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**Can Habermas' Discursive Ethics  
Support a Theory of the Constitution?  
Towards a Critique of the Attempt  
to Replace the Unity of Substantive Universal Reason  
by a Procedural Rationality of Argumentation**

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# 1. The Upholding of Reason Under Conditions of Pluralism

## a. *Habermas' Approach*

Jürgen Habermas, in “Facts and Norms” (1996), develops a theory of the constitution that starts from a historically defined view of the “completion of the individual through mutual comprehension” and building on that of the “transcendence of individuality in a ‘common’ comprehension”(Simon 1989, 107). He endeavours to adapt the form of the subject and of universal reason thereby established to conditions of cultural and ideological pluralism (Habermas 1995, 119ff.). In the interpretation of Kantian idealism, subjectivity is constituted as a form by not being reduced to any “objective definition”, but instead expressing the “unity of synthesis”. It does not “exist” outside of the implementation of that synthesis. Individuals are accordingly supposed to perfect themselves by securing their share in the “idea of humanity” as such. They are to experience themselves through the mediation of a “timeless instance”, namely “universal reason”, and define themselves in their activity in such a way as to be comprehensible to others (Simon 1989, 278). It is therefore the goal of “communication on the same basis”, of the formation of the “common subjectivity”, which would in the event of success guarantee that “the self-understanding of each individual reflects the transcendent consciousness, that is, a universally valid view of the world”. This would entail that “what is equally good for all actually be in the interest of each individual”. Individuals must accordingly transcend themselves by gaining their share in reason itself. However, “this can no longer be assumed under conditions of social and ideological pluralism” (Habermas 1995, 117). The complexity of the (post-)modern world can no longer be constructed through a common consciousness seen as unitary (Groys 1992, 156).

This philosophical form reflects an idea typical for the classical society of individuals, which refers individual self-determination in a modern artificial society freeing itself from another’s (God’s) will or the dictates of tradition to a new “collective mode”. Its basis lies in the postulate that in the society thus set free every citizen has to recognize “his reasoning as your reasoning”. This problem can be reformulated from a pragmatic viewpoint to

the effect that “reasoning presupposes a ‘community’ or common rules of thought” (Gauthier 1995, 25ff.; Gaus 1997, 205ff.). This interpretation also brings out the downside of philosophy tied to the subject, namely that it seeks understanding only through the “exclusion of other understanding”: in the philosophical formulation of Kantianism it “is abstracted from the fact that all particular understanding excludes, for the sake of its definiteness and rationality” (Simon 1989, 295), and in particular demarcates the real differences which, being only particular, have no share in universality (of the law and of legality). Derrida (1980) in particular has highlighted the inevitable exclusions in any discourse (Gamm 1994).

### *b. The Unity of Reason in Classical Idealism*

From the viewpoint of constitutional theory, this relationship between a discourse and the universe of discourse it is articulated within has to be demonstrated particularly in the “semantics of unfounded self-foundation of popular sovereignty” (Gamm 1994, 127), which in the founding declaration simultaneously allots itself the right of foundation and creates itself by declaring the monarch’s sovereignty illegal. It was absolute monarchy itself that had made this foundation possible by replacing the link with tradition, the factually given, by the written form of a legal code. That is what first established an abstract form of rule from which the conception of popular sovereignty could start (Zarka 1989, 75; Spitz 1993, 37ff.). Rousseau’s understanding in particular of the social contract takes off from the conception of absolute monarchy and constructs the “*volonté générale*” as a form of the unity of “‘corporate and collective’ body”(Seligman 1995, 206; 1994, 187; 1992), patterned on the sovereign will of the monarch, in which the individual can and must transcend his particularity through identification with the “social other”. There follows in Rousseau a mistrust of intermediate bodies because they tend to cumulate particular interests and present them as general.

It will still have to be shown that this was only one of the main lines of development in the European history of political thought. The other, which one may associate with the name of, say, John Locke, puts more emphasis on individual responsibility and does not believe in the constitutive importance of a public space in which a consensus sharply separated from

the specific interests of individuals, or a “volonté générale” takes shape (Gaus 1995, 205ff.). Instead it takes a more pragmatic orientation to the necessity to reach common decisions on common matters, thus necessitating a “reasoned debate” because society can no longer find guidance in tradition. This debate is not however based on the search for truth, but instead on the comparison of “opinions” (Gaus 1997, 205ff.). Its reliability is anything but unproblematic, so that we need institutional forms that should at least guarantee that no passions can percolate through public decision-making processes. The search for the “best justified” decisions is far removed from the search for truth. Especially the early Anglo-American tradition is focused on the institutional protection of the individual (and not on the “rights talk” (Glendon 1991) which is valued so highly by contemporary American authors). This theoretical variant is distinguished by valuing the private sphere higher, just because of the practical constraints that accumulate in it (and because of the disciplining effects ascribed to them, associated with, for instance, the need to preserve property), and the “instrumental rationality” that applies within it.

On the other hand, there is great skepticism as to the high requirements for consensus on the basis of shared values and truths. Accordingly, the majority principle too should not be associated with the search for truth, but is supposed to instead ensure that the passions not disciplined by the private sphere mutually cancel out, making decision on common matters possible. The above-mentioned exclusion effect of thought fixated on a public sphere of reason becomes clear in the fact that Habermas in particular himself tends not just to ignore this ordering work of the private sphere, but to reduce it to the expression of egoism that needs to be transcended in the public sphere. As against this one might recall that Adam Smith and the Scottish Enlightenment upheld specifically the private morality formed in the medium of economic exchange processes as the basis and prerequisite of a public order: private (economic) action is accordingly the basis for forming the “man within”, the “internal spectator”, leading within the individual to internalization of society’s expectations and to harmonization with them via the exchange processes (Seligman 1995, 207).

