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REGARDING THE RELATIONSHIP OF MORALITY,
LAW AND DEMOCRACY: ON HABERMAS’S
“PHILOSOPHY OF LAW” (1992)
FROM A TRANSCENDENTAL-PRAGMATIC
POINT OF VIEW

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RESUMEN: La moral, la ley y la democracia y su relación con la filosofía de la ley de Habermas (1992) desde un punto de vista trascendental y pragmático.
En este artículo, el autor presenta la “filosofía de la ley”, sostenida por J. Habermas, en relación con la filosofía moral y la teoría de la democracia. De ello ha resultado una nueva “arquitectura” de la diferenciación discursiva con aspectos problemáticos según Apel. Este filósofo analiza las similitudes y diferencias respecto de las iniciales tomas de posición filosóficas compartidas por ambos. Ahora Apel, en oposición a Habermas, no acepta abolir la diferencia entre la ciencia social empírica y la filosofía. Apel insiste, por el contrario, en la función posmetafísica de la filosofía trascendental, entendida como una pragmática trascendental, en la que todos los posibles miembros de la comunidad de argumentación tienen iguales derechos al usar los actos del habla con propósitos de validación e igual corresponsabilidad en identificar y resolver problemas morales relevantes del mundo vital. El autor se detiene luego en el análisis acerca del fundamento del principio de procedimiento en la ética del discurso. Se discute también la necesidad de suplantar el principio de moralidad por el de ley positiva. Finalmente, se estudia la relación de equivalencia entre el principio universal de la ley y el principio de democracia.

Palabras claves: filosofía de la ley – diferenciación discursiva – filosofía trascendental – pragmática trascendental – principio universal de la ley – principio de democracia

ABSTRACT: In this paper the author presents the “philosophy of law,” of J. Habermas and relates it with moral philosophy and the theory of democracy. A new “architecture” of discourse differentiation has resulted from them, which, according to Apel, is problematic This philosopher analyses the similarities and differences in relation to the initial philosophical principles shared by both of them. Now, Apel, unlike Habermas, refuses to do away with the difference between empirical social science and philosophy. Apel insists on the post-metaphysical function of transcendental philosophy as a transcendental pragmatics of argumentative discourse. From a transcendental point of view, all possible members of the argumentation community have equal rights in using speech acts for validation purposes and they have equal responsibility in identifying and solving morally relevant

problems of life. The author proceeds to analyze how to ground the procedural principle of discourse ethics. The need to replace the principle of morality by that of positive law, is also discussed. To conclude, the equivalence between the universal principle of law and the principle of democracy is presented.

Key words: philosophy of law – discourse differentiation – transcendental philosophy – transcendental pragmatics – universal principle of law – principle of democracy

I. Introduction

In his recent major work *Faktizität und Geltung* (in the following noted as *FuG*), Jürgen Habermas for the first time has presented a “philosophy of law,” and he has tried to determine its relationship to moral philosophy and theory of democracy within the framework of his longstanding discourse philosophy. In this context, however, a novel “architectonics” of discourse differentiation has resulted which is very problematic from my point of view. The problematic features, in my opinion, concern two points:

1. In his *Tanner Lectures* of 1986, the preliminary stage of *FuG*, Habermas still pleaded for the foundational priority of morality to law, but in *FuG* he introduced a new top position in his “architectonics”: the foundational principle of the whole of “practical philosophy” is now to be constituted by a discourse principle that is “morally neutral” (*FuG*, 138), rather than by the principle of “discourse ethics.” The “principle of morality” (*Moralprinzip*) and the “principle of law” (*Rechtsprinzip*) are now considered to emerge “equiprimordially” (*gleichursprünglich*) with regard to their normative status from the morally neutral “discourse principle” —analogously to their historical differentiation out of “substantielle Sittlichkeit”— (in the sense of Hegel) (*FuG*, 138).

2. The second problematic point of the novel architectonics of discourse differentiation concerns the following circumstance: the principle of law—which is said to be equiprimordial to the principle of morality, according to Habermas—is at the same time “identical with” the “principle of democracy,” the latter being the normatively foundational principle of politics (*FuG*, 136 ff.). This normative equation for Habermas obviously results from the following implication of his discourse theory: in an ideal form of democracy the discourses of free and equal citizens can ensure by their procedures that the legislators are simultaneously those who make and submit to the laws; or, in other words, that the human rights of citizens can be guaranteed by these same citizens as autonomous legislators (*FuG*, 122 ff.).

