "Doesn't the secular state also have to live from the impulse and inner bonding power created by religions for citizens?".[45] Rationally, according to Habermas, Böckenförde's problem triggers the question of whether a satisfactory theoretical foundation for the principles of the democratic rule of law can be achieved through the mechanism of post-metaphysical or post-religious rational reasoning.[46] From the inner will perspective, this question articulates the anxiety of how a well-functioning democracy inevitably requires sources of ethical orientation that transcend self-interest and can create social solidarity.

Habermas rejects Böckenförde's thesis. According to him, a procedural understanding of the discourse theory on democracy can explain how legitimacy and rational agreement are created. Legitimacy is formed through the inclusion of all who are affected *(Inklusion Aller Betroffenen)* by a policy and through rational consideration from all perspectives. All these processes take place in a democratic procedure. For Habermas, the democratic processes and procedures are not understood through the positivistic lens but rather as a method to create legitimacy based on legality (*Legitimität aus Legalität*).[47] It is no longer necessary to assume that the validity of a perfect constitutional system can only be cognitively guaranteed on the foundations of religious morality.

The formulation "creating legitimacy based on legality" (*Erzeugung von Legitimität aus Legalität*) is a solution offered by discourse theory to the basic problem of the foundation of modern law. Habermas argues that in modern legal theory, there are two conflicting moral principles: the liberal view of inalienable natural individual rights and the republican concept of popular sovereignty. Both principles are based on the concept of *Selbstgesetzgebung* (self-sovereignty/autonomy in creating law), which is the normative basis of modern legal and democratic theory. However, liberalism and republicanism present two different interpretations of the principle of autonomy.

The liberal view defines 'autonomy' as autonomous self-determination. Liberalism formulates subjective, pre-political interests as the starting point for all democratic deliberations. Individual rights protect and legitimize these interests. Meanwhile, the state is obliged to protect and respect these rights. In contrast, the democratic concept of republicanism views the general will or sovereignty of the people *(Volkssouveränität)* as the source of legitimacy. A sovereign nation creates its own rules and laws to obey.

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44 Ernst-Wolfgang Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation" in Ernst-Wolfgang Böckenförde, ed, *Recht, Staat, Freiheit Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Frankfurt: Suhrkamp Verlag, 1991) at 112.

45 *Ibid* at 113.

46 Jürgen Habermas & Joseph Ratzinger, *Dialektik der Säkularisierung: Über Vernunft und Religion*, Florian Schuller, ed (Freiburg im Breisgau: Verlag Herder, 2004) at 16.

47 *Ibid* at 20.

Behind this view lies an ethical understanding of autonomy as collective self-actualization. This is underscored in the process of democratic law-making, which is conceived as a project of collective self-realization.

The discourse theory of law and democracy tries to bridge the two principles. The shared normative substance of these two principles, the liberal principle of subject rights and the democratic principle of autonomous law-making, is grounded in an analysis of the implications of communicative reason.[48] From the perspective of communicative rationality, popular sovereignty as an autonomous law-making process is understood as a discourse procedure. This process is only discursive if it fulfils all the conditions of fair discourse, including being free of repression, egalitarian, inclusive, and absent of coercion. Nevertheless, the fulfilment of these conditions and the submission to the discourse rules in the political sphere are guaranteed through the Constitution. Therefore, the constitution is a concrete elaboration of the conditions of functioning popular sovereignty. Thus, human rights and the constitution serve to protect and guarantee the discursive formation of opinion and will in a sovereign society or nation. However, only if the formation of collective will and opinion is discursively formed (in the sense that constitutional rights and rules of discourse are not violated) can it be guaranteed that popular sovereignty creates not only legality but also legitimacy. Thus, legality in the sense of constitutional rights becomes a guarantee of legitimacy in the form of democratic self-determination.