This assumption – here given in much abbreviated form – of the possibility of a rationalization effort that takes us beyond the mere balancing of egoisms may well be criticized, but should not be ignored. It is at any rate a

model for the constitution of subjectivity in the private sphere which in turn gives an answer to the challenge of the need to create a collective order over and above the given. Turning the page back to the considerations on the constitution of the subject in a specifically public sphere in which individuality experiences itself in involvement in mutual understanding as a “purely empirical subject of that same thought” (Simon 1989, 105), then the first thing to say is that this sort of public thought oriented towards universalizability was tied to conceptions of the lawfulness of society (in accordance with the conception of lawfulness in the natural sciences; Baynes 1992).

c. *Habermas’s Attempt to Transfer the Universality of Reason to the Process of Argumentation*

How, then, does Habermas seek to maintain the public sphere’s claim to autonomy and its constitutive importance for the formation of social reason in the face of “social and ideological pluralism”(1995, 117)? Recourse can no longer be had to the self-establishing achievement of a common, unity-creating awareness that replaced the other-determined order of the past. Accordingly, in the legal system the universality of the form of law (the impersonality of the range of addressees and the validity abstracted from cases and situations, the non-retroactivity of the application of the law to itself) overcoming the particularity of individuals, cannot establish any reason either. In his theoretical constitutional considerations Habermas takes off from the universality of the form of “classical” law and seeks to open up its rationality claim by setting the level of abstraction for “social and ideological pluralism” higher and to make it tenable under altered conditions. This is done by extending the rationality-testing criteria: it is no longer the universality of the form of law (or put more abstractly, the unity of the “same thought” that finds its focus in subjectivity); instead, the universality claims are proceduralized and reformulated in terms of “ethics of discourse”. They are now addressed to the procedure of open discourse constituted as “intersubjective practice of argumentation” (Habermas 1995, 117), which thereby contains reason as a procedure under changed conditions. Procedural reason no longer requires individuals to transcend themselves by taking part in the “timeless unity” of a general consciousness of subjectivity as the essence of “man” as such grasping the essence of the lawfulness of the single world. In conditions of unavoidable multiplicity and

variety of individuals, reason can only be guaranteed through an “idealizing enlargement of their interpretive perspectives”. “Everyone is required to take the perspective of everyone else, and thus project herself into the understandings of self and world of all others” (Habermas 1995, 117).

This is a new version of procedural universality which assumes that “from these interlocking perspectives there emerges an ideally extended we-perspective from which all can test in common whether they wish to make a controversial norm the basis of their shared practice” (Habermas 1995, 117). While the universality of reason that overlaps and transcends particularity was bound up with “the same thinking”, here the particularities themselves are made compatible by being dealt with in the procedure of argumentation and brought down to a distributed form of generality tied to the individuals. This gives particular importance in the constitutional consideration to correcting the factual consequences of a legal statute from the viewpoint of guaranteeing factual equality: there is no longer any stable form of the general law, but instead generality can be brought about only “after the fact” by comparing and balancing different effects, with an eye to guaranteeing the greatest possible de facto equality on the basis of the process of applying the law itself. For this evaluative process an argumentative procedure is required which starts by gathering the various factual viewpoints and relating them to each other in a “we perspective”. This version of reason can develop universalizability only “step by step”: the rationality of its outcome can follow only from the rationality of the procedure of argumentation itself.

The continuity of the separation of a general form is kept; this generalization of perspectives is not exhausted in mere arrangement of enlightenedly self-interested individuals. Instead, the rationality expectation is addressed to the procedure itself, not the mere calculation of strategically thinking egoists who make concessions to others in order to ward off detriment to themselves: procedural reason links up with the classical form of universality to the extent that the individuals must basically transcend themselves, by this participation in a process of shift in perception, even if what lies at the end is no longer the timeless unity of a “universally valid view of the world”, but the common “we perspective”. This may take away the mobility of pluralism and at the same time, through the rationality of argumentation, fix it in a procedural consensus. The procedure of argumentation has its correspondence in the process of self-transformation

of individuals, who – by emancipating themselves from their constraints and possibilities of action, from the special effects in each case of the law and its application – link up the untranscendable difference of individual perspectives and gain a new level of decision for public decision-making.

This procedure presupposes a great deal, since “every valid norm (must) meet the condition that the consequences and side effects that (likely) arise from its being generally followed for the satisfaction of the interests of each individual can be accepted by all concerned (and the effects of the known regulatory alternatives presented)” (Habermas 1993, 53ff.). This is of course meant only as an idealizing assumption; nor does Habermas assume that it is an actually realizable goal. The point is to have individuals exposed to the “peculiar, constraint-free constraint of the better argument”, which brings the methodical testing of assertions expertly to bear” (Habermas 1971, 137). The process of self-change of individuals by participation in intersubjective communication on the basis of the “co-operative search for truth” presupposes the following of “rules of discourse”, which Habermas has formulated following Alexy (1991). Among these rules are in particular the sincerity of participants, freedom from constraints on action, the “symmetrical allocation of chances to choose and exercise speech acts”, the requirement for justification and response to others’ justifications, etc. (Habermas 1971, 137). But the important thing is that the process of developing consensus (leading to self-transcendence of individuals) is not to be equated with the procedure of argumentation that structures this process.