In *FuG* the scheme of a normatively founded discourse differentiation turns out to be the following:
Now what is problematic about this branching architectonics?  
(Preliminary remark: I have worked out an extensive commentary on Habermas’ FuG in my book Auseinandersetzungen (1998) under the sub-title “Third attempt at thinking with Habermas against Habermas,” together with two similar attempts in other essays⁴. Given this I should say something in advance about my longstanding relationship to Habermas in order to clarify the motives and the perspective of my comments on FuG.)

II. On the early history of “discourse philosophy”

Since ca. 1970, Habermas and I have developed a foundation for practical philosophy and the critical social sciences through a conception of communicative or discourse rationality which we developed in a constant exchange of thought. Until recently both of us used the term “discourse ethics” as a designation for the basic discipline of practical philosophy⁵. But, aside from strong common concerns, there were also differences between our approaches from the beginning, differences which appeared as early as 1976 when we published the basic conceptions of our approaches in a discussion volume, “Sprachpragmatik und Philosophie”⁶. Both of us in this volume took up John Searle’s elaboration of speech act theory (and inspirations by Noam Chomsky), but Habermas used the title “Universalpragmatik” and kept close to social science and generative linguistics⁷, whereas I used the title “Transzendentalpragmatik,” trying to continue a project of the “Transformation of Transcendental Philosophy,” which I first propagated in 1973⁸. What is the significance of this difference?

Common to both of us is a certain —positive and critical-transformative— connection with Kantian philosophy, e.g., a transformation of Kant’s philosophy of the “transcendental subject” or “consciousness” in terms of a philosophy of language and intersubjectivity, and in this respect we take up —both of us— the “pragmatic turn” of language-analytic philosophy. However, Habermas distances himself not only from metaphysics in general (as I do as well), but also from transcendental philosophy (which he does not distinguish from metaphysics). Following the tradition of the “Frankfurt School,” he does not accept
a principled (foundational) difference between philosophy and critical-reconstructive social science. And this means that all philosophical propositions are considered to be empirically testable and thus fallible, as are indeed propositions of general linguistics (e.g. Chomsky’s “innateness” thesis). This holds even for the necessary (unavoidable) presuppositions of argumentation, which according to “universal pragmatics” as well as “transcendental pragmatics” are the four “validity claims”: meaning (understandability), truth, truthfulness (veracity), and moral rightness, and the claim to possible discursive consensus with regard to these validity claims. Although for Habermas these presuppositions of argumentation are conditions for the possibility of empirical testing, they are said to be subject to empirical testing and are thus considered to be contingent: they could change, according to Habermas, since they belong to social forms of life. Thus there is no transcendental a priori.

All this, in our day, for most prominent philosophers sounds quite plausible. Along with surmounting “transcendent” (Kant) metaphysics, “de-transcendentalization” (Richard Rorty) is also demanded. For me, by contrast, this latter demand ultimately entails a step into the nonsensical. Thus, for example, the unavoidable presuppositions of argumentation (which cannot be denied without committing a performative self-contradiction) cannot be fallible and subject to empirical tests, because in case of falsification they would simultaneously be presupposed in their transcendental function. For the same reason it makes no sense, I suggest, to suppose that the presuppositions of argumentation could change one good day, for the question would be: from where —i.e., under which presuppositions— could we think of these presuppositions as being contingent? Habermas may try to think this from an ahistorico-sociological perspective, and in doing so he may understand himself as a modest and self-critical philosopher. But I would assert that he simply forgets to reflect on his own necessary presuppositions of argumentation and thereby falls back to “transcendent” metaphysics, for he takes, as it were, a divine point of view outside the world, from which (he tries) to conceive of everything, including transcendental conditions of thought, as being just contingent, that is, historical facts.

From these remarks it may have already become clear why I could not follow Habermas and the Frankfurt School in abolishing the difference between empirical social science and philosophy; why I insisted instead on the post-metaphysical function of transcendental philosophy as a transcendental pragmatics of argumentative discourse.

For the same reason I always held on to the possibility of, and need for, an ultimate transcendental foundation of discourse ethics. Due to the undeniable presuppositions of argumentation (even according to Habermas’s original conception of “universal pragmatics”), there must be a dimension of “moral rightness” in acts of argumentation as acts of communicative action. In my transcendental-pragmatic interpretation this means primarily that in serious argumentation we have always necessarily acknowledged that all possible members of the argumentation community have equal rights in using speech acts in proposing validity claims, and they have equal co-responsibility for identifying and solving morally relevant problems of the life world.

