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The Human Rights in Habermas' Discursive Democracy

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Abstract. In my brief analysis,[1] I will examine the question of the role Habermas' liberal theories play in his discursive theory of democracy, with special regard to the success of classical liberal freedom providing classical liberal rights of freedom, especially prevailing private autonomy. The question is interesting in itself since, as it is well-known, Habermas' theory of discussion refers to all parts of life and everyone concerned. It is a question then whether deliberate decision-making providing a wide-scale dispute is possible to conciliate with the liberal ideal advocating the sanctity of private life, whether the results of the discussion do not affect "detrimentally" private life and the regulations of the fight for status. Before finding a more accurate answer to these questions, I will examine how Habermas positions himself, on the one hand, advocating the importance of civil dialogue from the republican viewpoint and, on the other hand, against the deliberative ideals providing a wide multifariousness, and what kind of results he deems worthy of keeping from the liberal concept characterized by him as ideal-typical. According to my preliminary assumption, Habermas deems his own idea of democracy as a kind of a synthesis of liberal and republican theories, and he thinks he is capable of dissolving the contradiction existing between liberal and republican theories within his own theory, in the first place with regard to the nature of *political process, social integration, and rights*. In the second part of my work, I will examine the strength of this idea of Habermas only according to one viewpoint: how much does democracy resolve in the discourse on the conflict of negative and positive freedom, the conflict of human rights and popular sovereignty?

Keywords: human rights, democracy, Habermasian theory

Models of Democracy

Jürgen Habermas in his work *The Three Normative Models of Democracy* [Drei normative modelle der Demokratie, 1996] analysing the lessons of the works

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regarding American constitutional culture juxtaposes an ideal-typical *liberal* and *republican theory of democracy.* According to Habermas, the differences between the liberal and republican theories of democracy are based on a deep-rooted different interpretation of social and political processes. Liberals imagine society as an interaction of people having private interests, whose communication is decided by structures of social division of labour and mechanisms of a market society. According to liberal thinking, a bureaucratic state apparatus is juxtaposed against and – at least in certain cases – is likely to limit market processes and the free interaction of citizens, exempt from pressure. From this liberal viewpoint, politics is an organizing power, which is able to efficiently organize private interests, and enforces them against the administrative state power, in accordance with some "collective needs". Liberals interpret social integration according to two paradigms, namely the models of the organization of market and administrative organization, and they also assume political organizations to be against administrative state power along market models. [2] In this view, politics is a fight for position and the disposal over administrative power (Habermas, 1996a: 282): the debates experienced in public life and the parliament are the manifestations of competitive relationships of collective participants and of their opposing each other. The competition is likely to be won by those whose goals and preferences meet most of the members of the civil population: these agreements of preferences are demonstrated by the proportion of votes cast in the election.

In the centre of the republican way of thinking does not stand the social paradigm but rather a society integrated by *social solidarity*. From this viewpoint, the function of politics is not the mediation between individuals following private interests and the bureaucratic apparatus. According to this view, it is a medium in which "the nature-given groups of solidarity" recognize their interdependence in the communication and interaction with each other. According to the republican view, members of a group of solidarity clarify their common goals, interests, and values in the field of political publicity in a communicative way, thus forming a community of values, which must be defended both from the administrative state power and from the distorting effects of market structures. Political publicity and the parliament, according to the republican view, cannot be simply regarded as an arena for political competition: the formation of a political view and political volition do not follow the rules of market competition but rather "the autonomous structures of understanding-oriented public communication". In political debates, the participants are not only strategically active or goal-oriented rational people but rather active parties, who are open to understanding each other, capable of creating consensus. With the clarification of the situation of mutual interests and with the formation of a common orientation of values, a *communicative power* is born, which differs in its structure from *administrative power*: while communicative power arises from the common

2 This view is characterized by the young Habermas as an Anglo-Saxon political concept, having a Lockean origin. See: *Theorie und Praxis. Sozialphilosophische Studien*, Luchterhand Verlag, Neuwied 1963. 63–64.

orientation of values clarified in a discursive way by the members of the society, administrative power is organized along a system-like logic (Habermas, 1996a: 282).