## **2. The Integrative Effect of Discourse**

### *a. Rational Discourse Creates its Own Language*

The universality of reason is no longer pre-given as an individually attainable goal, but instead distributed over a multiplicity of products of consensus thanks to the “integrative effect” of rational discourse that overlaps process and procedure: knowledge (especially as to the consequences of the law), individual perspectives on action (dependent on the relevant conditions) and public speech that enables shift in perspectives are to be brought together, and to produce the “unifying force” of communication. This procedure is to ensure “the speakers involved at the

same time an intersubjectively shared lifeworld and thus a perspective within which they can all relate to one and the same world” (Habermas 1996a, 71). This shows the continuity of the classical idealist conception of the unity of reason (beyond individual arrangement); its bearer is in Habermas’s conception no longer the idea of the universal, the same thinking, consciousness, but the “telos of communication” is supposed to inhere in the “linguistic medium” itself. This has more recently been explained by Habermas to the effect that it is not language as such or all speech that is meant, but the speech historically determined by the lifeworld of being-in-communication and its opening up in the process of the European Enlightenment. Language thus understood takes the place of unitary thought and of the thought of unity in classical idealism, which can because of “social and ideological pluralism” no longer be defended in the original form.

This complex construction of procedural reason is continually reformulated in Habermas’s various works, and for that reason alone escapes criticism. Again, the relation between the individual components of “argumentative rationality”, the combination of which is what brings about consensus as an “integrative accomplishment”, is anything but clear. Thus, he refers to rhetoric that has as its object the justification of validity claims of participants in a discourse “before an ideally expanded audience” (1996, 322). This makes the “possibility of an ideal community” take second place to the conditions participants have to assume “‘within’ their actual social situation” (Habermas 1996, 322). This is not however specified in any more detail (and we shall return to this below). Ultimately, even testing the quality of arguments by the criterion of rules of discourse remains unclear, especially since the rules Habermas explicitly mentions are rather trivial. On the other hand, the idea of participation in discourse is strongly emphasized: but here too the relationship between the weight of arguments for participation in the discourse as such and the de facto weight of the factuality of detriment is not clear: is “being affected” a strong argument in itself, or only as long as the other’s perspective is also included?

One frequently has the impression that the argumentative quality of discourse is not so decisive as initially appears. Communication, to which Habermas, not coincidentally, attributes the nature of action, is instead distinguished by the fact that, “unlike success-oriented actors who observe

each other as one observes something in the objective world, persons acting communicatively encounter each other in a *situation* they at the same time constitute with their co-operatively negotiated interpretations” (Habermas 1996, 360f.). Here again the continuity of the autonomy of the idea, of thought, vis-à-vis the particularity of phenomena again emerges: for Habermas it is not thought that establishes the autonomy of reason, but the autonomous “linguistically-constituted public space” which “stands open in principle for dialogue partners who are present as bystanders or would come on the scene to join those present”. The public aspect brings about generalization of the “spatial structure” of the “lifeworld”, which against it creates a “reservoir for simple interactions” that may always presuppose prior understanding. This concept is antithetically tied to the opposing concept of instrumental action. In view of the replacement of the lifeworld integration of action and communication in the traditional world, an in principle new form of restoration of communication is required in a new, the public, space. This is also associated with the autonomy of (public) language as a medium devoted to communication. This medium does not merely quantitatively extend the linguistic options available in the private sphere by other objects and arguments, but is what in the first place structures an option space, in the sense of an “intellectualization” by abstracting from the constraints those obliged to act are exposed to (Habermas 1996, 360ff.).

The “same thinking” that establishes subjectivity as a share in reason is replaced by the “same reasons”, which “have rationally motivating power for communicative action” (119). Correspondingly, particular action is no longer characterized by having to draw its bounds “negatively” from the general law, but is that action which, “in virtue of subjective freedom” is not dependent on whether the “grounds” decisive for it can be accepted “by all the participating parties *together*” (119). Consequently, the “negative freedom” of the (private) individual is at a constitutional level the freedom not to have to give “any publicly acceptable reasons”; it is “freed of the burden of reciprocally acknowledged and mutually expected communicative freedom” (119). Here too the parallel with classical idealist thinking becomes clear: private, especially economic, freedom differs fundamentally from public, communicative reason that feeds on the “same reasons” that can be shared by all. The communicative form of discursive formation of opinion and will, not certainly the “form of general laws”, guarantees the bringing together of reason and will (103) that was seen in classical philosophy as characteristic for the unity of the subject. This assumption

presupposes that economic rationality has nothing to do with ethics. But this is a simplification which underestimates the “practice rules” of the economy which require an “ethical climate” in which interacting persons voluntarily respect constraints imposed on the manner in which they pursue their interest. This is an attitude which is based on an “ethics of rules” which has a value of its own (McClennen 1993, 174). It is the foundation of trust in economic relationships, a “social capital”, which is generated within a sort of relational (horizontal) rationality from patterns of networked conduct which is essential for the functioning of a legal system and for morality, as well. Habermas refers quite often to the integrative force of traditional lifeworlds, but does not accept this new type of implicit practice-based rule as being of ethical value - if it is taken into account at all, it is attributed to instrumental rationality, as a kind of enlightened egoism.