(This together makes up the primordial solidarity of the discourse partners as such.)
Now for me it makes no sense to think that the necessary acknowledgement of these fundamental moral norms, which are the conditions for the possibility of serious discourse and thus for all justifying and criticizing of material norms, could change. And this reflection, I suggest, points to the possibility of an ultimate transcendental foundation of ethics as discourse ethics. So, the first main point of the difference between Habermas and myself centers on the status of the transcendental, and this difference is highlighted in the changes in Habermas’s “architectonics” of discourse differentiation in FuG.

In this book Habermas not only disputes, as he did before, the possibility of an ultimate foundation of ethics, for the first time he explicitly denies the immediate implication of the principle of morality by the discourse principle. This principle is now called “morally neutral” (although it is still considered to be normatively foundational), thereby making discourse ethics no longer the basic discipline of practical philosophy. The claim to “moral rightness” obviously doesn’t belong any longer to the necessary presuppositions of argumentation as a form of communicative action, for it is said to be not yet thematizable on the level of the primordial discourse principle (see figure I: architectonics of branching). Thereby the original conception of “universal pragmatics” has been abandoned as well. But for me, above all, the possibility of an ultimate transcendental-pragmatic foundation of ethics by reflective recourse to the undeniable presuppositions of argumentation has been lost (and for me there is no other foundation of ethics possible at all, as still must be shown).

In order to assess the significance and bearing of this point we have to try to understand the motives behind Habermas’s new architectonics of branching. First there is a problem that is surely shared by Habermas and myself: the norms of law must be distinguished from the norms of morality in a specific way. Historically both sorts of norms emerged equiprimordially from “substantielle Sittlichkeit” (in the sense of Hegel); normatively they must be foundable, precisely with regard to their essential differences, by discourse philosophy. Thus far I can easily agree with Habermas. But for me the question arises: Does it follow from the fact that moral norms and norms of law must be different that they must be (or even can be) derived from, i.e., grounded by, a primordial discourse principle that is “morally neutral?” This claim —prima facie perhaps— seems to be a consequence of the assumption that otherwise the principle of positive law must be derived from that very principle of morality from which it has differentiated itself in the course of history. This is indeed an old aporia of the philosophy of law which, I think, Habermas rightly tried to avoid in his new approach.

On the other hand, however, after the emancipation of positive law from the metaphysical doctrine of “natural law,” there was and still is the intuitional belief that law somehow must be grounded by morality, lest it be surrendered to political power interests. Habermas in former times, and still in the Tanner lectures, obviously shared this latter intuition. However, how can it be made compatible with the insight into the necessary difference between the norms of law and the norms of morality in the sense of historically differentiated systems of rules?

Let us first return to the problem of grounding discourse ethics. In the years when Habermas and I shared the program of discourse ethics, we were always in agreement
about the following point: the material norms of morality cannot be deduced —say by philosophers— from principles. Philosophy can and ought to ground only the procedural principle for real practical discourses (only by substitution for those that have to be carried through in foro interno), through which the affected persons themselves—or their advocates—can ground norms that are acceptable to all affected persons and ultimately applicable to concrete situations. As a regulative principle for those discourses, a universalization principle (U) is set up which, in a sense, has to prescribe the procedure for the discursive concretization of the Kantian principle of universalisation.

Now with regard to those material norms that can be grounded through discourses, certainly a difference between the norms of morality and those of law has to be envisaged (as was supposed already by Kant’s distinction between the principles of “morality” and “legality”). One may even affirm that we can only speak of moral norms if and when there exist also norms of law, that is, those norms that concern only external actions (and not mental motives that were not realized by actions), norms whose observation can be enforced by sanctions through the constitutional state (Rechtsstaat). This necessary differentiation and reciprocal complementarity for Habermas is obviously a sufficient reason for postulating a discourse principle that —according to the branching architectonics— is at the same time “morally neutral” and normatively basic for morality and law.