Out of the different interpretation of society and politics follows a different interpretation of the civil population and a different interpretation of the laws at their disposal. According to the liberal view, a citizen is an individual opposing state power, defined by his own preferences; his status is defined by the subjective laws of freedom which defend him from the abuses of the state as well as from the unjustifiable strivings for power of their fellow countrymen. Thus, from a liberal point of view, subjective rights may be regarded as *negative rights*, which provide the individual with a playground void of external pressure. In Habermas' view, the ideal-typical liberal fights for the manifestation of the dominance of negative rights of freedom, and he interprets political rights of freedom from the viewpoint of negative rights of freedom. According to liberal thinking, political rights of freedom make it possible for citizens following their private preferences to compete with people having similar preferences with other groups for the disposal over administrative power. In the liberal view, the autonomous citizen who focuses on the defence of the negative rights of freedom and his private preferences is able to make a judgement whether the power of state is exerted in the interest or against the members of society (ibid., 282–283).

The republican idea that social integration is not formed in the market conditions or in the competition of individuals having different preferences, but it can be created through a naturally conveyed or discursively conveyed solidarity, crucially defines the republican idea about the relationship of the state and citizenship. In this view, the role of the state is not the provision of the free communication of citizens of equal freedom of decision but different preferences; its raison d'être is rather the way it must allow the creation of the discourse opinion and volition of free and equal citizens, the creation of their solidarity. Thus, according to the republican view, the status of the citizen is basically not defined by the defence of his negative rights or how he gains his status but rather by exercising his *positive rights of freedom* – political participation, the rights of participation. Citizens – regardless of the world of politics – do not have such subjective rights of freedom or such systems of preferences from the point of which they would be able to make a competent judgment about the functioning of the state; only with the other citizens can they be in a common autonomous practice and can they become politically responsible subjects, free and equal with other people (Habermas, 1996a: 280).

Different Perceptions of the Law

Differences of liberal and republican perceptions of politics and citizenship have a close relationship with the different interpretation of the notion of the law. According to the liberal view, the system of law can be interpreted as the

institutional guarantee of equal negative rights of freedom regardless of the world of politics: the system of law "is constituted based on equal subjective rights". According to the republican view, however, we cannot characterize the system of law regardless of the value system or political relationships of a particular society: the system of law always takes on a unique, concrete, objective form, and it is formed in the decision-making of the citizens and in the specific value system of the citizens. While according to the republican view rights are realized in concrete decisions, liberals consider that unique rights are built upon "higher principles", independently of politics and concrete decision-making.[3] We may formulate it as follows: while the republican way of thinking interprets the legal system based on its interpretation of the view of *concrete laws*, the liberal way of thinking interprets it from the viewpoint of the pre-political subjective rights of law before legislation.

In Habermas' view, a purely republican and a purely liberal view can be equally problematic. This way, the theory of liberal democracy gives a wide scope of free choice of values for citizens: citizens need not explain the whys of their choices, it is enough to make compromises with several different groups of the political society (Habermas, 1996a: 284). All citizens do not have to strive for a common value orientation, the acceptance of universal human norms above the legal system is a sufficient condition of the sustenance of a political society.

However, republicans can adduce against liberals that it is hard to imagine the cohesion of the political society if the citizens are not regarded as defined by their values and by the effort to personally understand each other, but are merely acting parties in a war of competition, acting strategically. In the republican view – says Habermas –, the integration of the political society may only come true through intensive ethical discourse surveyed by common interests. The problem of this republican view is that it shows too idealistic a picture of the political society: it wrongly assumes that the common cultural and ethical background provide a consensus necessary for the integration, and it is possible to be created in pluralistic societies (Habermas, 1996a: 284). In Habermas' view, if the republican thinking expects modern citizens to unequivocally confirm the common-good-oriented ideas of the classical republic and makes them accept the traditional ideas of a good life dominating in their own communities, it requires unrealistic expectations concerning citizens of contemporary societies. This idea unduly limits the private freedom of citizens to independently take a stand on a concept regarding a good life. From this point of view, it seems that the liberal idea – despite the problems mentioned before – shows a more realistic picture of modern societies when it interprets them not as consensual communities of