Habermas’s understanding of communicative reason and its linkage with constitutional theory postulates that along with the “system of rights” that constitutes the legal community as a communicative community at the same time the language has to be created in which “a community can understand itself as a voluntary association of free and equal legal consociates *under law*”. This self-created language, a particular language of communication, replaces the unity of reason. This is important to the extent that it brings in a conceptually systematic constructional element related to the transcendence of ideas and not just immunized against empirical arguments but also able to determine the understanding of the constitution: the will of the actual framers of the constitution is always already oriented to the assumptions of discourse theory. They may have grasped them “correctly” only intuitively, but the constitution in the modern liberal sense is necessarily bound up with a particular language that inevitably ties understanding actual constitutions to the procedural rationality of discourse. A different conception of the constitution is therefore not just scientifically false but unconstitutional too, since it moves outside the legal space necessarily created by the constitution.

### *b. The Logical Genesis of Rights*

The “system of rights” refers ultimately to a “logical genesis” (121): in a first stage the “discourse principle” is applied to the “general right to liberties - a right constitutive for the legal form as such - and ends up by

legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was first abstractly posited can retroactively assume an elaborated shape” (121). The legal code and the principle of democracy are thus taken as “co-originally constituted” (122). That is, the relation between private and public freedom in a modern constitution cannot be regulated in any other way than that contemplated by the principle of discourse. It is, then, not concrete normative and historical arguments that are in favour of a particular conception of the constitution, but the legal code itself, from which, for instance, concrete arguments on the appropriateness of taking factual effects on the conception of the constitution into account rebound, because this necessity is intrinsic to the logical genesis of rights, is embodied in a particular language, and is therefore not open to discussion.

Basic rights first and foremost “only regulate the relationships of freely associated citizens *prior to* any legally organized state authority” (122s.). This guarantees the private autonomy of the individuals who “recognize each other as addressees of laws” and on the basis of this status “claim rights and assert them against one another. Only with the next step do legal subjects also become *authors* of legal order, to be exact, through the following: Basic rights to equal opportunities to participate in the processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law”. This is what enables them to change the perception of their rights “so as to interpret and develop their private and civic autonomy simultaneously”. From this goal there implicitly follow “basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary” (122).

This “deduction” and the explanation Habermas gives of it show that not just the status of the rules of argument (of procedure) remains unclear in relation to the process of mutual agreeing on perspectives and the relation between procedure/process and product of consensus (how in particular is one to imagine the course of argumentation if the intention to come to agreement has in any case to be presupposed?). And the relation between historical and theoretical assumptions is also left floating. The assertion that everything somehow comes together in an “integrative effect” of discourse is a piece of wishful thinking but not an adequate explanation. Habermas continually

asserts that the various levels of construction and processes, the logical and systematic derivation of rights and the historical form of life complement one another as components of a process that creates unity. But this cannot be the case whether in establishing the basic rights or in establishing and allocating the rules of discourse. Habermas follows the examples given by Hobbes and Rousseau who - contrary to the assumptions of Liberalism - search for a foundation of politics as the unitary and public will of an abstract sovereignty in a *fiction*, the autonomy of a truth which breaks with the givenness of history (Zarka 1998, 129, 223).

The “catalogs of human and civil rights found in our historic constitutions” can according to Habermas be understood “as context-dependent readings of the same system of rights. The two hundred years of European constitutional law have provided us with a sufficient number of models. These can instruct a generalizing reconstruction of the intuitions that guide the intersubjective practice of self-legislation in the medium of positive law”(128). But it does not yet follow that the basic rights can theoretically be derived in the way sketched above. Habermas seems to admit that “our” introduction of fundamental rights constitutes an “artifice”, a “trick”. But this admission does not solve the problem of defining the relationship between historical and theoretical assumptions and different constructions. The “same system of rights” is nothing but a myth, if one bears in mind that not only the catalogues of rights differ but also the interpretation of the relationship between the different types of rights and institutional safeguards. This can be demonstrated with reference to the role of freedom of opinion in the American constitution: “The leading supporters of free speech in the late nineteenth century treated expression as one aspect of the personal liberty ‘to be free in the enjoyment of all faculties’” (Graber 1991, 8f.). Of course one may suggest a reinterpretation of this basic right and its status in a modern constitution, but the hypothesis of a reconstruction of the “logical genesis” of basic rights is only made to cover the heterogeneity of the historical development of protection of freedom of opinion. Habermas’s approach shows once again the unclear relationship between theoretical and historical arguments.

Similar objections apply to the unclear definition of the status of the rules of discourse: they are on the one hand associated with the self-enlightening effect of language as a medium, on the other with dialectic or rhetoric as the

practice of convincing an audience, without however going in more detail into the specific features of the latter. A liberal conception of rights would not opt for “egoism”, as Habermas would have it, but accept the fundamental break which constitutes modernity: the lack of a truth on which a State can be set up. The fact that society was in the past based on the identity of truth and reality does not justify the assumption that a search procedure has to replace the absence of a substantive truth. Liberalism accepts the arbitrariness of a symbolic “foundation” of political systems and political language which are “sans raison” (Rosolato 1993, 278). This is of course not a plea for irrationalism but for the acceptance of a democratic experimentalism that tries to base political and legal systems on the generational potential of society and the pool of variety inherent in its knowledge basis. This approach opens a perspective on the “power of cohesion” (Rosolato 1978, 304) which can be attributed to language because of the fundamental human “lack ‘to be’”(J.Lacan): it cannot be located in some truth-generative “inner structure” of discourse but in the horizontal relational rationality of rhetoric which links language to its practical “bindingness”.