III. How to ground the procedural principle of discourse ethics.

But for me, according to the demand for a transcendental-pragmatic foundation of discourse ethics, the following supplement becomes necessary: the procedural principle of discourse ethics —the principle of grounding material norms of morality through practical discourses according to the discursive universalisation principle (U)— does not lack all morally obligatory content. To the contrary: it must a priori ensure the equality of rights and also the co-responsibility of all discourse partners. These procedural basic norms of discourse ethics cannot be the result of practical discourses, since they make possible these discourses, but nevertheless they need to be grounded with regard to their moral content.

What are we to say then about the philosophical foundation of the procedural basic norms of discourse ethics? Since they cannot be grounded by practical discourses, they obviously must be grounded by the discourse principle itself, insofar as this principle prescribes the formation of all material moral norms by practical discourses according to the basic procedural norms. But this foundation through prescribing procedural norms obviously cannot be provided by a morally neutral principle. How then could this be possible without a petitio principii, i.e., without presupposing already what has to be grounded? Indeed, no ultimate foundation by deduction is possible without such a petitio. But an ultimate foundation is possible through transcendental reflection on what in argumentative discourse we cannot deny without committing a performative self-contradiction. Now precisely this
reflective foundation is possible in the case of discourse ethics, since the discourse principle, which cannot be transcended (circumvented) by argumentation, indeed contains implicitly those basic procedural norms that make possible and prescribe practical discourses in all cases of morally relevant conflicts or differences of opinion. (The methodologically revolutionary point of the foundation of discourse ethics, in my opinion, has been prepared by two changes in the presuppositions of a rational foundation: first, by the replacement of the “methodical solipsism” of Descartes’ and Husserl’s ego cogito by the transcendental a priori of discursive intersubjectivity, and, secondly, by the replacement of the traditional (rationalist) conception of grounding (or foundation) through deduction by grounding through reflection.

However, if this is correct with regard to discourse ethics, how then should the primordial discourse principle provide the foundation not only for the principle of morality but also for the principle of law, which after all has to be different from the principle of morality? (At this point the motive of Habermas’ architectonics of branching becomes relevant again, and I have to show a transcendental-pragmatic alternative to his program).

IV. How to ground the necessary supplementation of the principle of morality by that of (positive) law?

First, I want to emphasize that I agree with Habermas’s tenet that the ideal principle of morality — in the sense of (U) — stands in need of a “supplementation” if under the life world conditions of a post-traditional society “social integration” of the society is to be possible. Although I would not admit — as Habermas recently has suggested — that the “cognitive” foundation of the moral principle contains no capacity of motivation or “obligation” whatsoever, I would indeed agree that it cannot ensure the obeying of moral norms in practice. Furthermore, it has to be realized that human beings are overburdened in many respects by the demand of a discursive foundation of material norms and their applications. Therefore, it is a functional demand to supplement the principle of morality by a principle of law, which can afford to abstract to a great extent from the actual moral motivation of human actors and thereby ensure the regulation of external actions according to what can and must be expected socially. For, as I have already remarked, by the restriction to the regulation of external actions it becomes possible for the law to enforce the obedience to its norms by the sanctions of the constitutional state (Rechtsstaat).

But precisely this last insight — the realization of the necessity of the power monopoly of the constitutional state — shows as well that it is not possible to ground the law immediately — according to Habermas’s branching architectonics — by recourse to the primordial discourse principle (as it indeed is possible with regard to morality, if the discourse principle is not considered to be morally neutral.) By this statement I do not wish to deny that there is an internal relationship between the primordial discourse principle and the principle of the democratic constitutional state. (I shall still come back to this point.) But I want indeed to state that the principle of positive law or, respectively,
the *constitutional state*, in contradiction to the ideal principle (U) of *morality*, cannot be grounded solely on the basis of the *primordial discourse principle*. For through this avenue alone one could not ground the need for a power monopoly of the constitutional state. (At this point a further foundational argument is needed against those philosophers who—like the classical *anarchists*—plead for *freedom from domination*).

One may elucidate this point through examining the early history of Habermas’s version of discourse philosophy. In the 1960’s, in the context of the “philosophy of emancipation,” there was much talk about “domination free communication” or “discussion” (and the students of 1968 often gave the impression that they wished to eliminate all structures of *domination* whatsoever). Now I wish to emphasize that even today the *ideal of domination free communication or discourse* can indeed be justified as a necessary presupposition of the *ideal principle of discourse morality*. But, on this presupposition, one cannot *ground a constitutional state*, which has to put its *power monopoly* into the service of enforcing obedience to norms of law. In order to ground such a *constitutional state*, and hence *positive law*, it must be possible to ground norms that are at the same time capable of consent by free citizens and—by their form as norms of law—capable of being passed and put through by the *power-based* authority of a particular state. Thus far Hobbes’ verdict is still valid: “*Auctoritas, non veritas, facit legem*”.