3 The juxtaposition of the liberal and the republican model of democracy by Habermas is based on Frank I. Michelman's analyses of the American Constitution; for the juxtaposition of the idea of law see: Michelman: *Conceptions of Democracy in American Constitutional Argument: Voting Rights*. In: Florida Law Review, 1989. 446–447.

values but as a place where a competition of people with different value systems and preferences takes place.

These problems give us a hint that in order to somehow have a viable democratic theory we must combine elements of intellectually conceivable law of liberalism with community-based concepts of democracy of republicanism. This is what Habermas is aiming for in the development of *the deliberative theory of democracy*, about which he gives a concise summary in his work *The Three Normative Models of Democracy.* The deliberative theory of democracy shares the republican understanding of the idea that an individual cannot be an autonomous citizen of a political society without examining his goals and ethical discourse within the self-interpretation of his smaller or larger community. At the same time, he accepts the liberal criticism that the political society cannot be identified as a unified value system community. Since the political society is the arena of the conflicts of people having different interest positions and different ethical backgrounds, according to the deliberative theory, a large space should be provided for those agreements which are based on the compromises of citizens – assuming that they were created in reasonable circumstances. However, the deliberative theory accepts the thought that a reasonable agreement and mediation through different values is only viable within the conditions of comprehensive agreements. According to the deliberative theory, the road must be opened up for the diversity of discussions: in order to come to an agreement, it is necessary to have a self-interpretation discourse and a more general moral and legal discourse to clarify the conditions of a reasonable agreement (ibid., 284–286). Therefore, the deliberative theory opens up (in a republican spirit) the respect for the balancing opposition in discussions, on the one hand, and it opens up (in a liberal spirit) the road for the respect of the constitutional norms providing a higher level of understanding, with independent values of concrete political decisions, on the other hand.

In my assumption, Habermas' theory of deliberative democracy on the whole can be characterized as an aim to synthesise individual thinking, from the concrete decision-making to the theory of democracy itself through the emphasis on independent basic constitutional principles and between the republican idea thinking in the discursive communities of citizens oriented towards the common good. This effort of synthesis raises several questions: is such a concept of democracy possible, for example, which equally allows the keeping of particular traditions and the defence of universal legal theories? One which equally allows the legitimate reasoning besides providing the more general political norms, guaranteeing the rules of human rights and the rules of democratic provisions? In the following part, I will not argue for the elements of all these questions, but I would rather concentrate on one singular question: Is it possible to combine the defence of classical liberal rights of freedom within one model of democracy, the citizens' dialogue being an important part of the republican idea or rather the

discursive diversity emphasized by the deliberative idea? In Habermas' view, it is the basis of the autonomy of citizens that they are members of a public and limitless discourse the results of which are mandatory for everyone. In the next part of my study, I will search the answer for the question whether in such a political society citizens' classical liberal rights of freedom and private freedom are endangered or not.

The Problem and a Philosophical Presumption

Habermas in his work *Faktizität und Geltung* characterizes the relationship of private and public freedom with the help of the notions of communicative action theory, and he formulates private autonomy as the liberation of the citizen under *communicative freedom*. Communicative freedom is possible between decision-oriented parties who in their *performative inclination* expect an opinion of each other regarding the validity needs arising from the discussion. The responsibilities of this communicative community arise from the intersubjective appreciation and the positive opinion of the members of the community. At first, Habermas says that when a citizen makes use of his private rights of freedom he withdraws himself from this public space based on *performative acts,* understood as the field of force of "illocutionary acts", and so he withdraws into the space of clear acting where he need not explain the motivation of his actions any more (Habermas, 1992a: 153). At the same time, in Habermas' view, only those forms are legitimate where those concerned can agree in a rational discourse – i.e. in a space although constituted by illocutionary obligations, but in a free, public place (Habermas, 1992a: 138). In other words, enjoying my private life, I will have to express the motivation of my actions, but the formal limits and subjective rights of freedom, which mark the limits of this private freedom, do belong to the subjects of a rational debate. In order to enjoy my private freedom, in the private discourse, I have to express it over and over again that I do claim it, and the communicative community has to make a decision about its public and private limits in a rational debate. Thus, at first sight, the question of public and private freedom is adversarial even within the framework of discourse theory.