It appears, however, that the conception of rhetoric cannot at all easily be combined with the requirements of discursive ethics, since it specifically does not presuppose replacement of the argumentation process by constraints on action, but links up with established forms of practice. Elsewhere, once again a personal motive, the orientation to the common good, is thrown in as guarantor of the national consensus. Then the shift in perspective required for the self-transcendence of individual viewpoints appears as a decisive precondition for “mutual understanding over norms acceptable to all” (130). What contribution the rules of discourse make to this remains entirely unclear. The various interpretations of discursive reason are ultimately kept together by recourse to the “form of life” that constitutes argumentation itself. This too raises more questions than it solves. It leads into the paradox of self-reference, because the argumentation procedure cannot be justified by argumentation itself.

### 3. The Importance of Argumentation to the Formation of Consensus

#### a. *The linkage between “Lifeworld” and Discourse*

The vagueness and contradictoriness of Habermas’s discourse theory that embarks on solving one construction problem by creating another appears also in the use of the concept of “lifeworld” central to his conception. This is supposed, like the public, on the one hand to reproduce itself “through communicative action for which the mastery of natural language suffices; it is tailored to the *comprehensibility* of everyday communicative practice” (360). This is linked up with the “specialized systems of action and knowledge”, as they, for instance, in the form of science, art and ethics take up “different validity aspects of knowledge of communicative action”(360). Their public character differs from “everyday” communication not by the function or the themes, but by the structure: it refers to the “social space” created by communicative action itself. For this the “rules of a *shared practice* of communication are of greater significance for the structuring of public opinion” (362) (emphasis in original – KHL). By generating these the political public can build on the structures of the lifeworld insofar as it carries out its “function of perceiving general social problems and thematizing encompassing social problems only insofar as it develops out of the communication taking place among those who are *potentially affected*” (emphasis in original – KHL). The “burdens” created by the functionally-specified systems “accumulate in the lifeworld” (365) and create a resonance there in the responses of those involved.

This again raises a number of questions that are left unanswered. Instead, the integrative effect of discourse theory is located at a higher level. Above all, the concept of the “lifeworld”, itself not defined any more precisely, has the function of covering up the unclarities in defining the roles of argument, the procedure and the process of intersubjective communication. The conditions of prior understanding in the lifeworld, the linkage between communication and action in everyday practice, are hardly studied any further, specifically in the light of the linguistic pattern (Habermas 19961, 65ff.). Thus, what applies to the “commonplaces” of linguistic communication in everyday life, to “doxa”, is that they are vague and occasional; they are oriented not to

truth, but to the likely (Cauquelin 1999, 28, 60). How an argumentative practice oriented to the “co-operative search for truth” is supposed to be linked up to this is hard to make plausible. This is all the truer since the lifeworld, under the conditions of dominance by the functionally differentiated systems, becomes a world of suffering, the resonance of which has to be taken over “amplified” into the public space (367). This linkage between apparently quite different forms of use of language, lifeworld and public in general, as well as the expression of suffering from the effects of the “complex and poorly co-ordinated subsystems” (365) and the problem-solving discourses generated in the public sphere similarly remains unclear. Integration of a fragmented reality which is governed by the imperatives of subsystems seems to be possible because “problems can *be assessed in terms of one’s own life experience*”. But it is doubtful whether the complexity of reality can be evaluated in a rational way on the basis of a kind of a culture of victimization. This is all the more the case since the associations and movements which are according to Habermas to be allotted to civil society tend to be rather far from an orientation by the rules of discourse, although they in particular are evidently supposed to play a special part in linking up the lifeworld and the institutionalized public sphere (Gerhards 1997, Luhmann 1996). In the latter, it is specifically the autonomous “quality of public opinion insofar as it is measured by the procedures and properties of its process of generation” (362) that are supposed to apply. At the same time, however, the public is supposed to join up with the “communicative practice followed in common” in the lifeworld, the rules of which, of (vague) communication, are not studied in any more detail. Here again we see an unmediated transition from a theoretical to a practical argument.

*b. The Relationship Between Rules of Discourse and Rhetoric and the Conditions for De Facto Participation in Public Discourse*

The formal rules of discourse to which Habermas – following Alexy (1991) – refers are in turn in the main trivial. To the extent that reference is made to rhetoric as “process” (Habermas 1981 I, 49), this too tends to remain vague (as already mentioned above). This is all the more noteworthy since the importance of rhetoric to the development of law consists according to Ch.Perelman (1958; 1977) above all in the fact that – like the “doxa” of everyday life (Cauquelin 1999, 148) – it develops rules for linking up

occasional situational probability assumptions thus containing more a theory for giving relations to fragmentary practical knowledge than a form of universalization of argumentation. Habermas does not take this reference to rhetoric any further; in particular, he does not ask about its compatibility with his theoretical conception.