But then the question arises: how can the normative legitimation of the *constitutional state* be a task of *discourse* philosophy? And this question is especially relevant with regard to *democracy*?

I thoroughly agree with Habermas that the legitimation of the norms of law in a democracy has to be based not only on political power, but on “communicative power,” that is, on *discursive procedures* as well. But, in contradistinction to Habermas, I do not believe that this problem can be solved analogously to the normative foundation of morality by immediate recourse to a (morally neutral) *discourse* principle (as is suggested by the “branching” architectonics). It can only be ultimately solved, I suggest, by recourse to a *discourse principle* that by its primordial moral content —i.e., *its content of history-related co-responsibility of all discourse partners*—can justify not only the ideal principle (U) of justice by universalization, but also the necessary *supplementation* of ideal discourse morality by (positive) law. And this means: by political power of the state in the service of enforcing law.

Now to elucidate this contention I obviously must show how the principle of (positive) law or the constitutional state can be grounded by *discourse ethics as a primordial ethics of co-responsibility*. At this point, I have once more to take recourse to the development of discourse ethics by Habermas and myself.

From the beginning, in particular from around 1986, my approach to *discourse ethics* was different from that of Habermas not only by its insistence on a *reflexive, ultimate transcendental-pragmatic foundation*, but also by its tenet of *primordial, history related moral responsibility* (or rather co-responsibility), a tenet that later found its expression in my distinction between a foundational *part A* and a foundational *part B* of discourse ethics16. With regard to our problem of a *supplementation* of morality by positive law
or, respectively, the constitutional state, the A/B distinction arose from the following consideration: The primordial principle of morality, which on my account is implicitly contained in the discourse principle, implies not only a “rule of argumentation” on the lines of the universalization principle (U), but also the moral demand that discourse ethics has to be applied to the life world, i.e., that all morally relevant problems—for example, like conflicts of interest—should be solved by following the principle (U) of discursive consensus formation. However, what have we to do when we cannot expect that our opponents (i.e., the needed partners of cooperation) are prepared to enter a practical discourse in order thereby to settle conflicts in accordance with the principle (U)? They might prefer strategic negotiations or even open war. In these cases it would probably be irresponsible to try to follow the norms, nay even the principle, of ideal discourse morality. Nevertheless, there remains the primordial responsibility for finding a moral solution to the problems. What then is to be done? In considering these problems, I think, we have to supplement—on the foundational level of discourse ethics—part A, i.e., the ideal basic norm of following the principle (U), by a part B, which obviously cannot be ideal in the sense of A. What does this mean?

For a long time I treated the problem outlined so far only as a problem of “ethics of responsibility” (“Verantwortungsethik”) in contradistinction to “ethics of good intention” (“Gesinnungsethik”) in the sense of Max Weber17, that is, as a problem of political actions of single persons, especially in existential “limit situations” (in the sense of K. Jaspers and J.P. Sartre). Up to this point the problem turned out to be one of mediating consensual and strategic rationality under the guiding principle of a moral strategy. But I have arrived at a more general and more radical conception of the problem of part B of ethics: a conception that takes into account not only the situation of personal action under conditions of reciprocal interaction, but also that of acting under conditions of the “functional constraints” (“Sachzwänge”) of institutions or social subsystems, for example, those of politics or economy18. Let me explain.

In ordinary life it is not the case, and cannot be the case, that we act solely on the decision basis of an immediate response to the morally relevant claims of our fellow human beings, say, according to the I – thou relationship. This limit case of human encounter is often taken as the paradigm case of moral action by an existentialist ethics of Jewish-Christian provenance, e.g., by M. Buber and E. Levinas. And, no doubt, this is a profound source and focus of moral duties. But in most situations, even those of helping in case of emergency, people must act in accordance with their professional competences, that is, so to speak, by mediating their ways of acting through the conventional possibilities and duties that are pre-given by institutions. Now in very many situations people even act—without much reflection—in accordance with more or less strategic routine considerations that are suggested by their belonging to a family, a community, a firm, the nation state, etc. These strategic routine considerations are, so to speak, of a moral-immoral nature of quasi-duties; in short, they are suggested and even enforced by functional constraints (“Sachzwänge”) of institutions. What then is the relationship between these constraints and part B of discourse ethics?
If we could suppose that all morally relevant problems of human interaction could be solved on the basis of part A of discourse ethics, i.e., by discursive consensus-formation according to the principle (U), then no moral legitimation would be possible for institutions through which strategic interaction between human beings would be suggested or even enforced. Since, however, we are always confronted with the problems of part B of discourse ethics (and cannot change this situation, say through a new beginning of human history), we must derive from this situation a partial moral legitimation, even of institutionalized strategic interaction, for example, of power politics and of economic competition in the service of profit-making. From a part A point of view of ideal morality we may speak of the “functional constraints” of these institutions, whose moral acceptance is enforced by the vital need of political self-maintenance and of material self-preservation.