This provides one of the most important questions of *Faktizität und Geltung:* how can the opposition of positive and negative freedom be dissolved and how can a political theory model be created in which public and private autonomy are inseparable sides of the same legal status? To use the classical formulation of political theory: how can popular sovereignty formulated in public debates and classical liberal rights be conciliated? Habermas' political philosophy is connected in many respects to Rousseau and Kant's experiment to show an inner connection between popular sovereignty and human rights, and thus open up a

common source of our public and private rights. Rousseau and Kant agree that only generally advised principles can be mandatory and only then can they require legitimacy. With reference to human autonomy – according to which a citizen is obliged to obey the laws that he creates for himself –, the theory of popular sovereignty and human rights were confirmed mutually following each other, and the self-justice of citizens was based on their legal equality. The guarantee of popular sovereignty and of the emergence of human rights both in the political theory of Kant and Rousseau and in Habermas' political theory means that free and equal citizens can approve of general laws relying on the same reasons. It is true even if the two philosophers meant something entirely different by approval (Pawlik, 1996: 441). In Rousseau's work, the approval of citizens is real, empirically verifiable, it does not take place inside the subject and cannot be made independent of the collective process of legislation. The "Kantian approval" goes on a "noumenal level": it is the moral capacity of the individual subject allowed to accept the general law expressed in the form of a categorical imperative.

Kant's political concept built on moral grounds seems to be a more adequate theory to understand the evaluation of modern mass democracies: it does not require a direct democracy and the result of a democratic decision cannot hurt the subjective rights of freedom of citizens. However, Habermas believes it is problematic in Kant's theory that if the citizens are personally "morally autonomous" it does not mean that they have "political autonomy" as members of a collective. In Kant's case, the basis for legitimation is the moral law based on categorical imperative, and subjective rights of law are divided equally according to a general law according to the spirit of categorical imperative. In this model of political legislation, the creators and the "addressees" of the law are divided from each other. The citizens having equal subjective rights give up their freedom of communication, they renounce the right to bring about new laws by themselves, taking into account their own interest or the interest of community values. The fact that the citizens can later, individually, morally agree to the laws does not end the "paternalism of the ruling of laws" in Habermas' view (Habermas, 1992a: 154).

In Habermas' view, the practising of human rights with Rousseau means the practising of popular sovereignty. From the premises of Rousseau's political philosophy ensues a theory which unites the theory of popular sovereignty and "the substance of human rights" in the medium of abstract laws. In Habermas' interpretation, Rousseau's democratic legislation – according to the original premises of Rousseau – only allows the legitimization of such laws which exclude non-generalization interests, thus guaranteeing the invulnerability of equal subjective rights of freedom (Habermas, 1992a: 131). In Habermas' view, it is possible to have an interpretation according to which Rousseau considered

democratic autonomy a discussion or an agreement between free and equal citizens independently of the tangible ethical-cultural context of their way of life. Habermas later characterizes this as "Rousseau properly interpreted" (Habermas, 1996b: 166).