The same unclear relationship between theoretical assumptions, normative constructions and empirical statements can be seen in his view of the relationship between public and private. Here too he starts from a conceptual (logical) separation: the two spheres must be separated, because it is only then that the addressees of the laws can “understand themselves as authors of lawmaking”. Thereupon, citizens must, in this position as citizens of the State, draw the boundary of private autonomy in such a way as adequately to qualify these private people for their role as citizens of the State (Habermas 1996, 417). This has in turn no longer anything to do with the conceptual distinction: the point is now the subordination of private, and in particular economic, action to the primacy of the political, though elsewhere (again arguing conceptually) there is talk of the original equality of private and public autonomy. Here the point is again the de facto prerequisites for “legal equality” that are supposed to influence the quality of public discourse, not some special argumentative quality of this public discourse itself. Elsewhere, it is stated that the “substance of human rights then resides in the formal conditions for the legal institutionalization of those processes of opinion- and will-formation in which the sovereignty of the people assumes a binding character” (1996, 104).

Once discourse has been institutionalized, all that remains for discussion is the admissible measure of de facto inequality. This measure is, remarkably, dictated by the requirements of involvement in political self-determination. The justification for this is that Habermas starts from the assumption that discourse is what establishes the collective order in the first place. For discourse is to form the mediation between the people’s preordained “common sense” and legally institutionalized self-determination, between democracy and human rights. The link between “facts and norms”, as it can be assured for the lifeworld of simple interactions, requires in modern circumstances the complexity of a conceptual derivation, which alone can constitute the public space. This mediation between lifeworld and the public sphere is evidently supposed to control the themes of discourse, which are

determined by how far the lifeworld is affected. Turning the page back to the position of rhetoric, it emerges that from this dramatic viewpoint too the possibility of procedural discursive rationality as an equivalent to the unity of reason in the “same thinking” remains underdetermined. The importance of being de facto affected remains extremely unclear, because Habermas, because of the exaggeration of the importance of the public sphere, considers the limits – in legal terms too – to the possibility of “redistribution” at most from the viewpoint of State paternalism. He looks at neither the repercussions on the conditions of “instrumental action” (in the economy) nor the conditions for the possibility of a rational discourse among those “concerned” any more closely: the fact that this brings a range of themes into the public sphere which in the classical model were termed “private” is evidently regarded as not important. But how is a legal order conceivable which “enables and guarantees the integrity of an autonomous life in common based on equality and mutual respect” (1998, 242)? How can reciprocal “recognition” of citizens be expected without any further specifications? This is again a requirement that invites hypocrisy: the ethical element in economic action is ignored in the same way as is the instrumental aspect of ethical argumentation in the society of the Welfare State. The procedure of rational discourse is here being asked for a high “integrative effect”, which remains all the more problematic since the potential of argumentation and in particular of its rules is scarcely analysed any further. The role of the identity of the (universalizing reflection) of the subject is replaced by the universal character of linguistic intersubjective cooperation which does not underlie practical constraints (Mendel 1998, 169). Those constraints have, at best, to be regarded as the outer limit on idealizing discourse, but need not be taken systematically into account in the process of law-making.

Without the unity of the idea of reason, truth falls apart into a multiplicity of particular, occasional, time-dependent probabilities (Cauquelin 1998, 28). Habermas does not ultimately succeed in making it plausible that and how the “cooperative search for truth” can be achieved in conditions of pluralism. For his part he links a number of set pieces together into a concept of argumentative rationality that cannot however supply the “integrative effect” that is demanded of it. In particular, the viability of the conception of procedural reason for securing consensus under conditions of pluralism cannot be regarded as proven. Discourse cannot transfer the unity-creating role of substantive reason onto the argumentative procedures. If all the

“consequences and side-effects” of a potential norm have to be considered (Habermas 1993, 75), including the interest of all participants, the ideal observer is being invoked, not a procedure outlined which might help structure an argumentation process in a way that might be comparable to the classical universal laws that differentiated the essential formal relationships in reality from the inaccessibility of the multiple facts. In particular, the recourse to the clarification of the effects of laws for purposes of their legitimation shows that empirical arguments stand disconnectedly alongside rules of discourse and procedures (Lumer 1997, 43). This is all the more so because discourse procedure seems to be based on the idea that the participants have to transcend their economic interests, which means that specific types of answers have to be discarded. Interestingly, Habermas seems to neglect the fact that this clear separation between economic interest and ethical self-enlightenment no longer corresponds to the complex reality of an interventionist State where a lot of people have an economic interest in the expansion of “altruistic” public activities - apparently this problem is just left to the expectation to be sincere with oneself. But, in fact, there is a serious problem with hypocrisy in a democratic society!

### *c. Habermas and Argumentation Theory*

In discussing Toulmin’s argumentation theory, he reproaches him with not having made, in studying argumentation in various fields of argument, “the right cuts between the random institutional manifestations of argumentation on the one hand and the forms of argumentation determined by inner structures on the other”(Habermas 1981 I, 61). What this probably means is that the “unifying force” of “communication-oriented speech” can develop only if it “at one and the same time guarantees an intersubjectively shared lifeworld as a framework within which all can relate to one and the same world” (Habermas 1996a, 71).

This points on the one hand to the need for actualization of “each of our” political communities (?) which, as “expression of a conscious collective self-perception” has to become a “form of life”. This can on the one hand, in the first place, be interpreted as a hermeneutic conception of understanding, were not on the other side none other than the critique of validity claims, in particular the rigidification of ideologies, declared to be the task of

discursive rationality. The exaltation of criticism itself into a form of life is, however, a contradictory undertaking because a lifeworld has in some way to be presupposed. Democracy and the acceptance of basic rights cannot constitute a lifeworld, either, because they allow for heterogeneous interpretations. The will to communicate on the pattern of the prior understanding in the lifeworld does not, however, offer any stable reference framework either, for a discursive practice understood as a lifeworld.