Nevertheless, these institutions are morally legitimizable only under the condition that, with regard to their release of strategic rationality, they can be regulated and, as it were, domesticated by norms of law. By an order of law that can be enforced at a most universal scale, the rules of the strategic game must be subjected to the regulative idea of being acceptable (capable of consensus) to all affected persons. The systemic order of law must, so to speak, “sublate” (in Hegel’s sense) the political practice of power and the economic practice of competition, whose exertion is prima facie (i.e., in light of part A of discourse ethics) immoral. Thus the global order of economy had to make possible the optimal achievement of a provision for all — i.e., in the sense of John Rawls’ “second principle of justice,” which focuses on the weakest — and the global political order had to bring about a cosmopolitan order of law and peace, as already demanded by Kant in the 18th century.

Now, with regard to Habermas’ conception in FuG, we have to ask the following question: Is that functional achievement of a globally valid order of law that I have postulated in the light of a part B of discourse ethics (already) realized in the present global situation? For only in this case could I agree that the principle of positive law, which can be equated with the principle of democracy, be considered as an adequate supplement to the ideal principle of morality in the sense of discourse ethics. I will, in this context, leave aside the extremely topical and difficult question of a globalized economic order; as does Habermas in FuG. But then the question that can be related to Habermas’s second main thesis remains: may the old idea of a universally valid principle of law that was and is connected with the idea of “human rights” be equated with the idea of democracy, which according to Habermas may be traced back to Rousseau and also to Kant’s idea of “people’s sovereignty?”

V. Is there a relationship of equivalence between the universal principle of law (as expressed in the idea of “human rights”) and the principle of democracy (as expressed in the idea of “people’s sovereignty”)?

I would, in principle, answer this question in the negative. As I emphasized already, I do not disregard the internal relationship between the idea of democracy and the procedural principle of legitimizing norms by discourses, which ensures that the legislators...
and those who are subject to the law are treated identically. Taking recourse to this fundamental principle, I am even prepared to stick to the principle of democracy as a necessary precondition of realizing justice on a global scale. (In this I agree with Habermas and not Rawls, who in his essay, “The Law of Peoples,” dropped the condition of a democratic constitution as precondition of the political realization of justice on a global scale)²¹.

Nevertheless, I would not agree that the principle of democracy, which is expressed by the principle of “people’s sovereignty,” could, in principle, stand on the same normative level of legitimation as that principle of law that traditionally finds its expression in the idea of “human rights.” It is true indeed, as Habermas points out, that the idea of “human rights” is to be viewed in contradistinction to the idea of moral norms, since “rights” from the outset underwent a process of positivization and codification in the constitution of all constitutional states (FuG, 122ff.). Nevertheless, there remains a constitutive difference and tension between the idea of “human rights” that can be grounded morally — i.e., by discourse ethics, even under constant recourse to those foundational norms that make moral discourses possible and are thus implied in the procedural norms of practical discourses—and their possible positivization through the constitutions of particular constitutional states. And the existing democracies—even the imaginable democracies (in the plural)—are particular states! This is implied by the Rousseauean conception of “people’s sovereignty.”