Discourse serves to recreate agreement on the validity of the claims in question. The truth and rationality of statements are solely measured by procedures that guarantee the potential agreement of all parties. The conditions for testing and formulating validity claims are determined through the rules of a discursive procedure. Therefore, the content of possible validity claims may not need to be formulated with a priori. The rationality of the discursive procedure can be neutral to the moral content of the discourse. Thus, the rationality of discursive procedures can be accepted in a plurality of beliefs and social life contexts. However, morally relevant substantive formulations can still be drawn from the discourse; these are contained within the rules of the discourse procedure itself.

Habermas acknowledges that the procedure for creating legitimacy depends on ethical mechanisms that can create democratic virtues, such as social welfare. These democratic virtues are the result of socialization and internalization processes and ways of thinking about liberal political culture.[49] Therefore, from the perspective of discourse theory, it is acceptable that citizenship status and related democratic virtues are embedded in a civil society that is governed by spontaneous pre-political moral sources.

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48 Schmidt, *supra* note 23 at 24.
49 Habermas & Ratzinger, *supra* note 46 at 23.

However, the statement above does not imply that a liberal country is incapable of "reproducing the motivational conditions of its own power". Citizens' motivations to participate in the process of opinion formation and political will are derived from ethical life plans and cultural influences. Regardless, we must not forget the fact that democratic praxis also develops its own political dynamics."[50] This dynamic is first seen in citizens' participation in the process of public political will formation. This participation is lawfully ensured in a democratic constitutional state.

At the same time, citizens' broad participation in public discourse opens up space for new interpretations, criticisms, and modifications of the law. To the extent that citizens are consciously involved in the process of collective will formation, specifically through interpreting and reorganizing the constitution, loyalty to the constitutional order is formed. Loyalty to and love for the Constitution will be built if citizens are involved in the process of making and reinterpreting the Constitution. Juergen Habermas described this love and commitment to constitutional values as *Verfassungspatriotismus* – constitutional patriotism. Compared to classical patriotism, this refers to the view that the political culture of a nation is crystallized in its constitution.[51] In other words, the nation's identity is constructed under the principles contained in a constitution and is not just woven from elements of common history, geographical area, language, cultural traditions, and ethnic and religious backgrounds. Constitutional patriotism emphasizes the importance of the affinity of a nation's collective identity to the universal principles of the rule of law, human rights, and democracy.

Furthermore, Habermas contends that today's world shows how modernity must deal with various types of crises. We have witnessed that under certain conditions, the process of modernization and secularization may "go off the rails" (*Entgleisung der Moderne*), resulting in an erosion of solidarity due to competitive pressure, the process of extreme individualization, and the unbalanced dominance of technical-economic rationalization. Amid such a crisis, where is the motivational source to strengthen social solidarity and adhere to democratic principles such as freedom, equality, and justice, as well as a view of the inalienable dignity of a human person? Even if the rational basis of the democratic constitutional state is seen to be successful, does the crisis not show clearly that, in reality, the rule of law depends on sources of social solidarity and democratic virtue that are ultimately found only in religion?

Habermas views the crisis of modernity as not necessarily understood as an expression of substantial fragility of secular reason in the sense of logical development of destructive potentials that are always present in Western views. He also believes that threats to the democratic development process are not caused by the weak public role of religion but because of the eroding public sphere itself. The democratic public

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50 *Ibid*; see also: Habermas, *supra* note 25

51 Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Frankfurt am Main: Suhrkamp Verlag, 1996) at 143.

sphere is being eroded by the globalization process as more social spaces undergo a process of economization and distance themselves from the discursive formation of collective will. One of the roots of the crisis of liberal democracy, according to Jűrgen Habermas, is the absence of public participation in formulating constitutions and laws. This is due to the basic principles in the constitution that are regarded as eternal values that do not need to be debated.[52] Thus, one of the ways to overcome the crisis of liberal democracy is to revitalize citizens' participation in public discourses, making them feel that they are not only the recipients of but also the creators of these public virtues.