In Habermas' view, Rousseau's problem is that he introduced the basic social contract on which popular sovereignty is based as an "existential act" of the political society, in which the success-oriented actors gain their public autonomy as common-good-oriented citizens. He finally divided self-legislation from individual decision-making, he connected it to the "vast subject" of legislation, and – contradicting the original premises – he deduced it from the ethical substance of the originally defined nation in his value orientation (Habermas, 1992a: 132). The "volition of the nation" has no more connection to the autonomous individual, only to the "volition of the virtuous citizen". In Habermas' view, Rousseau and Kant – despite the differences in their political thinking – are prisoners of the same problem of philosophical consciousness: they can only imagine the process of the creation of reasonable volition on the level of the subject. Kant's moral ego creating autonomous laws broke away from the political community having traditions, and its laws can be in contradiction with what the subject deems right. The law decided by Rousseau's gigantic political subject can only "force the subject to freedom".

In effect – exceeding Rousseau and Kant's theory –, the task is to create a political theory which is built on the inner connection of popular sovereignty and human rights providing equal emphasis for private and public autonomy, which embraces citizens not as separate moral subjects but rather as interpreters and followers of its political-legal traditions, as active developers of their laws and political guidelines, and where collective volition can be captured without reference to a "macro subject".

The Approach of Discourse Theory

The arising problems in Habermas' view can be resolved within the frameworks of discourse theory, i.e. if the autonomy of the citizens is guaranteed by the *discourse principle*. The discourse principle states that "only those norms of action are valid with which every possible individual concerned is able to agree as a participant [zustimmen]" (Habermas, 1992a: 132). Since in rational discourse the governing principles extending individual orientations can gain legitimacy, this makes it possible for the community to experience the birth of *general volition*, in the name of which – as opposed to Rousseau's thought – individual and minority incentives cannot be oppressed. The emergence of the principle is not merely the guarantee of the establishment of moral norms but

also a basic tenet of ethical issues regulating a concrete legal community, the validity of political guidelines, and the legitimization of legal norms adapted to the society. Autonomy expressed in the discourse principle is neutral, and it is irrelevant whether it prevails in a moral or a legal dispute (Habermas, 1992a: 154). In a society providing a large scope for rational discourse, citizens do not agree to the formulated laws, but they announce pros and cons, since they themselves are also the creators of the laws.

Habermas' suggestion for resolving this issue is built on the fact that the formulation of private and public autonomy, popular sovereignty, and the mutual declaration of human rights is only possible if we refer to the basic tenets of rational discourse between free citizens having equal rights. The practice of popular sovereignty is only possible between free citizens having equal rights. If the discourse principle prevails "in a legal form", the status of the legal person is stated in five basic rights. This time only two of them are important to us, *the equal rights of freedom to take subjective action*, which ensures formal equality, and *the basic tenets of participation in the process of the making of political opinions and volitions*, through which the citizen can gain political autonomy.

By such deduction of basic rights it is possible to circumscribe the status of human rights in Habermas' discursive theory of democracy. Equal subjective rights of freedom are the preconditions of rational discourse between citizens, which provide formal equality for the members of the discursive community. Habermas states it several times that the connection between popular sovereignty and human rights means that the legal system institutionalizes the conditions necessary for autonomous legislation (Habermas, 1992a: 113; Habermas, 1992b: 615).

On the other hand, the connection between popular sovereignty and human rights can be interpreted in such a way that subjective rights of freedom are not pre-political norms, they cannot emerge without the other basic rights, namely the basic rights in the participation of political opinion forming and volition forming. From among classical liberal rights, Habermas mentions the right to human dignity, personal freedom, the right to life and physical invulnerability, freedom of movement, the right to property, and the right to the invulnerability of the place of living. These rights – which appear to the citizens as "protection rights" (Habermas, 1992a: 156) [Abwehrrechten] against the abuse on the part of the state –, in fact, gain their form in the interpretation of political decision-making, with the practice of political rights, and can become a reference base. The political integration of a community is not built merely on basic universal tenets but on the appreciation of the basic rights and a common interpretation dependent on the contexts of the forms of life given about these basic rights (Habermas, 1992a: 156). Therefore, the basic rights are not given to the citizens in their transcendental clarity, but the liberal rights of freedom can become tangible in the legal discourse of the political community.