Habermas has not completely overlooked the difficulty that arises at this point for the equation of the universal principle of right (implied in the idea of human rights) and the principle of democracy. But he believes that the difficulty, which exposed Rousseau’s conception to the suspicion of nationalism or even totalitarianism, can be surmounted in principle. We would only need to dismiss the idea of “political ethics” as that of ethical self-realization of one people or “ethnos,” which was indeed connected by Rousseau with the idea of “people’s sovereignty,” and to replace it by the idea of the constitutional state and the pertinent “constitutional patriotism” (“Verfassungspatriotismus”) (FuG, 132). But it seems to me that the difficulty with the Rousseauean idea of democracy is not only, and not even primarily, a consequence of the ethnic or nationalist dimension of his conception, but rather a consequence of the idea of raison d’état, which was (and still is) connected with the idea of “sovereignty” since Jean Bodin and Richelieu. Even if the idea of national self-realization, which is still very vivid in the European democracies, could be surmounted and replaced by “constitutional patriotism,” in a way similar to what seems to be the case in the United States of America, the simple fact would remain that (at least today) there are several particular democracies that stand to each other in power relations which are relevant on the level of foreign politics. This fact, I suggest, remains a grave obstacle for every attempt at equating the principle of universal law with that of democracy.

To overlook this fact, in my opinion, reflects a certain naivety in regard to foreign politics, a naivety that can indeed be found in present day theories of democracy in the West, in those of the Liberals as well as in those of the Communitarians²². Philosophers are inclined to thematize the moral and juridical aspect of politics primarily from the point of view of —local or even supposed global— domestic politics. They are often surprised when this supposition from the perspective of non-occidental cultures is considered to be
a symptom of western cultural centrism. (An aggressive confession of this cultural centrism has in fact turned up in Rorty’s contention that it is impossible and unnecessary to justify and defend, in an international forum, the legitimacy of Western democracy on the basis of a philosophical principle. Only the opposite, he says, is possible and necessary, that is, to make the acceptability of philosophical principles dependent on one’s belonging to the Western cultural tradition and to justify them by appeal to that tradition23).

To be sure, Habermas’ universalist position is fundamentally different from that of Rorty. But precisely for this reason one must critically notice that he shares with the philosophical contestants of the American debate between Liberals and Communitarians the tacit presupposition that one is allowed to methodically abstract the self-maintenance of particular states as power systems from the dimension of foreign politics (FuG, 158). I have to confess that I consider that to be false and naïve. In fact through this abstraction the empirical evidence that testifies against the equation of the universally valid principle of law with the principle of democracy is made invisible. Evidence against this equation can be seen in the present global discussion about “international law,” for instance, in the Security Council of the UN where there is a tension between the idea of the rights of world citizens, which is oriented towards human beings as individuals, and the traditional principle (of jus gentium) of non-intervention into sovereignty rights of particular states24. This tension shows that we are not allowed today to disregard the moral imperative of “human rights” (traditionally grounded in natural law, or the law of reason, and today justified by transcendental pragmatics, in my opinion) with regard to all possible positivizations through particular constitutional states, even if they are democracies.

The international discussion about human rights must go on. And it must take into account the arguments of developing countries, for example, arguments of the following type: the lack of material prerequisites of survival can reduce the value of individual rights of liberty, and thus a “human right” of economic development can temporarily deserve preference. But even in the developed democracies of the West there is a tension between the universal unifiable part of the law that finds its place in the preambles of constitutions and the political discourses that respond to the problems of raison d’état of a particular political system, for example, in the enduring debates about the rights of foreigners, of those seeking asylum, and of immigration in general, etc. No democratic state has thus far been able to afford to strictly subordinate its particular interests to universally valid human rights.

Therefore, for the time being, an insight still holds which Kant succinctly expressed in the 7th proposition of his essay “Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht” (“Idea For an Universal History from a Cosmopolitan Point of View”): “The problem of establishing a perfect civil constitution depends on the problem of the external relationship between states to be ruled by law and it cannot be solved without the solution of the latter problem”25.

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NOTES

1. This article is a translation and revision by Professor Apel of his previously published article, “Zum Verhältnis von Moral, Recht und Demokratie. Eine Stellungnahme zu Habermas Rechtspolitik aus transzendental-pragmatischer Sicht,” in SILLER B. KELLER, R. (eds.), Rechtspolitische Kontroversen der Gegenwart, Baden-Baden, Nomos, 1999, 27-40. This revision is reprinted by permission of the author.


15. Kant, by the metaphysical dualism of his doctrine of the two realms, has been misled into affirming that the problem of establishing a constitutional state must be solvable “even for people of devils (if only they have intelligence)” (Akademic-Textausg., vol. VIII, 366, trans. K. O.A.) By contrast, J. Rawls seems to me to be right in his insistence that a “sense of justice” has to be presupposed if the keeping of contracts is to be reliable.


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