Amidst the globalization wave, collective learning for the sake of citizens' collective will formation from different religious and ideological backgrounds is increasingly fading away. Threats to the normative substance of the democratic rule of law are the result of economic and political developments. It is not an expression of a theoretical deficit in secular legal foundations. Even if the reproduction of democratic attitudes in certain cases depends on the transposition of semantic potentials in religions, the notion of human rights as a basic normative principle in the democratic rule of law is not dependent on the logical foundations of theological argumentation.[53]

Discourse theory certainly does not deny the dependence of procedural democracy on "substantial sources", which are the ethical descriptions or narratives of legal legitimacy that religions offer. Discourse theory recognizes the roles and significance of substantial ethical or religious views as the basis for the stability and reproduction of democratic societies.[54] Habermas's belief that democratic will formation needs to be open to religious insights is revealed in his discourse on public rationality (public reason). The concept of public reason refers to the use of citizens' reasoning when engaging in political advocacy in the public arena. Habermas' concept of public reason is interpreted in a Rawlsian sense. According to Rawls, the concept of public reason is characterized by the "duty of civility" (*Tugendpflicht der Civilität*). Public reason requires citizens to limit themselves to shared values and publicly recognized research methods when communicating with each other in their capacity as political actors who exercise authority through voting. Robert Audi defines the obligation of *civility* as the obligation to provide secular justification. In other words, citizens who are engaged in public dialogue must justify their political positions based on strict secular reasons that are equally accessible to all.[55] Habermas rejects this view. He argues that Audi's view contrasts with the freedom of conscience that is guaranteed

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52 Alpers, *supra* note 6.

53 *Ibid* at 870.

54 Jürgen Habermas, "Religion in der Oeffentlichkeit. Kognitive Voraussetzungen fuer den oeffentlichen Vernunftgebrauch religioeser und saekularer Buerger" in Jürgen Habermas, ed, *Zwischen Naturalismus und Religion* (Frankfurt am Main: Suhrkamp, 2005) at 143.

55 Robert Audi, "Liberal Democracy and the Place of Religion in Politics" in Robert Audi & Nicholas Wolterstorff, eds, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, MD: Rowman & Littlefield, 1997) 1 at 25.

in the liberal state principle. Audi's view is also extremely detrimental to democratic institutions because it loses the sources of insight and solidarity that religions provide in public dialogue.

Habermas advocates for the need for reimagination of public rationality for religious citizens. This can be done by requiring religious citizens to translate religious terms into secular language when entering formal political space ("*institutional translation proviso*").[56] To Habermas, the secularization of political power has implications for the formation of a filter between the informal public sphere and the formal political sphere. In Habermas' theory of democracy, the concept of informal public space refers to the so-called "democratic public sphere"- a space for collective discussion where citizens exchange ideas to form public opinion. In contrast, the formal public sphere includes institutional spaces such as parliaments, ministries, and the judiciary, where deliberations of official decision-making bodies take place.[57] Although Habermas maintains that citizens are free to express themselves in the language of their choice when contributing to public discourse, he also believes that allowing religious arguments to influence the decision-making process in official institutions will jeopardize the principle of neutrality in political power. On this basis, Habermas advocates limiting religious argumentation in the deliberation of formal political space.

Discourse theory reminds us that the legitimacy of laws that are narrative and tied to reality is always limited to a particular perspective. The narratives legitimize the normative framework from the internal perspective of a particular comprehensive doctrine. Within these normative frameworks, there is a continuous and non-violent process of mutual learning between secular citizens and adherents of various religions.[58] For a plural society, the discourse theory paradigm of human rights grounding seems to offer an appropriate basis for a normative relationship between religion and politics. This can be illustrated by the freedom of religion, which has become the starting point for several debates on the relationship between religion and law. In a plural society, religions can only flourish if freedom is guaranteed by a neutral legal state. The right to be a member of a particular religious community is granted to every individual as a legal citizen. The right to freedom of religion not only opens the space for private freedom for individuals to choose religious beliefs but also simultaneously allows them to practice them. Indeed, public religious practice is only legitimate to the extent that it respects the equal freedom of others. However, the basic norms of such mutual respect are articulated through the notion of human rights. When these norms are violated, it is legitimate to limit the space for public religious practice.