Ultimately, however, Habermas cannot take off from Toulmin's version of the linkage between argumentation and particular language games either, although he refers to it with approval (Niehaus 1998, 416). Toulmin regards argumentation as a "language game" not to be reduced to the sequences of propositions located on the far side of the "propositional sequence", and not to be studied for formal consistency but considered in its individual steps from a viewpoint of "appropriateness". While Habermas has taken over this term, following K. Günther (1993, 41ff.), here too the question of compatibility with Toulmin's approach arises. For the latter seeks to understand just this linkage of social ideas within "populations of ideas" situationally and historically (Toulmin 1983, 118ff.), and thereby exposes himself to Habermas's criticism of not having pushed the logic of argumentation "far enough into the spheres of dialectic and rhetoric" (Habermas 1981 I, 61). But it is the opposite that is the case! For Habermas always assumes the necessity, existing in the interest of actualization, to restore the same "inner structure" (as a form of life) of argumentation processes, oriented to the furthest-reaching possible de facto equality of all those coming under the law (Habermas 1993, 75). But how does this fit together: a necessarily reductive structure of argumentation and the claim to include all kinds of arguments drawing, in particular, on the inequality of living conditions of all citizens? This would lead to a completely unstructured argumentation process! Toulmin by contrast investigates, without this sort of prior understanding, the developmental dynamics of the "'ecological' relations between the collective ideas of people and changing situations" (1983, 118s.). He is thereby pursuing an approach oriented to rhetoric, whereas Habermas has always presupposed the "ideally extended we-perspective" of the individuals and not pursued the situational chaining of arguments.

The “error” of Toulmin and his argumentation theory lies in the fact that he emphasizes just this situational character of argumentation and tries to get away from a specifically relational rationality differing from the classical conceptions of rationality oriented to the reproduction of unity (Golden 1991, 57). He reformulates the criteria of coherence and accuracy related to the propositional content of reasons and links them with the social constraints underlying the production of “truths”. But argumentation is then typified more by adjustment to and formation of social situations; it is more mobile than stable. At the same time, individual freedom is abandoned as a reference point for speech. Instead, the concern is with the consistency of “disciplines” (Willard 1987; 1991), the generation of which follows regularities of its own as to the development and chaining of situations, and can alone make co-operation among individuals possible in the first place. The ego, accordingly, always becomes a mobile form, permeable to the requirements of the relating together of arguments in particular situations. The emergence of consensus is then due more to a “statistical drift” (Willard 1987) than to the deliberate development of a “we-perspective”.

#### **4. From the Intersubjectivity of Argumentation to the Relational Rationality of Generative Patterns in Social Populations of Ideas**

The considerations on the position of rhetoric in Toulmin and Habermas can also be joined by a sketch of another model of communicative action (with an eye to constitutional theory) oriented to the (self-) creation of the new and drawing on J.Dewey (1888; 1958; 1970). This makes it easier to bring the relationship between democracy, freedom of action and social knowledge (self-descriptions) into a form adapted to post-modern conditions of uncertainty (Shusterman 1997; 1997a). While Habermas wished to maintain the unity of the subject in the form of the unity of the public discourse procedure and use it to make the link between democracy and fundamental rights, the conceptions of argumentation mentioned no longer recognize in the public sphere any “sovereign epistemic authority for evaluating or refereeing competing domain fields” (Willard 1987, 145). “Consensus formation is largely an accidental phenomenon, the result of statistical drift in alliances, in which reasons invoked by individuals have little to do with each other.”

This enables observation of the dynamics of self-transcendence of the networks of relations upon individuals and the patterns they form. This conceptual approach can confer new content on Dewey's conception of democracy as a "community of inquirers" under conditions of the post-modern society: "Nothing is more foreign to our age than the idea ... of a subject that could exist outside the network of relationships ... which it describes" (Gu  henno 1995, 33). The new "networked logic" shown in the formation of patterns in networks transforms communicative relationships into a "field of forces and imbalances" (Gu  henno 1958, 58f.) within which ever new possibilities are generated and old realities change and are no longer accessible, because of the complexity of knowledge, to argumentation separated from the networks of relations themselves and understood as a form of life. This alone is what makes it possible for just those mobile, self-changing individuals who are "open to the further self, in oneself and in others" (Khalil 1997, 147) to be "providing society with a wealth of different life hypotheses cultivating one's individual distinction" (Shusterman 1997a, 207). It is assumed here that the individuals tend to "agree on particulars but not on fundamentals" (Willard 1987; 1991).

This is the decisive weakness in Habermas's conception: the possibility of communication without "prior understanding" in a shared lifeworld is closed off to us from the outset. Accordingly, the relationship between the political orientation to the creation of de facto equality of individuals, and the transcendental, pragmatic assumption of the possibility of communication in a medium of language that has to be created (logically) itself through the system of basic rights and rules of argumentation in Habermas remains extremely unclear: in particular, the assumption that criticism itself might become a form of life that can support the rationality of argumentation seems contradictory. Forms of life are distinguished by the linkage between linguistic figures and practical situational constraints. In discourse theory, however, this retrospective factual linkage of discourse to the generative network effects of the overlapping situations is replaced by prospective normative encroachment upon the de facto equality (which has still to be established) on the far side of the practical situational constraints. Limits and constraints imposed by economic rationality are not to be considered in the normative approach of discourse theory. At the same time, however, the need for this future-oriented assumption is located in a form of life in each case already established through European constitutional history, in spite of