The Example of Feminism

In a later work by Habermas, in *Die Einbeziehung des Anderen*, this side of the connection of popular sovereignty and human rights become more emphatic, i.e. subjective rights of freedom cannot prevail without the practice of public autonomy. The analysis of feminism in equalizing politics, which was published several times (Habermas, 1996c: 243–245; Habermas, 1996d: 303–305), shows that if a given society provides the freedom of citizens merely by the provision of private autonomy that will lead to lack of freedom. The equality of women came into being in Western legal systems with the help of liberal legal politics; women gained the same subjective rights of freedom as men: the gaining of a status became independent of gender and female roles. The actual inequality of women, their social disadvantage became more noticeable, and the welfare states answered to this by a regulation which tried to help women by the observance of traditional women's roles, e.g. childbearing and divorce. These interventions led to further inequalities between men and women because of the payment of social benefits the risk of employing women enhanced, and poverty became feminized. The concerned legal communities, comprising men and women, could not exercise their public rights entirely, they could not clarify in a public debate what the viewpoints are which make relevant the injurious differences connected to equal rights of subjective freedom, experience, and life situations. The equalization took a paternal form, and the private rights of women became impaired (the fight for status) because decision-makers considered private rights the source of freedom.

Summarizing the analyses of private autonomy and human rights, we can come to the following conclusion about the liberal rights of freedom: *The liberal rights of freedom are created by a legal community, their interpretation depending on the contexts of those subjective rights of freedom, which – within the framework of a democratic rule of law – are necessary preconditions of the institutionalization of legal codes and of the discursive practice of political autonomy.* According to this legal view, classical liberal rights – which we can intuitively consider one of the most universal rights of humankind – have a universal core to them indeed: the basic right of equal subjective freedom. But the particular legal communities have to undergo long debates in order to recognize that property, the invulnerability of the human body, the right to human dignity, etc. belong to the subjective rights of freedom of citizens. It might cause a theoretical difficulty that it is hard to believe about these liberal rights of freedom that they gain force by contributing to a discourse at the level of the rule of law and by practising political autonomy. It is reasonable to think that human rights mean more than the conditions among which "means of communication necessary for autonomous political legislation can become institutionalized" (Steinhoff, 1996: 454). Habermas' idea for solving

the problem suggests that the validity of equal rights of subjective freedom come from the fact that by institutionalizing legal codes they contribute to the institutionalization of a rational discourse concerning the whole rule of law, and not the fact that the individual as a value in itself deserves protection.

There is another problem arising from my definition of "liberal rights of freedom" relating to Habermas. In the first part of the study, we could see that according to the ideal-typical liberal – who respects human rights as our natural rights – an autonomous member of a political community can judge whether in another part of the world human rights prevail or not and whether the private sphere of the citizens of this foreign country is entered into rightfully or not. From a Kantian view, we can say that as a moral being I make a monological judgment about the laws of a country, which can be hurtful to a moral person, equal to me, living in another part of the world, capable of making laws for himself. In Habermas' case, this question is hard to answer. The perfect judgment of whether in the given foreign country human rights prevail or not and whether the state enters the private sphere of a person or not – as we saw – is not a monological but not even a moral judgment. It is a question whether a person is competent enough to judge if in the other state there is a violation of privacy or it is the legal community paying attention to the context of life forms and the claims of its members that is competent to judge in a discussion how universal rights can be asserted

In summary: From many points of view, Habermas convincingly argues that in a theory in which the guarantee of the citizens' autonomy is the discourse principle that the problem of controversy between private and public freedom can be solved, since private rights are the preconditions of a rule of law as well. In his democracy, it is possible to open ways to the diversity of discourse (according to deliberative and republican ideals), supposing that human rights can prevail as guarantees of rule of law. The resolution of the contrast between private and public freedom brings about hardly acceptable conclusions from the liberal point of view: subjective rights of freedom do not gain their legitimacy from the protection of the individual as an end in itself, and the theoretically universal rights can be freely interpreted in each legal community.

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