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56 Habermas, *supra* note 12 at 30.
57 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (John Wiley & Sons, 1992) at 307–308.
58 John Rawls, *Politischer Liberalismus* (Frankfurt am Main: Suhrkamp, 1998) at 13.

From the perspective of discourse theory, the normative substance of human rights is formulated through several rules. These rules provide space for religion, law, and politics to interact non-violently. By adhering to this principle, the equal & fair participation and representation of secular, religious citizens in a state under democratic law can be guaranteed. This process reproduces the conditions under which the fundamental rights of all are guaranteed, and human dignity is respected. Therefore, an open democratic process should not exclude religious beliefs merely because they happen to be sacred. Yet, the normative framework for the justification of religious beliefs on which laws and statutes are based is defined by human rights: fundamental rights formulated in constitutional law. Loyalty to the legal order grows when the law protects these various religions and ideologies while ensuring the active political participation of their followers.

V. CONCLUSION

This article argued that the paradigm of discourse theory is a model for grounding the notion of human rights. Through the lens of discourse theory, the notion of human rights cannot be based on the pre-political basis of religious values or other comprehensive doctrines. This discourse theory grounding model is based on the conditions of contemporary post-metaphysical society, characterized by a plurality of comprehensive doctrines. The tension between various comprehensive doctrines has emerged since the beginning of the drafting process of the Universal Declaration on Human Rights. At that time, representatives of several Christian-majority countries recommended that Article 1 of the Universal Declaration of Human Rights affirm the theological basis of human rights with the following formulation: "All human beings are endowed by the universe, and/or by their Creator, with reason and conscience."[59] However, this formulation, with a Western theological and metaphysical foundation, was rejected by a Chinese representative, Peng Chun Chang.[60] The concept of God and the universe as the ethical basis of human rights comes from the tradition and philosophy of Thomas Aquinas. A more acceptable basis for all was sought in the wording of a commitment "to reaffirm faith in human rights, in the dignity and worth of the human person."[61] This is taken from the UN Charter and is universally recognized by Muslims, Christians, Chinese, agnostics, and other ideological backgrounds.

In the context of plural society, this model of grounding human rights in a discourse perspective that transcends religions is highly relevant. However, even though religion cannot be used as an ethical basis for the foundation of human rights

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59 Tore Lindholm, "Dasar Konseptual dan Landasan Umum Hak Asasi Manusia – dengan Prospek Cerah Dukungan Berbasis -Agama bagi Hak Asasi Manusia" in Cekli Setya Pratiwi et al, eds, *HAM & Syariat: sebuah kajian* (PT Mizan Pustaka, 2022) 161 at 177.

60 Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House Trade Paperbacks, 2002) at 144–147.

61 Lindholm, *supra* note 59.

understanding, the role of religion in promoting and advocating for human rights remains relevant and significant. Every religion has an intuition of humanity that goes beyond the communitarian solidarity of religions themselves.[62] From a historical review of the relationship between human rights and views of Catholic Church Christianity in Europe, we see that the concept of human dignity as an ethical foundation of human rights developed in the tradition of natural law that is synergized with Judeo-Christian teachings.

The role of religion in promoting and upholding human rights is significant because religion serves as a source of motivation for citizens to abide by the Constitution and human rights. The presence of religion in institutional discourse also shows solidarity with fellow citizens. A human rights interpretation of religious-secular discourse can sharpen and encourage religious morality to go beyond the religion's communitarian solidarity while sharpening commitment among adherents to take concrete action to better the conditions of the vulnerable. In this way, we can prevent religion from being reduced to rituals and piety in the private sphere and encourage religion to actively shape public life. Dialogue between secular and inter-religious groups with the understanding of human rights can encourage and strengthen the involvement of religions in plural public spaces to fight for social justice, shared prosperity, equality, freedom, and democracy.

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