the fact that it is one of the characteristics of Europe that its history, including constitutional history, is subject to different interpretations. Habermas himself follows a specific understanding of European constitutional history which belongs to the legacy of Rousseau. But this history is far from being homogeneous; on the contrary, its richness is linked to the element of “undecidibility” (Livet 1994) deriving from the “oscillation” between private and public (Rosolato 1993, 174). Collective order is only possible as a “virtual” one, as a secondary effect, but not as a direct goal of individual actions. (Livet 1994, 174). The special feature of Habermas’s approach consists exclusively in the fixation upon communication as an objective abstracted from all the determinacy of concrete life and pointing beyond the reality of de facto inequality which has to be changed. It “logically” follows that this goal cannot be oriented to the requirements of the economic freedom that leads to the de facto inequality: the individuals must after all free themselves from the practical constraints on actions. At the same time, however, they can no longer adopt as their own the idea of the unity of reason in the “same thinking” liberated from particular constraints on action. This void is – as we have shown – to be filled by the unity of reason in the “same procedure” of thought. But the procedure is in turn dependent on a supply of arguments from the private (albeit not dominated by economic constraints) lifeworld; it must be oriented to the production of de facto equality in order to be able to be recognized as rational. Process, procedure and rules of argumentation cannot however guarantee this since they can scarcely bring about an autonomous structural effect. The demand for general symmetry conditions (equal opportunities for participation) can scarcely justify the “approach to the ideal conditions of a speech situation immunized against repression and inequality in a special way”. The construction of argumentative procedural reason employing exclusively the “constraint of the better argument” can take on shape at bottom only through the antithetical fixation on economic freedoms. Their instrumental rationality, which co-ordinates the selfish motives of the competing individuals, has from the outset a different “logical” status vis-à-vis the rationality of discourse, because the public space has created its own language (for the consensus-oriented communication). Individual autonomy has to be “logically” presupposed only in order to enable individuals to see themselves, in a logically consequent step into the public sphere of citizens, also as authors (not just as addressees) of the law. In other respects the constraints of economic self-organization which do not exclude the virtue of “generosity” at all (Machan 1998) have no value of their own as arguments in the public sphere of discourse. This is true only for the suffering that the

constraints of the functional systems produce in the lifeworld (also understood as private). It is only the risk of “paternalism” associated with Welfare State intervention to create de facto equal conditions of life that can be built into the argumentative process. But this idea is given no further structure. This gives new value to the liberal distrust of “good intentions”: in a postmodern democracy there is a strong incentive to present oneself as a moral person once the resulting constraints can be distributed among others (Haroche 1996,35; Thompson 1996, 173, 190). Habermas tends to regard this as a positive tendency which seems to transform argumentative practice into a form of life which gives consistency to intersubjective communication.

This on the other hand excludes from the outset the objection that a liberal constitution combines with the recognition of liberal freedoms including the private economic ones a basic “social epistemological” assumption as to the constraints on the production of collective order under conditions of uncertainty: for dispensation from responsibility for remote consequences of individuals’ action, insofar as they cannot be attributed as “damage” to competing rights (e.g. violation of property rights), so that society can, in an acentric process of self-realization, institutionalized through the distribution of decisional rights to private individuals, generate a collective order oriented to self-transcendence (through permanent innovation). To that extent, the de facto unequal consequences of laws and of the exercise of private rights cannot without problems be taken account of against the formal equality of rights. This does not rule out all taking of de facto inequalities into account, but compels us always to bring to bear the fundamental assumption, constitutive for liberal constitutions themselves, of the long-term positive effects of dispensation from liability for consequences, and in particular at least to perceive, if not also to recognize, the moral claim associated with it. In Habermas this claim is not even noticed; for him, private action reduces to the living out of selfishness, which can be described only negatively as dispensation from the constraint to be guided by reasons (which are to be formulated in the language of the public sphere). This in turn from the outset presupposes the dominance of the public sphere and reformulates the dispensation from the liability for consequences in the language of the public sphere as relaxation of the requirements of argumentative rationality. That we here have to do with two differing rationalities (public and private) which in a liberal society cannot be brought into a relationship of superordination and subordination but can

only be co-ordinated in accordance with historically established patterns is not accepted. The fact that the language of the public sphere and argumentative rationality can in no way do justice to the complexity of the economic and in particular to the consequences of the public suspension of dispensation from consequences for private action is a possibility that cannot be taken into account in the forms of public argumentative rationality.

The suspicion remains that the attempt to link up procedural reason with the classical concept of the unity of reason and build a bridge to social and ideological pluralism cannot succeed but instead formulates the concept of procedural reason itself differently, that is, has to be explicitly focused on the heterogeneity of relational reason that abandons the priority of communication in a public sphere separated from the private sphere and shifts the permanent self-transcendence of liberal society through generation of the new into the centre of theoretical attention. For Habermas the new constitutes more of a pressure to adapt and a social suffering that the functional systems exercise on the lifeworld. The capacity of public discourse to meet the always equal requirements on argumentation cannot be called in question by this. It emerges here how rich in consequences are the “logical” derivations in Habermas’s discourse theory as they continually exclude particular arguments from the rational procedure of communication. Every theory must in its justifications start from particular assumptions that cannot themselves be justified, but Habermas attempts to render these prerequisites of discourse theory invisible. This lends the theory to a considerable extent a doctrinaire appearance.

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